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Labour Rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement

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Labour Rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement - The political limitations of “value-based trade”

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Abstract:

As an element of its “value-based trade policy” the European Union has institutionalised civil society participation in the context of its “New Generation Free Trade Agreements” less than ten years ago. In all recent trade agreements with partner countries, the EU includes a chapter on Trade and Sustainable Development (TSD) containing provisions to protect and promote international labour and environmental standards. The labour provisions require compliance with the 1998 ILO Declaration on Fundamental Principles and Rights at Work and other frameworks. There are procedural commitments in the chapter that allow for a monitoring of the sustainability impacts of the free trade agreements (FTA). Its institutional mechanisms include the formation of Domestic Advisory Groups (DAGs) on both sides, and a Joint Civil Society Forum (CSF) for an annual exchange and dialogue between the two DAGs and other civil society representatives on the sustainable development aspects of trade relations between the Parties. The purpose of this mechanism is to politically and publicly support the FTA, monitor the TSD Chapter implementation, provide a forum for democratic dialogue and develop recommendations on how to implement the commitments. However, based on current research on this topic, feedback from civil society stakeholders and own experiences in South Korea and Vietnam, we come to the conclusion that the “value based trade policies” by means of TSD Chapters have not yet produced significant results both in terms of improving labour standards and/or enabling civil society to participate in the monitoring of the agreement. The European Commission has acknowledged these deficiencies in 2018 and pledged to work for clear, transparent rules and procedures for the establishment and functioning of representative and balanced civil society structures on the side of the trade partners. But this may not solve the structural and political difficulties when two partners do not share the same political values but formulate human rights and labour standards as part of their trade agreement. A more stringent role for the EU not only before ratification, but also in the implementation phase is necessary, and the European Parliament should play a proactive role here. Overall, the authors are of the opinion, that in a political environment where trading partners have authoritarian political systems and do not share the same political values with the EU, only ex-ante conditionality could safeguard civil society participation and labour rights compliance in trade agreements. But this will require far-reaching changes in the legal text of the TSD Chapter.

Keywords: EU-Vietnam Free Trade Agreement, Sustainable Development, Labour Rights, Civil Society

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List of Abbreviations

| | |
|--------|---|
| CPTPP | Comprehensive and Progressive Agreement for Trans-Pacific Partnership |
| CPV | Communist Party of Vietnam |
| CSO | Civil Society Organisations |
| CSR | Corporate Social Responsibility |
| DAG | Domestic Advisory Group |
| EESC | European Economic and Social Committee |
| EU | European Union |
| EUKFTA | European Union – Korean Free Trade Agreement |
| EUP | European Parliament |
| EVFTA | European Union – Vietnam Free Trade Agreement |
| FES | Friedrich-Ebert-Stiftung |
| FTA | Free Trade Agreement |
| ILO | International Labour Organisation |
| NAFTA | North America Free Trade Agreement |
| NGO | Non-governmental Organisation |
| PCA | Partnership and Cooperation Agreement |
| TSD | Trade and Sustainable Development |
| TTIP | Transatlantic Trade and Investment Partnership |
| TPP | Trans-Pacific Partnership |
| VGCL | Vietnam General Confederation of Labour |

1. Introduction

After the withdrawal of the Trump-Administration from negotiations on multilateral trade regimes such as the Transatlantic Trade and Investment Partnership (TTIP) between the US and the European Union (EU) and the Trans Pacific Partnership Agreement (TPP)¹, the EU has shifted the focus of its trade policies to Asia and Pacific. In addition to the free trade agreement (FTA) with Korea which had been in force since 2011, the EU recently concluded trade deals with Japan and Singapore. An agreement with Vietnam was signed in 2019 and ratified by the European Parliament (EUP) on February 12th, 2020. Talks are ongoing, on different stages of development, with Australia, New Zealand, Malaysia, Indonesia, India, the Philippines and Thailand.²

As an element of its “value-based trade policy” under the slogan ‘*Trade for All*’ the EU has institutionalized civil society participation in the context of its “New Generation Free Trade Agreements” less than ten years ago in the form of the Trade and Sustainable Development (TSD) Chapters that have since become an integral part of the EU’s free trade agreements. Trade policies in this sense should support economic growth, social development and environmental protection.

The first case where such a chapter, committing both parties to adhere to internationally accepted labour and environmental provisions and involve civil society and social partners in the monitoring of these provisions through Domestic Advisory Groups (DAG) has been applied in an Asian country, was the EU-Korea Free Trade Agreement (EUKFTA) that entered into force in 2011 (European Commission, 2017a: 2). To a very large extent the wording and regulations of the TSD Chapter in the EUKFTA and the EU-Vietnam Free Trade Agreement (EVFTA) are similar. As in the case of Korea, the EVFTA makes an explicit reference to the social partners as key constituents of the DAG that are supposed to advise the governmental partners on the implementation of obligations under the TSD Chapter. One major difference is that unlike the case of Korea, the term “civil society” does not appear in the text of the TSD Chapter of the EVFTA.

Trade unions are one of the main actors for monitoring the implementation of TSD Chapter’s labour clauses and participating in the DAGs. However, in many cases

¹ The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the substitute for the TPP (the previous countries minus the USA) has entered into force on December 30, 2018. It was ratified by the National Assembly of Vietnam in December 2018.

² For an overview, see European Commission, Overview of FTA and other trade negotiations, updated December 2018, available online at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, [accessed on 19 January 2019]

- Trade unions may not be sufficiently independent from the Government to perform a monitoring and supervisory role, or
- may be too weak to be considered as a serious actor, since they lack structural and organisational power as defined in the power resources concept (Schmalz and Dörre, 2018), or
- may be in competition with each other in a fragmented trade union landscape.

The EU-Vietnam Free Trade Agreement (EVFTA) that has been ratified by the European Parliament, is such a case. The Vietnam General Confederation of Labour (VGCL), until today the only legally existing trade union confederation in Vietnam, has always supported Government policies in the negotiations on the EVFTA. While the European side (EU Commission, EU trade unions and Non-Governmental Organisations/NGOs) has demanded a clear road map for the ratification of the outstanding Conventions 87 and 105 (Convention 98 has been ratified in 2019) of the International Labour Organisation (ILO)³ by Vietnam, the VGCL has never moved pro-actively towards that goal. Firstly, because it is under direct control of the Communist Party of Vietnam (CPV) and the Government. Secondly, because VGCL is not interested in losing its monopolistic position through the ratification of ILO conventions allowing for freedom of association.

In such a situation, a serious and effective monitoring of the TSD Chapter by social partners as stipulated in the text of the agreement becomes obsolete because it can be assumed that employer's and business associations will not take the lead to push Governments on compliance.

Therefore, additional actors as foreseen in the concept of the DAGs are needed to mobilise pressure for an effective monitoring and implementation of the provisions of the TSD Chapter. These are “...*independent representative organisations*, ensuring a balanced representation of economic, social and environmental stakeholders...” (European Commission, 2018a: Chapter 13, Art. 15.4.), meaning independent civil society organisations in Vietnam, at least in the perception of the EU.

However, it is questionable whether the framework conditions in the case of Vietnam will allow for such a possibility. The case of the EU-Peru-Colombia Trade Agreement as illustrated by Orbie and Van den Putte (2016a) demonstrates that the political context of the partner country plays a very important role when it comes to compliance with provisions on trade and sustainable development and that the EU has limited leverage to enforce authentic

³ Convention 87 on freedom of association and protection of the right to organise; Convention 98 on right to organise and collective bargaining; Convention 105 on abolition of forced labour.

civil society participation, let alone the compliance with labour standards as stipulated under the agreement.

Vietnam is a one-party state with strict limitations on civil and political rights, the space for independent civil society organisations as stipulated in the TSD Chapter of the EVFTA is very limited. The Communist Party of Vietnam, the supreme power in the country, considers its mass organisations⁴ as the official representatives of the non-state sector, and it can be assumed that these organisations will be picked by Government as the “independent representative organisations” in accordance with Chapter 13, Art. 15 Nr. 4 of the EVFTA (European Commission, 2018a). In recent years, the CPV has even tightened its grip on the country and considers “civil society” in the Western sense as an “evil force” seeking to undermine the political system of Vietnam and the leading role of the Communist Party.

In addition, there is considerable restraint by the official labour union VGCL towards most local and international labour NGOs because the VGCL follows the ideological lines of the Party. These factors may de facto prevent a proper functioning of the Vietnamese DAG and thus an independent monitoring of the agreement if there is no continuous monitoring from the EU side. In line with this, contemporary research on ongoing EU-FTAs in general sees only a limited impact of the TSD Chapters on civil society participation in monitoring the implementation of and compliance with international labour standards.

2. Methodology of the paper

This paper will analyse the practicability of the involvement of civil society in the implementation of the TSD Chapter of the EVFTA, towards the background of the given political system and context in Vietnam and the experiences so far with civil society involvement in EU-FTAs since 2011, even in more open societies like Korea.

The paper will begin with a short overview on the existing literature and assessment of civil society participation in the implementation of the TSD Chapters of several already enforced FTAs, followed by a more in-depth presentation of the case of the EU-Korea Free Trade Agreement, with a special focus on the fulfilment of labour obligations in the TSD and the role of the DAGs. It was the first FTA with a designated TSD Chapter in Asia and can be considered a template for the case of Vietnam although there are differences between the two country situations. We will then describe the pre-ratification developments of the EVFTA

⁴ These are the so-called socio-political organisations (Trade Union, Farmer Union, Women Union, Youth Union and Veteran Union) under the Vietnam Fatherland Front. According to Article 9 of the Constitution of Vietnam (2013), they represent the social classes, ethnic and religious groups in Vietnam as well as Overseas Vietnamese and participate in building the Party and the State. In practice they function as *transmission belts* of the CPV.

followed by an analysis of the potential civil society mechanism in this FTA and its implications for the promotion of labour rights. The positions of VGCL and civil society organisations (CSOs) will be described on the basis of in-depth interviews as well as from own impressions that the authors gained from interactions with them between 2011 and 2018 while working on the issue.

The in-depth interviews were conducted with six CSO representatives and two VGCL officials in the period between February and March 2019. The small number of organisations and individuals interviewed were due to the lack of interest and knowledge on the TSD Chapter at that time since in Vietnamese society the EVFTA was officially discussed during the phase of negotiations only under commercial considerations. The interviewees were chosen based on a mapping of organisations working on relevant topics and several roundtable discussions on the TSD Chapter organised by Friedrich-Ebert-Stiftung (FES) Vietnam⁵ from 2016 onward. The questions asked were surrounding their experience in the pre-ratification process of EVFTA, whether they were informed, consulted or engaged in any form by EU and/or Vietnamese government in this process, as well as their perspectives and recommendations regarding the implementation of the TSD Chapter in the future. Due to the sensitivity of the discussed topics in Vietnam's context, the identities of interviewees cannot be disclosed.

The limiting factors here are clearly the political affiliation of the VGCL to the Communist Party, the rather limited space for the slowly emerging civil society in Vietnam, the vague text in the EVFTA for the formation of the DAGs and the lack of a culture of real social dialogue between independent social partners. The paper will conclude with an assessment of the practicability of trade and sustainable development in Vietnam in terms of civil society involvement.

Given the structural limitations of the mechanisms incorporated in the EU FTAs to ensure a linkage between trade and sustainable development that have been identified by numerous researchers, this paper therefore argues that civil society participation in monitoring trade and sustainable development has major obstacles in a political context such as that of Vietnam (and similar political situations) and that ideally, value-based trade needs shared values between the trading partners on democracy and pluralism. We think however that the space created through the institutional mechanisms in the TSD Chapters can at least support the emancipation and advocacy work of civil society and contribute to coalition building of civil

⁵ Friedrich-Ebert-Stiftung (FES, www.fes.de) is a German non-governmental organisation working in Vietnam since 1990, among others in the field of labour issues.

society and trade unions. Especially, when the EU has economic leverage towards its trading partner which is more the case in Vietnam as compared to Korea. This will however need consistent and coherent support from the EU right from the beginning of the negotiations, but even more so into the implementation phase. It is suggested that especially the European Parliament should be involved on the ground not only in the pre-ratification phase, but also during the implementation of the commitments of the TSD chapter. Overall, the TSD Chapters in EU-FTAs need to be reconsidered to ensure civil society participation especially in countries where the political context does not support their participation.

3. Civil society mechanisms in EU Trade Agreements – Literature Review

Civil society involvement in the implementation of labour provisions in FTAs already began in 1994 in the form of the North American Agreement on Labour Cooperation (Van den Putte, 2015: 222), a side agreement to the North America Free Trade Agreement (NAFTA). As an element of its “value-based trade policy” the EU has institutionalised civil society participation in the context of its “New Generation Free Trade Agreements” less than ten years ago with the conclusion of the EU-Korea Free Trade Agreement in 2011. Since then, in all recent trade agreements with partner countries, the EU has included a chapter on trade and sustainable development containing provisions to protect and promote international labour and environmental standards. The labour provisions require the ratification and effective implementation not only of the 1998 ILO Declaration on Fundamental Principles and Rights at Work, but all other ratified ILO Conventions. There are procedural commitments in the chapter that are supposed to enable social partners and civil society to monitor the sustainability impacts of the FTAs “...through direct exchanges amongst civil society actors and with governments.” (European Commission, 2017a: 3) Its institutional mechanisms include the formation of DAGs on each side comprising social partners (employer’s associations and trade unions) and independent civil society organisations. This threefold structure is probably shaped according to the model of the European Economic and Social Committee (EESC) in the European institutions that consists of three subgroups, business, trade unions and non-governmental organisations. And there is a Joint Civil Society Forum (CSF) for an annual exchange and dialogue between the two DAGs and other civil society representatives on the sustainable development aspects of trade relations between the Parties. The text in the TSD Chapter on the Civil Society Forums varies in the different agreements, but in all agreements the TSD Committee has to decide on the operation of the CSF *one year*

after enforcement of the FTA. In all agreements it is regulated that the partner governments have the sovereign responsibility on their side to set up these domestic advisory mechanisms. If both parties disagree on the implementation of the obligations under this chapter, they have to resort to special procedures for this TSD Chapter that are different from the ordinary dispute settlement procedures applying to all other aspects of the FTA. Usually, the issues of disagreement will first be dealt within the joint governmental body (the TSD Committee), the Domestic Advisory Groups can be consulted on the respective subjects by the governmental body.

Orbie et al. (2016b: 25-37) establish four categories that describe the potential purposes for these mechanisms: To politically and publicly support the FTA, to monitor the implementation of the commitments in the chapter by civil society (watchdog role), to provide a forum for democratic dialogue and to influence policy through recommendations on how to improve the implementation of the commitments of the TSD Chapter. The experiences with these procedural mechanisms are relatively new, but there is some recent research on their practical impact to ensure the sustainability of trade (agreements).

Overall, most researchers are sceptical about the practicability of the mechanisms in the TSD Chapter to allow for an independent civil society monitoring of the implementation of the chapter and the impact that it has on improving the adherence to international labour standards. In their comprehensive assessment of the EU-FTAs with Caribbean countries, South-Korea and Moldova, Harrison et.al. (2018: 12) “...found no evidence that the existence of TSD chapters has led to improvements in labour standards governance..., nor did we find any evidence that the institutionalization of opportunities for learning and socialization between the parties was creating a significant prospect of longer-term change.” And on the role of civil society, they note that “...there have been serious difficulties affecting the functioning of the civil society mechanisms in all three agreements.” (Harrison et al., 2018: 8) Especially the trade unions and civil society organisations involved see the need for technical improvements of these mechanisms like clearer procedures for the formation of DAGs, more efficient and valuable feedback mechanisms with Governments or financial and logistical support (Orbie et al., 2016c: 526)

In addition to these more technical problems, there seem to be inherent structural and political problems for the efficient functioning of the civil society mechanisms in the TSD Chapters. The case of the EU-Peru-Colombia Trade Agreement as illustrated by Orbie and Van den Putte (2016a) shows that the political context of the partner country plays a very important role when it comes to compliance with provisions on trade and sustainable development. And

that the EU has little leverage to enforce authentic civil society participation, let alone the compliance with labour standards as stipulated in the agreement. Although the Peruvian Government may have formally complied with the mechanism according to the agreement, in practice it has not organised “...an effective domestic dialogue with a view to monitor the chapter on sustainable development” (Orbie and Van den Putte, 2016a: 5).

This shows the limited scope of sustainable trade, if both trading partners do not share the same political values. The Peruvian Government at that point of time was clearly not in favour of civil society participation in monitoring trade and sustainable development but rather “...reluctant (not to say hostile) towards civil society involvement. Again, this is even stronger when it comes to trade unions, given the anti-union climate in the country.” (Orbie and Van den Putte, 2016a: 32)

This was reiterated in several official statements by the European Economic and Social Committee (EESC) that usually coordinates the work of the DAGs on the European level. In an ‘own-initiative opinion’ from February 2018 on the civil society mechanism in TSD chapters in EU Free Trade Agreements, the EESC concluded: “Identified shortcomings include an unbalanced membership and delays in establishing DAGs, the need for joint meetings between EU DAGs and the DAGs of the partner countries and for their chairs to take part in meetings of the TSD committees, having the right to present the views of their groups, and the lack of adequate financing for DAGs both by the EU and the partner countries. “ (EESC, 2018, p. 2)

Harrison et. al. (2018: 12) confirm through their research that government officials both in the EU and the partner countries in all the three trade agreements under research have not really taken civil society involvement seriously and that the civil society mechanism was rather “...utilized to legitimize the agreement, without leading to any substantial change for labour rights protection on the ground.”

In this context, one major complaint of the trade unions and NGOs in the DAGs on both sides refers to the failure of the DAGs and the Civil Society Forum to enforce their recommendations. As the name of the body tells already, it has merely an advisory function. For example the DAG in Ecuador complained vis-à-vis their national governments and the EU about the growth of precarious employment and the violation of labour and environmental standards in the banana production sector in Ecuador. Both DAGs in Colombia and Peru raised the perilous working conditions of trade unionists in Colombia or the hazardous working conditions in the mining sector in Peru. It was only for the Peru complaint that then Trade Commissioner Malmström replied to after 17 months with a letter in which, however,

she delegated the responsibility for the breaches of the TSD obligations to the Peruvian Government although the banana importers and consumers are also in Europe. Truly effective measures against these violations of the sustainability chapter have so far been absent in all three countries⁶.

The real impact of civil society consultation in form of the DAGs is therefore more than tenuous. This could lead one to conclude that the civil society mechanisms in the sustainability chapters are merely a fig leaf to legitimize trade agreements that are viewed with skepticism by parts of society, especially in Western countries.

But it could also be argued that in spite of the limitations of this relatively new instrument, trade policy implementation should not be left to governments alone. Participation in Domestic Advisory Groups on the Free Trade Agreements is necessary to denounce grievances in public and bring about change even by small pinpricks. To quote the statement made by the participants of a meeting of the Consultative Groups and National Mechanisms for consultation with civil society that met on 22 October 2019 in Bogotá, Colombia: “The importance of using forums for civil society dialogue as they provide opportunities for debate and consensus-seeking for all groups was highlighted. Such forums should be a tool for civil society to discuss compliance or non-compliance with commitments under the title. The Advisory Groups are entitled and obliged to issue opinions and recommendations to the authorities: if used efficiently, this is a very powerful tool.” (European Economic and Social Council, 2019)

4. Case study: Experiences with the EU Korea Free Trade Agreement

The EU-Korea Free Trade Agreement (EUKFTA) which entered into force in 2011 is until now not an encouraging example for sustainable trade, neither with regard to improving the situation of labour rights in South Korea, nor when it comes to the civil society mechanism.

Van den Putte (2015: 225ff.) establishes three criteria to assess the monitoring mechanisms in the TSD Chapters, two of which (institutionalisation and accountability) are relevant here in the case of Korea⁷. Institutionalisation refers to how obligatory the monitoring mechanism is and how precisely it is specified. Accountability “concerns the degree to which the comments

⁶ Interview with Mrs. Susanne Stollreiter, Coordinator for Trade Policies in the Latin America Department of Friedrich-Ebert-Stiftung, Berlin. She is also a member of the NGO-subgroup in the EU-DAG of the FTA with Colombia, Peru and Ecuador.

⁷ The third one refers to the scope of monitoring, meaning one or more agreements; in this case the mechanism only applies to the EUKFTA.

and criticisms of civil society representatives find their way into the policy process” (Van den Putte, 2015: 225).

Following these criteria, in theory *institutionalisation* as well as *accountability* of the mechanism can be considered high at least for the European and to a lesser extent also for the Korean side. There are clear rules of procedure (*institutionalisation*) for the DAG of the EUKFTA on the level of the EU, published on the website of the European Economic and Social Committee (EESC)⁸ (EESC, 2017). The group has 12 members that are entitled to vote but also allows for a non-specified number of observers. Meetings should take place at least twice a year. The members are appointed by the EESC and the Commission for an initial period of two and a half years. Three of the twelve members are nominated by the EESC while the other nine are nominated by civil society in Europe under the sub-groups business, labour and NGOs. The Chair of the DAG is elected from one of the sub-groups on a rotating basis, the EESC handles the secretarial functions for the group. The members of the EU-DAG are automatically also members of the EU-Korea Civil Society Forum. The funding for the operations of the DAG is provided by the European Commission.

The observers to the DAG can participate in all matters except voting. Even beyond that the DAG can decide to open its meetings to other civil society organisations that are not permanent observers. The European DAG can produce and address communication to the two parties of the agreement, the EU institutions, the DAG in Korea, the Civil Society Forum etc., and can be consulted by these institutions vice-versa. All the written output of the DAG must be agreed upon by consensus or simple majority and will be made public (*accountability*).

Also, the Korean DAG has rules of procedure⁹ but they are less comprehensive and detailed and rather unspecific on the selection of DAG members and its operation. Unlike on the EU side, there is little clarity on the decision-making mechanism (voting etc.) in scenarios with no consent which happens quite often in the Korean situation. The DAG has 15 members, nine from labour-related organisations and six from the environmental sector. In the view of Induk Lee (2018), a representative of the Federation of Korean Trade Unions (FKTU), there was a lack of transparency and representativeness in the composition of the DAG, since the Korean government in the beginning appointed workplace union leaders to the DAG without proper consultation of the two major national trade union centres FKTU and Korean Confederation

⁸ The European Economic and Social Committee is a consultative body of the EU, composed of employers' organisations, trade unions and representatives of other interests. Members are nominated by national governments and appointed by the Council of the European Union for a renewable 5-year term of office (<https://www.eesc.europa.eu/en>).

⁹ The rules of procedure are not available online, only a Korean version (hard copy) issued on 10 July 2013 could be obtained with the help of one of the Korean DAG members from the Korea Environmental Preservation Association which is currently the DAG Secretariat (<http://www.epa.or.kr/eng/about.jsp?topmenu=A>).

of Trade Unions (KCTU) and also excluded the KCTU from the DAG. Trade unions, civil society and academics complain of the lack of a clear mandate, task and authority for the DAG.

Despite these limitations, independent researchers in Korea considered this mechanism in the beginning as a positive and rather new exercise for Korea. As labour lawyer Jeong (2017:2) argues: “The European society may have more experience with kind of soft implementation mechanism, but to Korean government and civil society, this way of participation was very new, even radical in some way, as it came along with *trade* agreement that states the obligation of the state to observe the international labour standards and to ratify ILO conventions. Also, with its short and dramatic history of democracy and the last 10 years of conservative government, the state has been neglecting, sometimes even actively sabotaging the participation of the labour union and civil society in any policy making decision...”. But during the process it became clear that the Korean Government did not consider civil society participation an important task in the implementation of the TSD Chapter.

When it comes to the protection of labour rights in Korea which was the objective of the TSD Chapter, no progress can be reported as of today. None of the outstanding ILO Conventions (C87, C98, C29 and C105) has been ratified since the enforcement of the agreement in 2011. On the contrary, further violations of labour rights have happened during this period, including imprisonment of trade union leaders, cancellation of registration certificates as in the case of the teacher’s union, restriction of freedom of expression for teachers and public servants and others (Ryu, 2018).

Since 2013, the DAGs on both sides as well as the joint Civil Society Forums asked “...the Korean government to take necessary measures to ratify the remaining fundamental conventions and to cooperate with the ILO on this matter” (Ryu 2018). In December 2016, the European DAG had requested the Directorate General for Trade of the European Commission by letter to take formal steps since the mechanisms of the TSD Chapter and the actions of civil society over the past five years did not achieve any tangible results. In a resolution on the implementation of the EUKFTA in May 2017, the European Parliament (2017: Nr. 5) urged the Commission to “...take up formal consultations with the Korean Government in accordance with Article 13.14 of the Agreement and, if such consultations should fail, calls on the panel of experts referred to in Article 13.15 of the Agreement to take action and to continue the dialogue with regard to the failure of the Korean Government to comply with some of its commitments, and in particular to make continued and sustained efforts, in line with the obligations enshrined in the Agreement, towards ensuring the

ratification by Korea of the fundamental ILO Conventions which this country has not ratified yet.“ In a report to the European Parliament in October 2017 the European Commission acknowledged these concerns about the situation of labour rights in Korea and stated to “...engage closely with the new Korean government in order to address them, and continue its cooperation with the EU DAG and with the Civil Society Forum comprised of stakeholders from all sides“ (European Commission, 2017c: Nr. 7).

As no positive developments could be reached in the subsequent meetings of the EUKFTA Trade Committee in January 2018 and the EU-Korea Summit in October 2018, the EU had finally started the official consultation mechanism with the Korean government. A press release on 17 December 2018 announced that the EU “...requested formal consultations with the government of the Republic of Korea regarding the implementation of the sustainable development commitments under the EU-Korea trade agreement“ (European Commission, 2018c). It is for the first time that the EU triggers a dispute settlement process in the framework of a TSD Chapter in such a “new generation” trade agreement. The communication of the Commission to the Republic of Korea calls for several disputed issues in the Korean Trade Union Act and the Korean Criminal Act as well as the demand to ratify the outstanding ILO Conventions¹⁰.

The first meeting on this formal dispute settlement process with the Korean Government took place on 21 January 2019 (HANKYOREH Newspaper Website, 2019). In the meeting, the Korean Government reiterated its intention to ratify the outstanding ILO Conventions through a process of social dialogue and blamed resistance of opposition parties in the National Assembly as a major obstacle to further progress. But observers are sceptical about the political will of the Korean Government since it is obviously not using the EU pressure for political efforts in changing the position of the opposing parties in the National Assembly. Also, the visit of EU Trade Commissioner Cecilia Malmström to Seoul in April 2019 did not yield any breakthrough. The next step in July 2019 therefore was to start the setting-up of a Panel of Experts according to the TSD Chapter which then would produce a report and recommendations to both sides (European Commission, 2019a). In the meantime the EU had probably hoped that the Korean Government would become active with regard to the National Assembly to change some parts of the labour legislation and initiate the ratification of the outstanding ILO Conventions. In October 2019, the government of Korea submitted a proposal in the National Assembly for the ratification of three of the four outstanding

¹⁰ The complete list of violations can be found under: International Trade Union Confederation (ITUC), State of play of global trade March 2019, 9.4.2019, available online at https://www.ituc-csi.org/IMG/pdf/2019-03_stateofplay_of_globaltrade_2019-en.pdf, [accessed on 9 April 2019]

fundamental ILO Conventions and of the bills for necessary labour reforms. However, the National Assembly has not taken any formal steps to discuss and vote on these bills.

Then, only on December 19th, 2019, three years after the European DAG had made its request to the European Commission, the EU and Korea completed the procedure for selecting the members of the panel that will examine the ongoing dispute on workers' rights in the Republic of Korea (European Commission, 2019b). The panel was officially established as of 30 December 2019 and is expected to deliver its report by the end of March 2020. However, civil society and trade unions both in Korea and the EU raised concern about the composition of the Panel which did not seem to be balanced and lacks knowledge on international labour standards. And since the announcement of the panel came so late, little time was left especially for international trade unions and civil society to submit their statements (*amicus curiae*) in the process (ITUC/ETUC/FIDH, 2020). And at this important stage, the Korean DAG seems to be non-active.

In 2017, the Economic and Social Committee in the European Union had made a rather positive evaluation of the civil society mechanisms in the Trade and Sustainable Development (TSD) chapter of the EU-Korea FTA and noted that „...representativeness and balanced representation of stakeholders has improved significantly “ (EESC 2017, p. 1). This was also credited to the strong support of the EU-Directorate General of Trade given to the demands of the EU-DAG for a more balanced membership of the Korea DAG (EESC, 2017, p.5.).

But in 2019, the Korean DAG meeting had been postponed since the end of April arguing that they will wait for the fixed date of the civil society forum. However, no CSF-Meeting took place in 2019. This means that the ongoing dispute settlement process could not be properly monitored by Korean social partners and civil society. While both partners praise the economic benefits of the EUKFTA, towards the end of 2019, eight years after enforcement of the trade agreement, no progress on the implementation of the sustainability chapter of the trade agreement can be recorded and the civil society mechanism on the Korean side was defunct in 2019.

The EU Commission has acknowledged the need for improvement of the substance and the practicability of the Trade and Sustainable Development Chapters. Not only through taking action in the concrete case of Korea, but also more in general in its “Non-paper of the Commission Services on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements” (European Commission 2018b). It was developed in 2017 in collaboration with EU member states, the European Parliament and civil society organisations, including the social partners. The paper contains

“...15 concrete and practical actions” under four broad headings: Working Together; Enabling civil society including the Social Partners to play a greater role in implementation; Delivering; and Transparency and Communication“ (European Commission, 2018b: 2) that are supposed to improve the implementation and enforcement of TSD Chapters. Of special relevance here is section B, enabling civil society including the social partners to play their role in implementation. In particular the Commission has pledged to work “...for clear, transparent rules and procedures for the establishment and functioning of the civil society structures...and also to ensure their balance and representativeness, in particular on the side of our trade partners” (European Commission, 2018b: 5).

In general, labour provisions within EU FTAs have “widened and deepened” over the past decade. This is linked in part to the 2007 Lisbon Treaty which accorded greater influence in trade policy-making to the European Parliament, an institution which has emphasised the labour and human rights dimensions of trade policy. The text of the EU-Korea FTA had been concluded right before the Lisbon Treaty came into force in December 2009. In a discussion with the authors in September 2016¹¹, the chief negotiator of the agreement from the Korean side shared his thoughts openly that both the EU and the Korean government signed the FTA with the TSD Chapter in full awareness that Korea would not ratify the remaining core labour standards.

The experiences with the EU „New Generation“ Free Trade Agreements with a designated sustainability chapter are still limited since not many agreements are in place that can provide generalised data. Although research about this topic is also scarce, the existing literature does not recognise significant results both in terms of improving labour standards and/or enabling civil society to participate in the monitoring of the agreement. And this is not only due to deficiencies in the configuration and wording of the agreements, but also due to the structural and political difficulties when two partners that do not share the same political values, formulate human rights and labour standards as part of their trade agreement. This has been clearly demonstrated in the case of the EUKFTA where eight years after its enforcement, no progress on labour rights has been made and the civil society mechanism is more or less defunct.

In the next chapter we will describe the case of the trade agreement with Vietnam that was ratified by the European Parliament in February 2020 and will most likely enter into force in the middle of 2020. Here, we will especially focus on the role of civil society and trade

¹¹ The discussion was part of a study visit in Seoul for a Vietnamese delegation on the experience of Korean stakeholders after 5-year implementation of the EUKFTA, with a focus on the TSD chapter. The programme was initiated by FES Vietnam and organised by FES Korea.

unions. We also argue that in light of the experience with Korea, the European Parliament has been playing a more pro-active role in governing labour and human right standards as well as involving civil society in the pre-ratification phase of the EVFTA. This could perhaps provide a positive template for further FTA negotiations.

5. The EU-Vietnam Free Trade Agreement: Political context and the role of civil society actors and trade unions

5.1. The status of the EVFTA and pre-ratification civil society involvement

After negotiations for a free trade agreement between the EU and the Association of South East Asian Countries (ASEAN) stagnated in 2009, the Parties decided to continue bilateral negotiations between EU and some ASEAN member states before aiming at a region-to-region agreement. In 2011, negotiations with Vietnam started and a first text was adopted in December 2015. It nearly took another three years until the final legal text was concluded between the Vietnamese government and the EU Commission and submitted to the European Council as a draft on 17 November 2018, split into a Free Trade Agreement (FTA) and an Investment Protection Agreement (IPA)¹² (European Commission, 2018a).

For Vietnam, one of the fastest growing countries in Asia, the FTA would be of major economic and political importance. It would reduce 99 percent import duties on Vietnamese goods into the European market within the first seven years after enforcement¹³, create pressure on modernising the legal economic framework and bring it into compliance with international standards, further accelerate the international economic integration of Vietnam and thus counterbalance the economic and political influence of China in Vietnam, especially in conjunction with the parallel Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

In view of the EU Commission, „...the Vietnam agreement is the most ambitious and comprehensive FTA that the EU has ever concluded with a middle-income country. As such, it sets a new benchmark for Europe’s engagement with emerging economies“ (EU-Delegation to Vietnam, 2016: 4). On its website on the FTA, the Commission emphasises in particular the legally binding commitments on human rights and labour standards as part of the Trade and Sustainable Development Chapter, involving civil society in the monitoring of the TSD Chapter and the possibility of the suspension of the agreement in cases of breaches of human rights (European Commission, 2018d: 1-2).

¹² While the FTA is meant to gradually eliminate over 99% of custom duties on exports in both directions, the IPA aims to protect investors and investments in the host country

¹³ The tariff elimination roadmap for EU exports to Vietnam is over a period of ten years.

Taking such announcements as a measurement, at least publicly human rights and civil society have not played a visible role during the preparation and negotiation of the agreement. In 2014, the International Federation of Human Rights (FIDH) launched a complaint with the then EU-Ombudswoman, Emily O'Reilly that a human rights audit should have been conducted by the Commission before the conclusion of the agreement in order to influence the agreement in favour of human rights. The Ombudswoman ruled in March 2016 that the absence of such a rights impact assessment indeed constituted maladministration and as such a breach of Art. 21 of the Lisbon agreement. Mrs. O'Reilly „...rejected the European Commission's arguments that a legal link to the human rights clause in the FTA and the use of other traditional tools like dialogue and development cooperation were sufficient to comply with the EU's human rights obligations.“ (FIDH, 2016). However, rulings of the Ombudswoman are not legally binding.

Concerning civil society involvement, it is not surprising that little to no consultation with trade unions and civil society was carried out by Vietnamese government during and after negotiation of the EVFTA. According to a staff member of the VGCL's Legal Department, he was involved in many discussions on Vietnam's labour commitments under the then Trans-Pacific Partnership Agreement (TPP) including meetings with American politicians, but equivalent attention was not paid to EVFTA. None of the interviewed VGCL officials or representatives of civil society organisations (by March 2019) had experienced any information session on the TSD Chapter held either by the Vietnamese government or by the EU Delegation in Vietnam. A number of own initiatives to raise awareness on the TSD Chapter among civil society and trade unions were carried out by FES Vietnam (some as early as 2013) and through an EU-funded project later on (starting 2017).

As late as May 2019, a delegation of the EU Commission's Directorate General for Trade and Directorate General for Employment paid an official visit to Vietnam concerning preparation for the implementation of the TSD Chapter. Beside bilateral meetings with Vietnamese authorities, the delegation also had a roundtable discussion with potential DAG members from CSOs, trade unions and employers' organisations. Whether or not any concrete preparation for the formation of the DAG had been discussed in previous bilateral meetings, was not shared at the roundtable, apart from a general explanation of the mechanism and experience with previous agreements, including that of the Korea-EU FTA. Even if too short and too few, such an initial exchange between EU and Vietnamese stakeholders, especially CSOs, was necessary to gain interest and understanding of a rather new and ambiguous framework like the TSD Chapter.

On the other hand, throughout the process the European Parliament has been more vocal on human rights issues and active in civil society involvement. The Chairman of the Commission for International Trade (INTA) in the European Parliament (since 2014 onwards), Mr. Bernd Lange, travelled regularly to Vietnam during the negotiation period, had intensive talks both with the Vietnamese Government as well as civil society and constantly emphasised the need for Vietnam to improve on human rights and develop a clear road-map for the ratification of the outstanding ILO conventions. In line with previous resolutions, on 15 November 2018 the European Parliament adopted a resolution on Vietnam, notably the situation of political prisoners. In Nr. 15 of the resolution, the European Parliament called “...for the Vietnamese Government and the EU, as important partners, to commit to improving respect for human rights and fundamental freedoms in the country, as it is a cornerstone of the bilateral relations between Vietnam and the Union, notably in view of the ratification of the EU-Vietnam Free Trade Agreement (EVFTA) and in view of the EU-Vietnam Partnership and Cooperation Agreement (PCA)” (European Parliament, 2018a: Nr. 15). This was clearly a sign that in line with the deteriorating human rights situation in Vietnam as described in the resolution, expectations of an easy signing and ratification of the EVFTA fell.

On 10 October 2018, the Commission for International Trade held a public hearing at the European Parliament on EVFTA (European Parliament, 2018b) where not only the chief negotiator of the Vietnamese government but also a representative of civil society was invited to the panel. The latter speaker, Dr Nguyen Quang A is a vocal human rights activist and a key opposition figure in Vietnam. Reported by a Member of Parliament to Euractiv, Dr Nguyen Quang A had been intimidated by the security forces before he left for Brussels and could not speak his mind freely at the hearing (EURACTIV Website, 2018).

Perhaps this and the continuous violation of human rights and repression of civil society in Vietnam that was constantly brought to the attention of the EU bodies and especially the European Parliament caused a delay in signing and ratification of the agreement (Human Rights Watch, 2019). There had been high hopes that the agreement could have been submitted to the European Parliament and the National Assembly of Vietnam for ratification before the European elections that took place at the end of May 2019. But the then EU Presidency Romania had to reschedule an EU Council Decision on the signature of the agreement until after the European elections at the end of May. Only on June 25th, the European Council endorsed the signing of the agreement to take place on June 30th, 2019 (European Parliament, 2019) which started the concrete ratification process in the European

Parliament. The decisive vote in the European Parliament Committee on International Trade was held in January 2020 and decided in favour of the FTA (29-6 votes, 5 abstain) and the IPA (European Parliament 2020). In the following plenary vote on February 12th, 2020, the EUP ratified the EVFTA and also the Investment Protection Agreement (European Commission, 2020) with a majority of about 57 percent of the votes. The National Assembly of Vietnam has discussed the EVFTA in its plenary session in November 2019 and is supposed to ratify the deal in the plenary in May 2020. This will probably lead to an enforcement of the trade agreement by June or July 2020. The Investment Protection Agreement can only be enforced after it has been ratified by each individual member state first which may take a couple of years.

Chart: EVFTA Timeline



While the EVFTA has far greater economic importance for Vietnam than for the EU, it is politically significant for both partners. Especially the EU has also always emphasised the positive impact on human rights and labour standards expected after entry into force of the agreement although it failed to conduct a human rights impact assessment before the start of the negotiations. The annual Human Rights Dialogue between Vietnam and the European Union in line with the Partnership and Cooperation Agreement was used to recall the need to respect and promote human rights and labour standards. While the EU consulted civil society organisations on this dialogue in either Brussels or Hanoi, there is no news about such a dialogue between the Government of Vietnam and Vietnamese civil society before these consultations. In the next subchapter we will analyse what this could mean for the civil society mechanism in the EVFTA.

5.2. The civil society mechanism in the Trade and Sustainability chapter and the position of the actors

The labour commitments in the FTA and the civil society mechanism to monitor these commitments are enshrined in Chapter 13, Article 1-4 and Art. 15 of the EVFTA (European Commission, 2018a). Reference is made to the ILO Decent Work Agenda, the ILO 2008 Declaration on Social Justice for a Fair Globalisation and the 1998 Declaration on Fundamental Principles and Rights at Work (Core Labour Standards). As in the case of Korea and other agreements, a Domestic Advisory Group (DAG) should be set up by each party for

domestic consultations; the DAG should include a *balanced representation of independent economic, social and environmental stakeholders, including among others employers' and workers' organisations, business groups and environmental organisations*. There are no further criteria how the DAGs be set up. The procedures to form the Vietnamese DAG and appoint its members is the sole responsibility of Vietnam. „Each Party shall decide on its domestic procedures for the establishment of its domestic advisory group or groups and the appointment of the members of such group or groups.“ (EVFTA Chapter 13.15., Institutional Provisions, Nr. 4) Legally, it means that the EU cannot interfere into this process. There are no further criteria regarding the establishment of the DAGs.

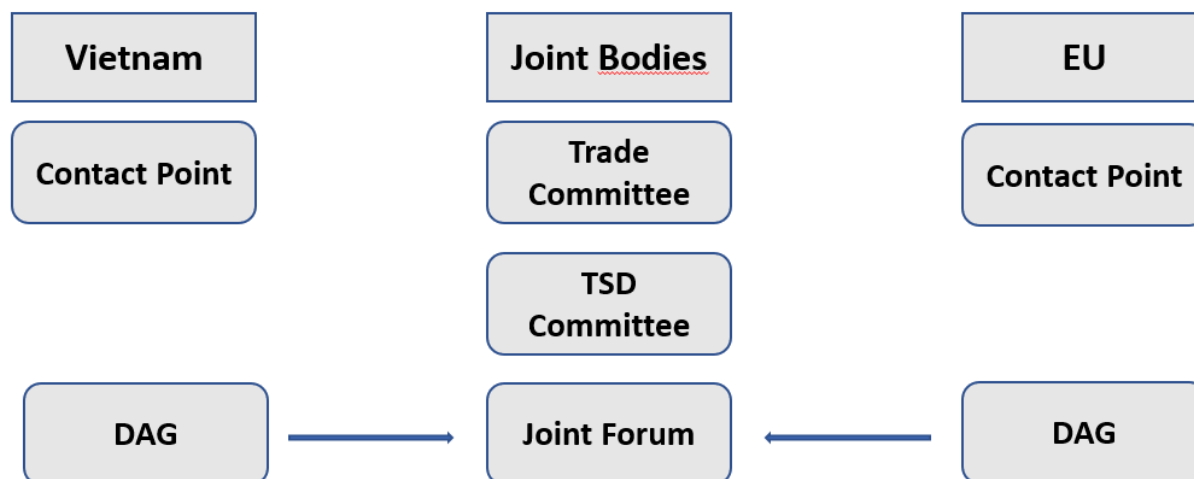
Members of the DAGs of each party (EU and VN) shall meet in a Joint Forum (Civil Society Forum/CSF) to conduct a dialogue on sustainable development aspects of trade relations between the parties. The meetings are supposed to be back-to-back with the meetings of the Committee for Trade and Sustainable Development (the Government body for the TSD Chapter, consisting of senior officials) to receive an update on the implementation of the Chapter. The reports and recommendations of the Joint Forum shall be submitted to the Government Body and thereafter be made publicly available.

While there is no concrete timetable for the establishment of the DAG, the Joint Forum of both DAGs shall meet once a year. According to the text of the agreement the first meeting must take place not later than one year after the entry into force of the FTA. This implies that the DAGs should be set up soon after the agreement enters into force. However, both Vietnamese government and the EU commission have not yet started to make any concrete preparation before the agreement is signed.

While the EU has not paid attention to the preparation of the civil society mechanism in Vietnam, it had at least called for a road map from Vietnam for the ratification of the outstanding ILO Core Labour Conventions Nr. 87 (Freedom of Association), Nr. 98 (Right to Collective Bargaining) and Nr. 105 (Prohibition of Forced Labour) that had not been ratified by Vietnam when negotiations began. Additional leverage was exerted through the Labour Chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Chapter 19). The CPTPP, enforced for Vietnam in January 2019, contains commitments for the participating countries to adopt and maintain the ILO Core Labour Standards as well as acceptable conditions of work with respect to minimum wage, hours of work, and occupational safety and health in its laws and practices (CIRD, 2018: 7).

Chart: Institutional bodies in the TSD Chapter

(according to Art. 13.15 EVFTA)



In an exchange of letters with all the other ten members of this multilateral free trade agreement, Vietnam has pledged to begin implementing these commitments from the time of entry into force of the CPTPP, but is given a „grace period“ of practically five years for compliance before negotiations on the suspension of trade benefits in accordance with Article 28 (Dispute Settlement) of the CPTPP will start. This is not as stringent as in the former TPP, but rather more concrete and binding than in the EVFTA. The monitoring of the commitments is left to a Labour Council on the Governmental level, but individuals or organisations can make public submissions to the contact points of each Party (situated in the Labour Ministries of the member countries) on issues arising from the enforcement of the labour chapter (CIRD, 2018: 8).

On June 14th, 2019, the National Assembly of Vietnam has unanimously ratified the ILO Convention 98 on the Right to Organise and Collective Bargaining, making it six out of the eight ILO Core Labour Conventions that are now ratified by Vietnam. According to the ILO, „...Vietnam will also work on the preparation to ratify Convention 105 on forced labour by 2020 and Convention 87 on freedom of association by 2023.“ (ILO Vietnam, 2019) In the National Assembly of Vietnam and in the media it was clearly admitted that the ratification of the convention was meant to fulfil Vietnam’s obligations under the CPTPP and the EVFTA, but was also in line with party and government policies. (Vietnam+, 2019a)

Furthermore, on November 20, 2019 the National Assembly of Vietnam adopted a revised labour code that will come into force on January 1st, 2021. In the view of the ILO, the „...most important change in the revised Labour Code, comprising 17 chapters with 220 articles, is the ability of workers in enterprises to exercise their rights to form or join a

representative organisation of their own choosing.“ (Vietnam+, 2019b). Chapter 13 of the revised law¹⁴ allows the formation of new workers’ representative organisations at enterprise level that are not forced anymore to affiliate to the VGCL thus paving the way for compliance with Convention 87 to be ratified later.

However, the wording of the draft is quite unspecific and leaves many details for government's instructions which will be formulated by decrees of the Ministry of Labour during 2020. The most important issues are:

- The procedures and criteria according to which the independent trade unions on enterprise level are being registered, and
- If this is happening, whether independent workers' organisations will be allowed to assemble beyond plant level as well, forming federations at the industrial level which then should have the right to form a national centre outside of the VGCL.

In this respect the ILO will play a very important role in Vietnam since it is considered by Party and Government as the most important foreign institution when it comes to labour law revision. Research shows that while ILO instruments are the main references in all EU and US trade agreement, the role of the ILO in the implementation of labour commitments is less clear. However, as Peel and Fino argue, the ILO has legitimacy and credibility to explicitly engage in the implementation of labour commitments as stipulated in FTAs: ” Indeed, the ILO’s constitutional mandate – which includes the promotion of compliance with international labour standards, the provision of technical assistance and the fostering of legal certainty regarding the meaning and implications of international labour standards – provides a broad basis to assist states (on a voluntary basis and upon request) in giving effect to labour provisions in trade agreements. Furthermore, the ILO 2008 Declaration, explicitly equips the ILO to provide various forms of assistance to its members within the framework of bilateral and multilateral agreements to ensure compatibility with ILO obligations.” (Peel,R., Fino, M., 2015, p. 198)

The need for a stronger role of the ILO in implementing the TSD Chapters has also been acknowledged by the EU Commission. At the end of 2018, the EU and the ILO established a joint project under the name *‘Trade for Decent Work’*. It „...will support actions to improve the application of the ILO fundamental Conventions in EU trading partner countries“ (European Commission, 2019c, p. 26). In this respect, the ILO-Office in Vietnam has already

¹⁴ Only an indicative and preliminary translation of the text of the revised labour law could be obtained at this time informally from UN sources in Vietnam, there is no official translation of the text as per 20 January 2020.

played a highly significant role both in the preparations of the TPP and EVFTA labour commitments as well as advice for the upcoming corresponding legislation. The ratification of Convention 98 is clearly also a result of the continuous work of the ILO country office into that direction. It can be expected that the ILO will continue to work on bringing the new labour law and its enforcement in compliance with the ILO Conventions that have yet to be ratified. However, the tripartite character of the ILO prevents advocacy and campaign work that is too intensive. Participation by civil society would therefore also be required to support efforts by the ILO.

In addition, the ILO will also have to play a significant role when it comes to the implementation of CSR (Corporate Social Responsibility) commitments in the EVFTA according to Article 13.10, Nr. 2e. Normally, these CSR elements are not very prominent in the discourse of the TSD Chapter but could become a confidence building measure for cooperation with NGOs. In the case of Vietnam, the ILO has developed experiences on CSR promotion through the Better Works Programme since a number of years (Peels, A. et al, 2016).

In the recent labour law revision process, the Vietnam General Confederation of Labour has been vocal on issues like retirement age, overtime regulation, labour contracts, wage and labour dispute settlement (Quang, 2018: 9-11). However, when asked about freedom of association, a VGCL official only gave an equivocal response „VGCL does not hold an official opinion on freedom of association. You will not find anything in writing. We follow the Party’s line on the issue.“¹⁵ Indeed nothing concrete can be found but one could imagine that VGCL is not too enthusiastic about losing its monopolistic role and being put under pressure of competition. Since 1986, the economic reform process called ‘*DoiMoi*’ (Renovation) has turned Vietnam into a more market-orientated economy and transformed the country from one of the poorest countries in the world into a lower middle-income country. However, trade unions in Vietnam politically have hardly followed the process of market reforms. They remain to be closely tied to the Communist Party of Vietnam and have yet to find their role as autonomous genuine representatives of the interests of workers.

But at least the Vietnam Government’s commitments to labour reform in the CPTPP and EVFTA constitute a pressure on the VGCL to reform. The prospects of establishing non-VGCL unions at firm, industrial and regional level have urged the VGCL leadership to speed up their internal reform, starting with the autonomy of the union in terms of personnel and planning (Schweissshelm and Chi, 2017). But since the top leadership of VGCL who are

¹⁵ Interview with a VGCL official on 4th March 2019.

mainly party bureaucrats has no interest in losing its monopolistic role to which a lot of financial benefits are attached, they used their political ties to the Communist Party to delay freedom of association and continue to do so at this point in time. They might not be finally able to completely block the ratification of ILO-Convention 87, but as a designated member of the Domestic Advisory Group in Vietnam they will for sure not be the spearhead for an independent and pro-active monitoring of the labour commitments in the DAG. The Communist Party and its security apparatus will find a way to “legally” constrain independent unions within certain boundaries, and to prevent them from being politicised. This would require more efforts by external trade partners but also an active group of labour NGOs in Vietnam working together with the small reform-minded group in the VGCL. The process towards the ratification of the outstanding ILO Conventions is clearly externally driven by commitments under the EVFTA and CPTPP and not by the VGCL.

Because of its sensitive nature in the country’s particular context, there are only few NGOs, be it local or international, working intensively to promote labour rights in Vietnam. A mapping that the authors conducted in 2016, identified a handful of labour-related projects and programmes and showed that most are dealing with labour issues from a humanitarian approach which sees workers as vulnerable groups to be empowered. With this approach, NGOs work directly with particular groups of workers, including female workers and migrant workers, on their own particular issues, for instance gender-based violence. There are only a few cases where NGOs cooperate with trade unions on project basis and only at provincial level. “We maintain a relatively good relationship with the federations of labour at district and provincial levels. However, they only accept to work with us when there is a project with clear objectives. They would be hesitant of our intention otherwise”¹⁶ – said a representative of an NGO active on labour issues. There is apparently a lack of trust between labour NGOs and VGCL, especially at central level.

6. The practicability of trade and sustainable development in Vietnam

In many ways the following considerations are partly still speculative since the EVFTA is not yet enforced and all the cases of FTAs with a TSD Chapter have their own unique character. But since the wording of the TSD Chapter in the EVFTA is very similar to the text of the EUKFTA, lessons from the Korean case and other previous agreements are important for Vietnam although the context is different. Like the case of Peru, the experiences from Korea hint to political obstacles on the level of the partner countries that might imply a side-lining of

¹⁶ Interview with a Hanoi-based NGO on 26th February 2019.

independent civil society participation and ignoring of labour provisions in the TSD Chapter. Harrison et al. (2018: 5) state that “research on the trade–labour linkage has identified that during the negotiating period pressure upon trading partner governments can lead to increased support for, and positive changes in, labour rights; a point reflected by a number of EU representatives in our interviews.” Enhanced and more stringent political dialogues with partner countries on the undisputable principles of value-based trade, like human rights and worker’s rights are needed before the ratification of agreements because the impact of an solely “promotional approach” is clearly limited. In the case of Vietnam at least, for a long period during the negotiations there were no signs of making safeguards and insisting on mechanisms of the agreement to establish an independent Domestic Advisory Group. Only when the ratification on the EU side was obviously questioned by the European Parliament, the EU Commission became cautiously pro-active in Vietnam by at least publicly informing about the civil society dialogue mechanism in a briefing in May 2019.

Also, financial support from the EU to prepare for the establishment of a proper Civil Society Mechanism was rather limited. Direct funding to civil society organisations for the implementation of the TSD Chapter was only provided with a first EU-Call for Proposals in January 2019, meaning the project will only go operational in 2020. On the other hand, support to business in Vietnam for preparation for the time after enforcement of the agreement was already started at a very early stage of negotiations¹⁷.

The EU has demanded a road map from the Vietnamese Government to implement labour commitments, but for a long time not produced its own roadmap on how to ensure compliance and ensure a functioning civil society mechanism. Once the agreement is ratified, it will be difficult to convince the Communist Party and Government in Vietnam to ensure balance and representation within the DAG if there is no further monitoring from the EU side. The wording of the text to form the civil society mechanism for monitoring the sustainability aspects of the EVFTA is vaguely formulated. A small but decisive difference to the text of the EUKFTA is that in the case of Vietnam, *new or existing domestic advisory groups* will be consulted (European Commission, 2018a: Art. 13.15, Nr. 4) while the text of the EUKFTA says that such groups *shall be established* (European Union, 2011: Art. 13.12., Nr. 4). This would allow Vietnam to use the existing structure of the party-affiliated mass organisations as civil society bodies and make it difficult for independent civil society organisations to be

¹⁷ Several projects to support business of various scale and sectors were carried out under the umbrella of a larger project managed by the EU Delegation to Vietnam and Ministry of Industry and Trade since 2012, namely “The European Trade Policy and Investment Support Project”, shortly referred to as EU-MUTRAP. See <https://vietnamnews.vn/economy/419332/eu-mutrap-project-promotes-viet-nams-deeper-trade-integration.html#lgFo9DEcS03TzDHe.97>

included in the mechanism. As mentioned above, formation of the DAG is principally the sole responsibility of each partner. And it is quite alarming in this context that in the whole EVFTA's TSD Chapter, the term „Civil Society“ is not even mentioned, obviously on negotiation and demand of the Vietnamese Government.

We therefore conclude that as in other cases as described above, a proper civil society mechanism to implement the TSD Chapter commitments in the context of Vietnam will be politically and practically hard to achieve under the prevailing conditions. This assessment is also shared by two independent civil society organisations in Vietnam, Human Rights Space (HRS) and iSee (Institute for Studies of Society, Economy and Environment) who prepared an analysis in 2017 on the implications of the EVFTA on civil society organisations in Vietnam on behalf of a European Embassy in Vietnam (internal unpublished report). It concludes that whether civil society participation will be meaningful depends on the way that the DAG is selected and constructed, the prevailing political climate in Vietnam and the preparedness of the civil society movement and their knowledge and interest in the EVFTA (HRS/iSee, 2017).

This leads to the question if the existence of the civil society mechanism will at least contribute to an empowerment of labour-related NGOs in Vietnam and bring trade unions and civil society closer together. Orbie et al. (2016b: 34) argue that such “dialogues may empower certain civil society actors that are currently marginalised within the domestic context. While the process of empowerment is typically a process that should originate from the inside, actors like the EU can facilitate it by promoting social dialogue or establish venues for participation. They could make it possible for marginalised actors to transcend the domestic political arena and have their voice heard within a wider, transnational setting...Empowerment can be strengthened through the forging of alliances with other domestic and international actors, which could be created through the civil society mechanisms. As such the civil society mechanisms could foster the creation of ‘transnational advocacy groups’ or facilitate the functioning of existing transnational networks.” This assumption is shared by the authors for the case of Vietnam.

It is probably undisputed that one major intention of the EU Commission in including the TSD Chapter in all FTAs since 2011 is to mobilise more public support for such agreements that are under heavy criticism and scrutiny of especially large parts of the international civil society movement (Orbie et al., 2016b: 26). The question then may arise, if civil society involvement in these processes can provide space for participation and influence or is just a *fig-leaf* to make the FTAs digestible for policy-makers in the EU who are concerned about

human and labour rights and environmental provisions. It seems that most civil society organisations involved in the TSD Chapter monitoring mechanisms of previous agreements have fairly managed the problem of *co-optation*, as Orbie et al. (2016c) call it. They conclude that “...a critical perspective suggests that providing civil society with a role in trade agreements, but at the same time restricting their influence in policy-making, may be a way of silencing potential criticism of neoliberal orientations.” Orbie et al. (2016c:532).

Civil society in Vietnam is a complex issue. The Vietnamese society in general is very open to international integration for historic reasons. It can be assumed that the legally operating civil society organisations in Vietnam are not afraid of co-optation by their Government because this is much outweighed by their fear for repression which is a daily threat. There is no Law on Associations yet and all international ratings on civil liberties in Vietnam are very low although there is a tradition of local organisations. For the purpose of this paper, we consider civil society organisations that are legally registered as potential members of the Vietnamese DAG because otherwise they may be automatically excluded from the DAG selection. We also distinguish between Vietnamese civil society organisations and international non-governmental organisations that may also play a role in this context.

Of special importance in this context are the so called „labour“ NGOs or labour research institutes and individuals. They deal with the situation of the huge number of low-paid workers in the manufacturing industries in Vietnam (mainly textile and garments, footwear, electronics, furniture making or sea-food processing) and very often especially focus on the internal migrant workers that still form a large part if not the majority of the industrial workforce in Vietnam. The number of these institutions or individuals is quite small. They operate of course under the scrutiny of the security forces. But since labour issues are at least theoretically part of the Communist Party’s ideology, these groups are not as repressed as much as groups that work for civil and political rights. These labour NGOs do not openly oppose the communist political system and have sometimes good personal relationship to Government officials in different institutions that are involved in labour relations. They openly campaign for a reformed and improved labour law, including the ratification of the outstanding ILO Conventions. As Wells-Dang (2014: 169) formulates: “The fact that many of the participants in such actions say nothing about opposing the Party, or even expressly endorse its role, should not be taken as weakness or self-censorship, but rather as evidence of different priorities coupled with smart strategic positioning.” At least, for some parts of Party and Government, such groups could be acceptable for the Vietnamese DAGs provided there is some pressure from the European side. Since these groups network very well with each other,

they might have an impact even if only one or two groups would be represented. But if there is no pressure from outside it is very likely that the Government will just appoint representatives of the mass organisations or the apex bodies with which local NGOs are registered (like VUSTA, the Vietnamese Union of Scientific and Technological Associations) to the membership of the DAG and the Joint Civil Society Forum.

If one looks at the broader picture of recent developments on human rights in Vietnam, it is clearly hard to be optimistic about the ability of the TSD Chapter's mechanisms to bring about significant changes. The space for civil society participation has been shrinking against the background of increasingly restrictive internet freedom and crackdown on dissident voices. Some unregistered groups, individuals or groups active outside of the country have been calling for a complete halt of the ratification process because they do not believe in a momentum that the EVFTA would have to improve the situation, and rather call for EU to exercise pressure on other bilateral and multilateral platforms (HRW, 2019a, HRW, 2019b). The perception is slightly more optimistic, or rather hopeful among the registered NGOs. Used to the narrowness of domestic civil space, labour NGOs generally see trade agreements as an additional entry point for their work. "Trade and economic liberation are catalyst for other forms of freedom",¹⁸ said one NGO representative. Most of the interviewees of this group have some knowledge on the TSD Chapter's mechanisms and are hopeful about its implementation.

A couple of these NGOs have been working together since 2018 to form a network called „Friends of DAG“ in order to ensure that whoever represented in the group will be backed by the rest. Their expectations are that the TSD Chapter, alongside the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), will generate a discourse on freedom of association and support alliance building among labour NGOs. During the labour law revision process, a group of 30 civil society organisations and individuals working on migrant labour, gender based violence or corporate social responsibility had developed a joint recommendation on workers' rights, workers' representation, wage, working hours etc. to several members of National Assembly just before the first reading of the draft law in June 2019. They also have compiled an official submission to the National Assembly for the second reading of the draft in November 2019. They wanted to make sure that the bill was only passed if these issues are improved and not just made for the sake of EVFTA with just

¹⁸ Interview with a member of Human Rights Space, a network of several organisations and individuals working on human rights issues in Vietnam, on 1 March 2019.

cosmetic changes. This time, fundamental issues like freedom of association were opened for public debate and this assumingly thanks to the pressure created by EVFTA ratification.

On the possibility of working together with VGCL in the context of the DAG and the Joint Civil Society Forum, the opinions expressed by the interviewed NGOs were not unanimous. Their confidence, if any, is very much placed at the small number of open-minded individuals in the VGCL apparatus rather than the organisation as a whole. A researcher of the Institute for Workers and Trade Unions, directly under VGCL, is concerned that even in the prospect of the DAG, it will be difficult to get VGCL leaders to the same table with NGOs because they still position themselves as high-ranking officials (bureaucrats). The distrust between VGCL and labour NGOs does not necessarily come from conflicting missions as both stakeholders are working to protect workers' rights and interests in one way or another. The distrust mostly comes from how VGCL leadership position themselves and how civil society are being perceived in the broader context of the political system. If they both will be represented in the DAG, this distrust needs to be overcome to ensure an effective coalition vis-à-vis those that are there to represent business' interests.

Although the South Korean case is being used as a precedent for the case of Vietnam, there are a number of important differences. For instance, South Korea has a more developed civil society which is very experienced in policy advocacy, compared to the young, underdeveloped civil society of Vietnam. This includes an active and independent group of trade unions that have practiced cooperation and alliances with civil society organisations during the period of democratisation in Korea. And even under such conditions, the implementation of the TSD Chapter are dissatisfying. On the other hand, South Korea is a much bigger trade partner where the EU may not have as much leverage upon as in the case of Vietnam as shown in the recent situation.

Turning that argument around, it could be hoped for a tougher stance by the EU regarding positive steps by the Vietnamese Government on the implementation of labour commitments and civil society participation. In this respect there are encouraging signs from the European Parliament. The Chairman of the International Trade Committee, Mr. Bernd Lange wrote a letter to the Vietnamese Prime Minister, Nguyen Xuan Phuc in December 2019 and asked the Vietnamese Government to provide a written and binding roadmap to the EUP before the ratification of the EVFTA, containing (Deutsche Welle, 2020)

- A clear timetable for ratification of ILO Conventions Nr. 87 and 105,

- A swift preparation of the decrees implementing the revised labour code with regulations that allow for an effective registration of independent workers representative organisations,
- Bringing other national laws like the Penal Code in line with the ILO Conventions and the revised labour code, and
- Prepare a timeline for the establishment of the Domestic Advisory Group, as well as their criteria for composition so that independent civil society organisations are represented.

The reply of the Prime Minister on January 6th, 2020 contained an affirmation that the DAG will be established right after ratification of the EVFTA by the National Assembly, ensuring a balanced representation of independent stakeholders and that the Government would provide every support to the operation of the Group. A corresponding time-table for the formation of the DAG was provided. In addition, the Vietnamese Minister of Labour, Invalids and Social Affairs in early January 2020 confirmed in writing per January 8th, 2020 not only the verbal commitments on the ratifications of the two remaining ILO Conventions in 2020 (105) and 2023 (87) and the implementation of the revised labour code but provided a detailed timetable on how the corresponding legislation will be adopted.

Mr. Lange also suggested the establishment of a Joint Committee of the European Parliament and the National Assembly of Vietnam to monitor the enforcement of this roadmap and to consult with civil society organisations and social partners which is currently considered by the National Assembly of Vietnam. The Chairman of the Foreign Affairs Committee of the National Assembly accepted and confirmed this plan in a letter to the EUP dated February 20th. This shows that at least relevant members of the European Parliament are committed to a policy that the work of the EUP does not end with ratification but has to continue in the full period of the implementation of the TSD Chapter. These are all far-reaching achievements by the European Parliament and in this way, the Vietnam case could be a template for EU engagement in future FTAs¹⁹.

The TSD Chapter of the EVFTA has so far provided little more than just an aspiration for change in Vietnam when it comes to civil society space. Much support is needed to turn the aspiration of a small group of NGOs into a perspective. On a more optimistic note it should be noted here also that the ratification of ILO-Convention No. 98 in July 2019 and the planned ratification of Convention 87 (in 2023) is a clear step away from the Leninist paradigm that

¹⁹ Based on interview with Tim Peter, Head of Office of the Chairman of the International Trade Committee in the European Parliament, 20. January 2020)

all trade union organisations must be subordinated under the rule of the Communist Party. In this respect Vietnam is politically much more advanced as for instance compared to China. And this would not have happened without the obligations set out in the CPTPP and the EVFTA. Therefore, continuous work on the implementation of the TSD Chapter is really worth the effort.

7. Recommendations and conclusion

Some technical recommendations like more efficient and valuable feedback mechanisms with Governments or financial and logistical support have already been mentioned in the text. But of special importance are clearer procedures on the formation of the DAG. As shown in the case of Korea and Vietnam, there are no clear rules of procedure for the establishment and composition of the DAGs. It would be advisable to shape the formation and operation of the Vietnamese DAG similar to the practice in the European Union. To become a member of an EU-DAG, an EU organisation needs to be (European Commission, 2019d)

- Independent and not-for-profit
- Represent and promote EU interests
- Have specific expertise or competence on areas covered by the trade and sustainable development chapter
- Registered in both the Transparency Register of the European Commission/European Parliament and in the civil society dialogue database of DG Trade

The crucial term here is: *independent organisations*. Even if formally not involved, the EU has the responsibility to secure that the “spirit of the TSD Chapter” is respected. Mass organisations or government-related agencies like for instance in Vietnam are probably not independent in this sense since they are affiliated to the Communist Party of Vietnam. The definition of “*independent organisations*” must stand at the start of discussions on the formation of the DAG and *should be based on the principles of independence, transparency and democracy*.

Various researchers have also made suggestions to improve the substance and language on the mechanisms of civil society participation. From a legal perspective, these deficits are being addressed by a paper commissioned by Friedrich-Ebert-Stiftung in 2017 under the title „Model Labour Chapter for EU Trade Agreements“, developed by academics from the Georg-August University Law Faculty in Göttingen/ Germany in cooperation with Mr. Bernd Lange, Chairman of the Committee on International Trade in the European Parliament. In comparison to the current TSD Chapter in EU Trade Agreements, it clearly spells out more

power to the participation of social partners and civil society. Art. X.3. of the Model Labour Chapter “highlights their role both in the cooperative and promotional and the sanctions-backed dispute settlement dimensions of the chapter... and guarantees basic freedoms and the independence of the respective organizations, in particular with a view to avoiding undue state influence.” (Stoll et al., 2017: 10). Article X.24. on the DAG and the Civil Society Forum draws on formulations of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EUKFTA in the respective chapters and the rules of procedure. It is more precise in terms of institutionalisation and accountability, though it still lacks clear references on how the parties will make sure a balanced representation of independent civil society organisations.

A group of South-Korean law attorneys has also developed a set of related recommendations on the basis of the experiences with the EUKFTA (Kim et al., 2018). They suggest strengthening the participatory and supervisory role of civil society in the implementation of the TSD Chapter by giving the Civil Society Forum the authority to mandate the Group of Experts to conduct an independent inquiry into whether or not formal consultations are necessary and to identify the issues on which such consultations should take place. This authority is to be subjected to a two thirds majority vote in the Civil Society Forum. They also propose to tighten the timeframe for consultations and applying the overall dispute settlement procedure on trade and sustainability subjects to 30 days. The results of the consultations should constitute a defined programme with clear measures to ensure compliance. At the end of this programme the Panel of Experts will produce an assessment report evaluating compliance. And furthermore, should either Party fail to implement the measures as agreed above or should the consultation fail to produce a result the dispute should automatically become subject to the general dispute settlement mechanism.

And finally, the role of the European Parliament should be enlarged as tested in the case of the EVFTA. That applies to the pre-ratification period but should especially extend to the implementation phase. The planned establishment of a Joint Committee of the National Assembly of Vietnam and the European Parliament for the monitoring of the TSD Chapter is a good example in that respect.

In conclusion, the authors of this paper hold the opinion that political differences and obstacles to sustainable trade are often omitted from the discussion. Where the two parties operate on the basis of conflicting political values systems, the EU-centred approach of ex-post compliance with labour standards and a role of independent civil society participation may not work. And this applies to many trading partners in the world. Therefore, firstly ex-

ante conditionality must become an element of the TSD Chapter (as it was partially applied by the EUP in the final stage before ratification). Usually, the negotiations for a free trade agreement take more than five years. If a sustainability impact assessment is done right at the start of the negotiations, there is ample time for the partner government to bring its labour relations system into compliance with international standards.

This points into the direction given by the EESC in its 2018 opinion on the TSD Chapters in future: “With respect to a strong commitment given by the EU Commission on strengthening labour provisions, partner countries should demonstrate full respect of the eight ILO Core Labour Conventions before the conclusion of a trade agreement. If a partner country has not ratified or properly implemented these Conventions, or demonstrated an equivalent level of protection, the EESC recommends that a roadmap on solid commitments is sought, to be included in the TSD Chapter to ensure this be achieved in a timely manner. “ (EESC, 2018, p.3) Since such a road map was not included in the TSD of the EVFTA, the road map demanded by the European Union depends on the political good-will and the prevailing power constellations in the Communist Party of Vietnam.

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