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Commission reply to the European Ombudsman

Complaint ref. SI/5/2021

Reply of the European Commission on a suggestion for improvement on the Strategic Initiative concerning how the European Commission ensures respect for human rights in the context of international trade agreements from the European Ombudsman SI/5/2021/VS

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 7 July 2021, the Ombudsman opened a strategic initiative (ANNEX 1) to assess how the European Commission ensures respect for human rights in the context of EU trade agreements. In particular, the initiative aimed to examine the use of so-called ‘human rights clauses’ in international trade agreements signed by the EU, as well as to look at how human rights are dealt with once trade agreements have entered into force.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

This was the Ombudsman’s strategic initiative. There was no complaint.

III. EUROPEAN OMBUDSMAN’S INQUIRY

On 7 July 2021, the Ombudsman set out a series of questions to the Commission (ANNEX 2). These questions aimed at getting a better understanding of: (i) the preparatory stage of human rights clauses, including how the content is decided on; and (ii) the implementation stage, including how the Commission monitors whether/how human rights clauses are respected and how it seeks to ensure compliance, where it suspects they are not. The Ombudsman also sought to follow up on her previous inquiry into the failure to carry out a human rights impact assessment in the context of the EU-Vietnam free trade agreement, in particular, how the Commission has sought to ensure respect for human rights now that the agreement is in force. The Commission replied to the Ombudsman’s questions on 25 October 2021 (ANNEX 3).

The Ombudsman sent a meeting request to the Commission on 15 December 2021 together with additional questions (ANNEX 4). The meeting with the representatives of the Ombudsman’s team, the Commission and the EEAS took place on 2 February 2022. The Ombudsman published a report of this meeting (ANNEX 5).

At the initiative of the Commission, an informal meeting with the Ombudsman’s team and the Commission took place on 20 June 2022. In this meeting, the representatives of the Commission gave an update to the Ombudsman’s team of the TSD review and the newly updated Single Entry Point Operating Guidelines.

On 15 July 2022, the Ombudsman published the closing note on her strategic initiative (ANNEX 6). The Sub-Committee on Human Rights (DROI) of the European Parliament had exchanges with the Ombudsman on 5 September 2022.

IV. THE REPLY OF THE EUROPEAN COMMISSION

1. THE OMBUDSMAN'S CONCLUSIONS

In her closing note of 15 July 2022, the Ombudsman closed her strategic initiative inquiry with the following remark: "The Single Entry Point, which in theory can handle human rights complaints, does not seem to be suited to such complaint handling".

The Ombudsman suggested that the Commission should consider setting up a new and separate complaint-handling portal for alleged human rights abuses, and that the Commission should examine how it can facilitate the submission of human rights concerns through this new portal by stakeholders based in the countries with which the EU has agreements.

2. THE COMMISSION'S OBSERVATIONS ON THE OMBUDSMAN'S RECOMMENDATIONS

The Commission has carefully analysed the Ombudsman's closing note on the Strategic Initiative, which highlights important aspects relating to the interaction of human rights and international trade agreements entered into by the EU.

The Commission engaged with the Ombudsman's team throughout the various phases of the Strategic Initiative and has provided concrete replies to all the issues raised by the Ombudsman, including through written inputs and participating in meetings. The Commission agrees on the importance to ensure that stakeholders can effectively share any human rights concerns they may have also in the context of the EU's trade agreements. At the same time, the Commission considers that the existing mechanisms and instruments allow the EU to address human rights issues in the context of the EU's trade agreements and will pursue the application of those mechanisms and instruments. Those replies also highlighted that this is a complex area, and that responsibilities and solutions are shared and coordinated across different services, principally in the Commission and the European External Action Service, and different policies.

The Commission takes note of the Ombudsman's suggestions that the Commission should consider creating additional mechanisms to address the issues covered by the Strategic Initiative. While the scope of human rights complaints and their policy impact is broader than trade policy, it is true that certain aspects of human rights protection are directly addressed by trade policy measures. In the case of trade agreements, this relates to labour rights where these are also human rights and - in the future following the recent trade agreement with New Zealand - gender related issues; while in the case of the Generalised Scheme of Preferences (GSP), the EU unilateral scheme of generalized tariff preferences (although not a trade agreement as such) a broader set of human rights are addressed. In both cases, complaints to the Commission of alleged infringements of commitments can be submitted via the Single Entry Point, as reflected in the corresponding complaints forms and the published operating guidelines.

The Commission has created the Single Entry Point as a contact point through which stakeholders can raise issues related to EU trade instruments - including also specific human rights concerns - to the attention of EU institutions. For example, citizens can raise concerns about broader human rights breaches in the framework of the Generalised Scheme of Preferences Regulation. Through GSP Regulation, the Commission grants unilateral tariff preferences to developing and least developed countries. In particular, the granting of benefits under the special incentive arrangement for sustainable development and good governance (GSP+) is conditional upon the ratification and effective implementation by the beneficiary countries of certain conventions related to human rights and core labour standards. The Commission can withdraw the tariff preferences granted under the GSP Regulation in case of serious and systematic violations by a beneficiary country of the principles of those core human rights and labour rights conventions. Citizens can also raise concerns regarding the application of the Trade and Sustainable Development (TSD) Chapters of trade agreements with regard to labour issues. In addition to engaging with the partner countries through diplomatic means to

resolve issues, the Commission can bring trade and sustainable development cases to dispute settlement under the trade agreements. In both cases, also potential complainants based outside the EU and located in the partner country can raise concerns together with EU-based stakeholders. The Commission has recently proposed to enhance these tools through the TSD review¹ and the proposal for the new GSP Regulation².

Outside of the international human and labour rights conventions listed in the GSP Regulation and the core labour rights and the conventions referred to in the TSD chapters of trade agreements (which, as noted above, can be the subjects of complaints through the Single Entry Point), commitments on broader human rights are also included in the EU's political framework agreements. Beyond specific commitments on labour rights, the respect for human rights constitutes an essential element of EU association or political framework agreements with partner countries, under which trade agreements are typically concluded. In the absence of such broad framework agreements, the EU policy is to include human rights clauses in free trade agreements. These are the so-called "essential elements" clauses, the violation of which enables the EU to terminate or suspend fully or partially the agreements, in accordance with Article 60 of the Vienna Convention on the Law of Treaties.

The EU also has a wide variety of tools and instruments at its disposal to address human rights issues in its relations with partner countries.

Political and human rights dialogues are crucial instruments for engagement with third countries on human rights issues. This includes engagement under the specific committees or sub-committees (typically called "on rule of law, democracy and human rights") established under political and association agreements with partner countries. As the Ombudsman indicates, the EU has established approximately 60 human rights dialogues and consultations with partner countries and regional groupings. The Commission is convinced that the promotion of human rights needs to be undertaken primarily through engagement and dialogue. The dialogues include active promotion and support for the implementation of human rights commitments and engagement on negative developments.

In addition to these dialogues and consultations, the EU has various other tools at its disposal to address human rights concerns in partner countries. These include application of thematic and geographical programmes under the multiannual financial frameworks such as the European Instrument for Democracy and Human Rights (EIDHR)³, and the Neighbourhood, Development and International Cooperation Instrument (NDICI)⁴. Other regularly used instruments include engagement in multilateral human rights fora; public diplomacy, awareness raising campaigns, public statements, declarations and démarches.

Reporting activities also play an important role. The Ombudsman's closing note highlights that the EU High Representative publishes an Annual Report on Human Rights and Democracy in the World, providing details of particular human rights concerns in countries which have trade agreements with the EU. For countries benefitting from the EU GSP preferences, the

¹ <https://circabc.europa.eu/ui/group/8a31feb6-d901-421f-a607-ebbdd7d59ca0/library/8c5821b3-2b18-43a1-b791-2df56b673900/details>

² https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4801

³ EIDHR has funded more than 1200 projects in over 100 countries to support to civil society initiatives promoting democracy and human rights worldwide.

⁴ The new NDICI for 2021-2027 includes a thematic programme on human rights and democracy that will be used to support human rights monitoring initiatives.

Commission publishes a biennial report, which includes detailed country assessments based also on the results of monitoring. The Commission also publishes an annual report on the overall implementation of trade agreements and enforcement activity.

Finally, the Commission evaluates major trade agreements after they have been in place for a certain period of time. In these ex-post evaluations, the impact of trade agreements on human rights is systematically analysed following a methodology that was developed specifically for that purpose⁵. This contributes to ensuring that the Commission's trade policy is kept accountable. A selection of these ex-post evaluations are subject to independent scrutiny of the Regulatory Scrutiny Board.

These actions and processes are the foundations of the EU's work on human rights with respect to third countries. The various actions are integrated and applied to mutually reinforce each other.

Decisions on possible EU actions in response to potential breaches of human rights by partners are taken on a case-by-case basis. The EU's entire toolbox outlined above can be deployed: from public diplomacy, targeted assistance and capacity-building, to measures of last resort, such as the suspension of an agreement through the triggering of the essential elements clause.

The EU institutions carefully assess possible EU actions, taking into account the impact of the measure (including on vulnerable populations), and its effectiveness for remedying the situation and achieving long-term progress on the protection of human rights. The decisions triggering formal responses such as the launching of dispute settlement procedures under a trade agreement (e.g. the Korea labour case⁶) or the withdrawal of Everything But Arms preferences under the GSP Regulation (the Cambodia case⁷) were taken after extensive and careful consideration of all human and labour rights and foreign, economic and development policy aspects.

It is in the light of these approaches that the Commission takes note of the Ombudsman's suggestions.

First, in relation to the proposal that the Commission should consider setting up a separate entry point for human rights complaints, the Commission considers that the existing mechanisms – as described above - provide sufficient routes for complaints or concerns to be raised to the Commission or to the European External Action Service.

As already indicated, the Single Entry Point provides for a possibility to raise trade-related concerns regarding the specific human rights issues. Thus, for concerns that relate to TSD provisions within trade agreements or to the GSP Regulation, the Single Entry Point provides an easy-to-use route to raise issues with the Commission's trade department. Moreover, human rights concerns can also be communicated to the Commission and the European External Action Service (to both the headquarters and via the network of EU Delegations). Complaints

⁵ European Commission [Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives \(europa.eu\)](https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/), 2015

⁶ Further information on the EU-Korea labour dispute, including the final report of the panel, is available at <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>

⁷ On 12 February 2020, the Commission adopted Delegated Regulation 2020/550 partially withdrawing GSP tariff preferences from Cambodia.

submitted by correspondence, e-mail, in person meetings, or via the European External Action Service contact form⁸ are followed up in line with the rules from the Code of Good Administrative Behaviour. It has to be noted that besides being open to receive complaints, the European External Action Service systematically and proactively seeks input from stakeholders (notably civil society organisations and human right defenders) from both the EU and third countries on human rights issues, before and after the organisation of each political and human rights dialogues held with third countries. This practice is replicated also in the GSP context, and thus extends beyond the countries with which the EU has trade agreements.

Second, in relation to the proposal that the Commission should ensure that such a mechanism is accessible also to stakeholders based in countries with which the EU has trade agreements, the Commission must balance the use of its tools and limited resources with the need to ensure that our trade instruments deliver benefits to EU actors. Against this backdrop, the Commission has taken the view that in order to promote the values reflected in our trade instruments (both TSD Chapters in trade agreements and the GSP Regulation) there should be a possibility for non-European stakeholders to flag issues concerning the implementation of the agreements and the GSP Regulation. This can be done through EU-based stakeholders, who in addition to their own interests can represent interests of similar entities or organisations located in the partner country. For example, this has recently been the case for a complaint related to trade union rights in Peru and Colombia, which was submitted to the Single Entry Point by a Dutch non-governmental organisation.

As the Ombudsman notes, stakeholders may contact the Single Entry Point, before formally submitting a complaint, to obtain further information on how to approach an issue or submit a complaint.

The Ombudsman rightly points out that stakeholders on the ground are often best placed to report problems and present evidence, especially concerning human right issues. This is why both the Commission and the European External Action Service rely on the information provided by various stakeholders, including those established in third countries, which actively engage and participate in the monitoring and implementation of human rights commitments by trading partners. Consultations with civil society actors (including non-governmental organisations and human rights defenders) are an essential element in the implementation of the GSP Regulation, in the implementation of TSD Chapters in trade agreements, and the human rights dialogues. As mentioned earlier, the European External Action Service holds civil society consultations before and after each human rights dialogue. The Commission also holds regular Civil Society Dialogues through which human rights concerns linked to trade policy can be raised with the EU institutions. More generally, human rights focal points as part of the political sections of EU Delegations also act as key interfaces for civil society organisations and human rights defenders in third countries and for receiving complaints of violations. The contacts of EU Delegations are easily accessible on their dedicated websites⁹.

In this context, it should also be recalled that human rights abuses may also occur in third countries with which the EU does not have trade agreements (and where human rights concerns may possibly even be bigger), which underlines the need for the holistic approach to human rights, including receiving human rights related complaints, as set out above.

⁸ https://www.eeas.europa.eu/eeas/contact_en

⁹ https://www.eeas.europa.eu/eeas/eu-world-0_en

The Commission trusts that these elements will reassure the Ombudsman that, together with the Single Entry Point, there are various, effective and accessible channels for stakeholders in the EU and in third countries to bring allegations of human rights abuses by trading partners to the attention of the Commission and the European External Action Service. The Commission and the European External Action Service are committed to applying the current tools to ensure the full contribution of trade agreements and the Generalised Scheme of Preferences to the respect of human rights.

V. CONCLUSION

The Commission attaches great value to promoting the respect of human rights in the context of trade agreements and the Generalised Scheme of Preferences Regulation and, together with the European External Action Service, will continue to address human rights concerns with trade partners.

For the Commission

Valdis DOMBROVSKIS

Executive Vice-President

List of enclosures

- ANNEX 1: Ombudsman's case opening announcement – 7 July 2021
- ANNEX 2: Ombudsman's questions to Commission – 7 July 2021
- ANNEX 3: Commission replies to Ombudsman – 25 October 2021
- ANNEX 4: Ombudsman's meeting request to Commission – 15 December 2021
- ANNEX 5: Report of meeting of 2 February 2022
- ANNEX 6: Ombudsman's closing note on strategic initiative – 15 July 2022