



## **Decision of the European Ombudsman on complaint 1646/2007/WP against the European Commission**

Decision

**Case 1646/2007/WP - Opened on 23/07/2007 - Decision on 05/08/2008**

Strasbourg, 5 August 2008

Dear Mr G.,

On 18 June 2007, you submitted a complaint to the European Ombudsman against the European Commission concerning its handling of your information requests as regards development cooperation with Argentina.

On 23 July 2007, I forwarded the complaint to the President of the Commission and asked for an opinion to be sent by 30 November 2008.

On 4 January 2008, you forwarded to me an e-mail you had sent to the Commission on the same day, which concerned the subject-matter of your complaint.

By letter of 10 January 2008, I informed you that, in spite of informal reminders, the Commission had still not sent its opinion on your complaint and that I had, therefore, formally asked it to send its opinion or to provide me by 31 January 2008 with a time-table for the submission of this opinion.

On 13 and 21 January 2008, you sent me further information relating to your complaint.

On 15 January 2008, the Commission sent the original English version of its opinion and, on 22 January 2008, a translation into German. On 29 January 2008, I forwarded both documents to you with an invitation to make observations, which you sent on 5 February 2008.

On 24 April 2008, my services contacted the Commission in order to ascertain whether it had replied to your e-mail of 4 January 2008. On 20 May 2008, the Commission forwarded a copy of an e-mail to me which it had sent you on the same day.

On 11 June 2008, you sent me a copy of an e-mail which you had sent to the Commission on 7 June 2008. You maintained your complaint and stated that, in addition, you wished to make a complaint concerning public access to a document.



I am writing now to let you know the results of the inquiries that have been made.

## THE COMPLAINT

### *Background*

Starting in the 1990s, Argentina suffered from a severe economic crisis. In 2002, it defaulted on part of its external debt. Among its creditors were many private citizens from European countries, who had invested their savings and pensions in debt bonds. In its efforts to refinance its debt, the Argentine government finally negotiated an arrangement by which a large percentage of the defaulted bonds were exchanged for others, of a much lower nominal value and at longer terms. The terms of the debt exchange were not accepted by some of the private debt holders, the so-called "holdouts". One point that met with much criticism was the fact that Argentina considered the International Monetary Fund ("IMF") as a "privileged creditor", which meant that payments to it were not suspended, whereas the situation of the holdouts, notwithstanding a number of court proceedings at the national level, still appears to be unsolved (1).

The complainant, a German citizen, is one of the holdout bondholders. He took the view that all development aid that the EU paid to Argentina should be frozen for as long as the latter did not fulfil its obligations towards private bondholders and that payments intended for Argentina should instead be made to these bondholders.

In November 2005, he wrote to the European Commission, asking a number of questions concerning the programmes under which financial aid was granted to Argentina. He referred to Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (2), Article 2 of which contains the following provision:

*" In the case of fundamental and persistent violations of human rights and democratic principles, the Community could amend or even suspend the implementation of cooperation with the States concerned by confining cooperation to activities of direct benefit to those sections of the population in need. "*

The complainant considered that this provision applied to the situation in Argentina, which in his view severely infringed a human right, namely, the right to property. On that basis, he asked the Commission to take action. On 7 February 2006, and following a number of reminders, he received a substantive reply to most of his questions from the Commission's EuropeAid Cooperation Office ("EuropeAid"). As regards certain political issues he had raised, the complainant was informed that he would receive a separate reply from the Directorate-General ("DG") for External Relations. On 8 February 2006, the complainant replied to EuropeAid by asking a number of detailed follow-up questions concerning the aid programmes.

On 24 March 2006, DG External Relations wrote to the complainant, informing him that the Commission was acting politically in order to stress the importance of an adequate solution to the problem he had referred to. It added, however, that, as respect for human rights and for



democratic principles in Argentina was generally satisfactory, neither the Commission nor the EU Member States had considered the suspension of development cooperation with Argentina.

On the same day, the complainant replied to this e-mail, making critical comments on the Commission's position and asking further questions regarding concrete steps the Commission intended to take in order to support European bondholders in Argentina.

#### *The complaint to the Ombudsman*

In his complaint to the Ombudsman, the complainant submitted that, even though he had sent several reminders, he had still not received a reply to his last e-mail of 24 March 2006 or to his e-mail of 8 February 2006. He criticised the Commission's position in relation to the matter he had raised and stated that a number of his questions had still not been answered. The complainant confirmed his request that development aid to Argentina be suspended.

The complainant essentially alleged that the Commission failed properly to handle his information requests relating to development cooperation with Argentina.

He claimed that the Commission should provide him with a comprehensive reply to his e-mails.

The complainant also asked the Ombudsman to use his entire political influence in order to stop EU aid to Argentina.

## **THE INQUIRY**

### **The Ombudsman's approach**

As regards the complainant's request that aid to Argentina be suspended, the Ombudsman informed the complainant that he is not competent to decide on how the EU's aid to third countries is granted. He advised the complainant that he could consider turning to the Committee on Petitions of the European Parliament in this respect.

As to the complainant's request that the Ombudsman use his political influence in order to see to it that payments were suspended, the Ombudsman informed the complainant that his mandate is limited to investigating possible maladministration and that, therefore, he may not seek to influence this question politically.

However, the Ombudsman decided to open an inquiry into the complainant's allegation and claim.

### **The Commission's opinion**

The Commission submitted that, in its e-mails of 7 February and 24 March 2006, it had already replied - to the extent that it could - to the substance of the questions raised in the complainant's e-mails of 16 November 2005 and 8 February 2006. It went on to state that it regretted that a certain delay had occurred in transmitting these replies. In particular, as regards the letter of 7 February 2006, the delay had been due to the absence of the responsible official. However, the Commission noted that its services had contacted the complainant on several occasions in order to inform him of the reason for this delay. As regards its e-mail of 24 March 2006, the Commission submitted that, following a careful discussion of the issue the complainant had



raised and wide internal consultation, it had provided a thorough reply to the complainant's questions and comments.

The Commission acknowledged that its replies might not have been as comprehensive as desired by the complainant. However, it pointed out that this could be explained by the fact that the Commission had neither the mandate nor the specific competence to act in relation to some of the issues about which the complainant had requested specific information.

The Commission recalled that, in its e-mail of 7 February 2006, it had encouraged the complainant to contact its Delegation in Argentina in order to obtain further information. However, the complainant had not done so.

The Commission added that, on 22 November 2007, it had sent another letter to the complainant in which it provided him with the comprehensive reply that he had requested. It stated that it hoped that this letter clarified all of the complainant's questions to the extent that they were within the Commission's competence.

In its letter of 22 November 2007, which the Commission attached to its opinion, it apologised for the fact that some of the complainant's questions had remained unanswered. It recalled that, as it had explained in its initial replies, it had no mandate or specific competence to act in relation to the matter he had raised, which remained a bilateral issue between the Argentine government on the one side and the private investors and the respective EU Member States on the other side. Bilateral investment treaties between Argentina and several EU Member States existed and could constitute the legal basis for challenging the Argentine government's actions with respect to the default.

The Commission emphasised that, in the yearly dialogue meetings with Argentina on economic and financial matters, it invariably expressed its concerns about the situation of, as it put it, "*bondholders who have not accepted the original offer*" and expressed its interest in the efforts to solve this "thorny issue" involving many European citizens.

However, the Commission added that, as it had explained to the complainant before, it was difficult to interpret the default on Argentina's debt and the subsequent negotiations with bondholders as a "*fundamental and persistent violation of human rights*" as the complainant had claimed. The general human rights situation in Argentina was considered to be satisfactory. Therefore, neither the Commission nor the Member States had, in their political assessment of the situation in Argentina, considered the suspension of development cooperation.

As to the complainant's questions that had not been answered previously, the Commission referred to four such questions and provided answers to them in some detail. In particular, as regards his question whether he could obtain copies of the financing agreements concerning the individual EU projects in Argentina, the Commission stated that these agreements were jointly owned by both parties and that the Commission could therefore not distribute them without the agreement of the Argentine government. The Commission advised the complainant that, if he wished to receive copies of the agreements, he could "*request the opinion of the*



*Argentine government* ". In reply to the complainant's request, in his e-mail of 8 February 2006, to be given the contact details of an English-speaking staff member of the Commission's Delegation in Argentina, the Commission provided him with the contact details of three officials, whom he could address with further queries.

#### **The complainant's e-mail of 4 January 2008**

On 4 January 2008, the complainant forwarded an e-mail to the Ombudsman, which he had sent, on that same date, to all three officials indicated by the Commission. He stated that the Commission's letter of 22 November 2007 still left a number of questions open. As regards its recommendation to address the Argentine government in order to receive copies of the relevant agreements, he considered that this recommendation was discriminatory and unacceptable. Moreover, he considered it unlikely that the government would accept such a request. Since, in his view, Argentina had deliberately betrayed private creditors, the Commission's proposal was cynical and could not be taken seriously. Furthermore, he stated that his questions as to what jurisdiction and law the financing agreements were subject to and what legal basis had been agreed upon by the parties had still not been answered.

As regards the human rights situation in Argentina, the complainant asked the Commission on which rules or objective criteria it based its evaluation of whether a country violated human rights. He pointed out that a number of high courts had declared Argentina's behaviour to be illegal, which was also affirmed in a Report to Congress of the Central Bank of Argentina. According to the complainant, it was scandalous that the Commission ignored this fact. Additionally, the complainant asked how garnishments against the Commission could be issued and which jurisdiction and law applied in such circumstances.

#### **The complainant's e-mail of 13 January 2008**

In a further e-mail of 13 January 2008 to the Ombudsman, the complainant took the view that the Commission had only insufficiently addressed his questions, both in its initial replies and in its letter of 22 November 2007. In particular, he criticised what he perceived to be a discriminatory response to his request to be sent copies of the relevant financing agreements.

As regards the Ombudsman's recommendation that he could turn to the Committee on Petitions of the European Parliament in relation to certain issues that the Ombudsman was not able to investigate, the complainant stated that he did not believe that petitioning Parliament could have any useful effect.

#### **The complainant's observations**

In his observations, the complainant stated that he was shocked by the content of the Commission's opinion and by its tone. He protested against the Commission's statement that he had not tried to contact its Delegation in Argentina. He submitted that the Commission had, before its letter of 22 November 2007, never indicated any contact persons and had left his request to this effect unanswered. However, he stated that one of the contact persons whom the Commission had now indicated had received copies of his entire e-mail correspondence with the Commission, so that he wondered why she had never replied to him.

Additionally, the complainant pointed out that he had contacted all three persons indicated by the Commission in an e-mail of 4 January 2008, but that, in its opinion, sent on 15 January 2008, the Commission had not made any comments as regards the content of this e-mail.



As to the Commission's competence in the matter, the complainant argued that the EU's programmes in Argentina were also financed by the taxes of those creditors who were EU citizens. Therefore, he maintained that the programmes should be put on hold until Argentina changed its position. He also maintained that the Commission had not referred to any relevant arguments that could support its position that Argentina was not in " *fundamental and persistent violation of human rights* ". According to the complainant, the Commission took this position against its better knowledge. Furthermore, he maintained that the Commission's approach to his request to be sent copies of the relevant financing agreements was discriminatory. He added that, in his view, it was incompatible with Article 42 of the Charter on Fundamental Rights of the European Union.

The complainant made a number of additional detailed comments as regards the allegedly illegal character of the debt restructuring measures taken by the Argentine government. In fact, there had never been any negotiations with the creditors or an "offer" to them, as the Commission had put it. Rather, the conditions had been imposed unilaterally. The complainant also recalled that, although the claims of private creditors had the same rank as the claims of other creditors, Argentina had chosen to meet the claims of the IMF in full even before they were due. Moreover, private creditors had hardly any chance to assert their claims before the national courts.

The complainant also submitted that, when the EU Commissioner for External Affairs visited Argentina in November 2006, she did not appear to have addressed this issue at all. He stated that it was cynical that the Commission referred to efforts at the political level, as its position was against one of the priorities laid down in the Programme of The Hague ("The Hague Multiannual Programme for strengthening the area of freedom, security and justice"), namely, according to a Commission communication (3) :

" 10. (1) *Fundamental rights and citizenship: creating fully-fledged policies*

*Fundamental rights are at the core of the Union's values. Full development of policies monitoring and promoting respect for fundamental rights for all people and of policies enhancing citizenship must be ensured. "*

The complainant also noted that none of those involved in the Commission had addressed what he considered to be fraudulent behaviour by Argentina. According to him, the Reports to Congress of the Central Bank of Argentina clearly proved that Argentina had deliberately provoked the default and had transferred substantial assets from the United States of America to Switzerland, in order to benefit from the immunity granted there and thus to protect the money from its creditors.

In conclusion, the complainant maintained that the Commission had either not replied or not sufficiently replied to his questions and that it had failed to observe standards of good administration as laid down in the EU Charter of Fundamental Rights.



The complainant asked the Ombudsman to inform the responsible EU Commissioner as well as the Commission's President of this matter.

**The Commission's e-mail to the complainant of 20 May 2008**

On 24 April 2008, the Ombudsman's services contacted the responsible service in the Commission in order to ascertain whether it had replied to the complainant's e-mail of 4 January 2008.

On 20 May 2008, the Commission sent an e-mail to the complainant in which it addressed the questions contained in his e-mail of 4 January 2008.

As regards access to the financing agreements, the Commission referred to Regulation (EC) 1049/2001 of the European Parliament of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (4) ("Regulation 1049/2001") and attached a copy of this Regulation to its e-mail. It pointed out that applications could be made in any written form, in one of the Community languages and in a sufficiently precise manner. Since the financing agreements were third-party documents, Argentina had to be consulted pursuant to Article 4(4) of the Regulation before access could be given.

As regards the jurisdiction and law to which the financing agreements were subject, the Commission stated that, according to the "framework financing agreement" between the European Community and Argentina, for disputes which could not be settled among the parties, arbitration was to be sought in conformity with the "Facultative Arbitration regulation of the Permanent Court of Arbitration for International Organisations and States (The Hague)".

As regards the legal basis of the agreements, the Commission informed the complainant that, together with the EC Treaty, notably its title XX ("development cooperation"), Regulation (EC) 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (5) was one of the main legal bases for agreements signed after this Regulation entered into force.

In reply to the complainant's question concerning rules or objective criteria for evaluating whether a country violated human rights, the Commission stated that violations were established on the basis of a political assessment by the Commission and the Council of Ministers and were measured against the main international human rights instruments. The Commission recalled that the general human rights situation in Argentina was considered to be satisfactory, which was why the suspension of development cooperation had not been considered. It added that, in the course of the most recent Universal Periodic Review of Argentina carried out at the United Nations Human Rights Council in Geneva in April 2008, none of the issues to which the complainant had referred had been raised.

The Commission also reiterated that it did not have any mandate or specific competence to act on the issue the complainant had raised.

**The complainant's e-mail to the Commission of 7 June 2008**

On 7 June 2008, the complainant replied to the Commission that he was not satisfied with its answers. First, he argued that the Commission had not properly applied Regulation 1049/2001



and was apparently not willing to grant him access to the financial agreements. Moreover, the Commission had not informed him about possible remedies against its refusal to grant access. Second, as regards the competent jurisdiction in matters relating to the agreements, the Commission had not informed him which authority was competent in the event of "judicial disturbances" between the EU and Argentina. Third, as regards the criteria for evaluating violations of human rights, the Commission had again not provided any concrete answer. The complainant referred to new developments in cases before the German courts and concluded that there was still a number of questions to which the Commission had not replied.

#### **The complainant's e-mail to the Ombudsman of 11 June 2008**

On 11 June 2008, the complainant forwarded his e-mail of 7 June 2008 to the Ombudsman. He emphasised that he was not satisfied with the Commission's reply and asked the Ombudsman to approach the Commission again and to make it very clear that a mere "physical reply" to his e-mails was not sufficient.

In addition, the complainant stated that he wished to make a complaint as regards the Commission's application of Regulation 1049/2001.

## **THE DECISION**

### **1 Introductory remarks**

1.1 The complainant, a German citizen, invested in debt bonds issued by the Argentine government. When Argentina defaulted on parts of its external debt, the complainant was one of the bondholders who did not accept the terms of a debt exchange by which defaulted bonds were exchanged for others of a much lower nominal value. Notwithstanding a number of court proceedings at national level, it appears that the situation of these bondholders is still unsolved. The complainant took the view that, as long as Argentina failed to fulfil its obligations towards private bondholders, all EU development aid to Argentina should be frozen. In November 2005 and in February and March 2006, the complainant wrote to the Commission and asked it a number of questions concerning the programmes under which financial aid was granted to Argentina. In his complaint to the European Ombudsman, submitted on 18 June 2007, the complainant stated that, even though he had sent several reminders, he had still not received a substantive reply to his latest correspondence. He criticised the Commission's position relating to financial aid for Argentina and stated that a number of his questions had remained unanswered. The complainant confirmed his request that development aid to Argentina be suspended.

The complainant essentially alleged that the Commission failed properly to handle his information requests concerning development cooperation with Argentina. He claimed that the Commission should provide him with a comprehensive reply to his e-mails. The complainant also asked the Ombudsman to use his entire political influence in order to stop EU aid to Argentina.

1.2 The Ombudsman informed the complainant that he is not competent to decide on how the EU's aid to third countries is granted. He advised the complainant that he could consider turning to the Committee on Petitions of the European Parliament in this respect. The Ombudsman also



informed the complainant that his mandate is limited to investigating possible maladministration and that, therefore, he may not seek to influence the question at issue politically. However, the Ombudsman opened an inquiry into the complainant's allegation and claim.

1.3 In his e-mail to the Ombudsman of 11 June 2008, the complainant added a new allegation to his complaint, namely, that the Commission had failed properly to apply Regulation (EC) 1049/2001 of the European Parliament and of Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (6) ("Regulation 1049/2001").

In view of the fact that this new allegation is not immediately related to the subject-matter of the present case, the Ombudsman would not consider it appropriate to include it in his ongoing inquiry. However, he has considered whether he should register the complainant's e-mail of 11 June 2008 as a new complaint. This would be justified if the new allegation were admissible and if the Ombudsman could thus open an inquiry into this allegation.

One of the admissibility conditions for complaints to the Ombudsman, laid down in Article 2(4) of the Ombudsman's Statute, is that a complaint " *must be preceded by the appropriate administrative approaches to the institutions and bodies concerned* ". In cases in which failure to grant access to documents under Regulation 1049/2001 is being alleged, this means that a complainant has to have made an initial application for access, pursuant to Article 7 of the Regulation, and, in the event of a rejection, a confirmatory application pursuant to Article 8 of the Regulation before he can turn to the Ombudsman.

The Ombudsman notes that, in its reply to the complainant of 22 November 2007, the Commission advised the complainant that, if he wished to receive copies of the financing agreements between the EU and Argentina, he could " *request the opinion of the Argentine government* ". The complainant protested against this suggestion, which he considered to be discriminatory and unacceptable.

However, the Ombudsman also notes that, in its e-mail of 20 May 2008, the Commission explained to the complainant that Regulation 1049/2001 applied if he wished to have access to the financing agreements, and that it attached a copy of this Regulation. Further, it explained some modalities of the application of the Regulation in the complainant's case. Thereupon, the complainant alleged that the Commission had failed properly to apply the Regulation.

The Ombudsman considers it likely that a misunderstanding arose at this point. The complainant apparently believed that the Commission had already rejected his application for access to the financing agreements. However, the Commission's intention appears to have been to inform the complainant of the possibility to submit an application.

In the Ombudsman's view, it would have been possible for the Commission to interpret the complainant's e-mails as containing an implicit application for access to the documents concerned. In any event, and even though the Commission may have had doubts as to whether the complainant had intended his e-mails to constitute an application for access to documents, it would have been up to it to clarify these doubts with the complainant.



However, the Ombudsman also takes the view that none of the complainant's correspondences can be considered to contain a confirmatory application for access to the financing agreements. Therefore, the condition laid down in Article 2(4) of his Statute is not fulfilled and the Ombudsman cannot, at this stage, open an inquiry as regards the Commission's application of Regulation 1049/2001.

In view of the above, the Ombudsman has decided not to register the complainant's e-mail of 11 June 2008 as a new complaint. He advises the complainant, in the event that he still wishes to have access to the documents in question, to submit an application for access under Regulation 1049/2001 to the Commission. Should the Commission not observe the rules laid down in this Regulation, the complainant could consider submitting a new complaint to the Ombudsman.

1.4 Before entering into his assessment of the complainant's original allegation and claim, the Ombudsman also considers it useful to address certain further issues which the complainant brought up in the course of the Ombudsman's inquiry.

First, the complainant stated, in his e-mail of 13 January 2008, that he did not believe that petitioning the European Parliament could have any useful effect in his case. The Ombudsman points out that the Committee on Petitions has considerable powers in dealing with submissions from citizens. When it finds a petition admissible, it can, for example, draw the attention of Parliament as a whole to the matter or refer it to the competent committee within Parliament to be taken into account in its legislative activity. Therefore, the Ombudsman finds it difficult to understand why the complainant excludes this additional possibility of pursuing his concerns from the outset.

Second, the complainant appeared to consider that the Commission should have taken his e-mail of 4 January 2008 into account when it prepared its opinion. In this respect, the Ombudsman notes that the Commission's opinion is dated 21 December 2007, but that it was only sent to the Ombudsman on 15 January 2008. This circumstance may be due to the fact that the opinion had to await the approval of the competent Commissioner, namely, Ms Benita Ferrero-Waldner, whose accompanying letter is dated 15 January 2008. However, the time taken for the above approval is in itself not sufficient to explain why the Commission did not take the complainant's e-mail into account. However, the Ombudsman also notes that, in its e-mail of 20 May 2008, the Commission has now replied to the complainant's e-mail of 4 January 2008. Therefore, he considers that he does not need to pursue this issue further.

Third, the complainant requested that the Ombudsman inform the competent Commissioner and the President of the Commission about his case. The Ombudsman recalls that, as mentioned above, Commissioner Ferrero-Waldner has already been involved in the case because she took responsibility for the Commission's opinion. Further, the President of the Commission is the Ombudsman's interlocutor in the Commission. The entire correspondence in this case has therefore been sent to the President, and he will naturally also receive a copy of the present decision.

## **2 Alleged failure properly to handle information requests and related claim**



2.1 The Ombudsman understands the complainant's allegation that the Commission failed properly to handle his information requests to relate both to formal issues, particularly the timeliness of the Commission's replies, and to the content of these replies. The Ombudsman will therefore assess these issues separately.

2.2 In its opinion, the Commission stated that it regretted that a certain delay had occurred in transmitting its replies to the complainant. In particular, as regards its letter of 7 February 2006, the delay had been due to the absence of the responsible official. However, the Commission noted that its services had contacted the complainant on several occasions in order to inform him of the reason for this delay. It added that it had encouraged the complainant to contact its Delegation in Argentina in order to obtain further information. However, the complainant had not done so.

2.3 The Ombudsman notes that the complainant's initial correspondence dates from 16 November 2005. Following a reminder sent on 7 December 2005, the complainant received, on that date, a holding reply in which he was informed that the competent official was on leave and that his request had been copied to the Delegation which could "*surely help you to find the information requested*". Following a further reminder sent on 31 January 2006, the complainant received another holding reply, sent on 6 February 2006, in which the Commission stated that it very much regretted the long delay and that he could expect a reply in the next few days. On 7 February 2006, the complainant received the Commission's first substantive reply.

On 8 February 2006, the complainant replied, asking a number of detailed follow-up questions. Following another reminder of 20 March 2006, he received another substantive reply from the Commission, sent on 24 March 2006, to which he replied on the same day, asking for clarifications and further information. On 18 June 2006 and following two further reminders, which appear to have remained unanswered, the complainant turned to the Ombudsman. In the course of the Ombudsman's inquiry, the Commission addressed two further replies to the complainant, on 22 November 2007 and 20 May 2008.

2.4 The Ombudsman considers that the delays that occurred in the Commission's handling of the complainant's requests are indeed substantial. It took two and a half months before the complainant received the Commission's first substantive reply and then another six weeks until the second reply was sent. Furthermore, the Ombudsman especially regrets to have to note that the complainant's e-mail of 24 March 2006 and even some of the questions he had raised in his first e-mails were only addressed in the Commission's letter of 22 November 2007, that is, more than a year and a half after the complainant had first contacted the Commission, and only after the Ombudsman had opened an inquiry. The Commission has not provided any explanation that could justify a delay of such length.

2.5 However, the Ombudsman notes that, in its letter of 22 November 2007, the Commission apologised for the fact that some of the complainant's questions had remained unanswered and made an effort to address all of the remaining questions. In view of this apology, the Ombudsman considers that no further inquiries are necessary as regards this aspect of the complaint.



2.6 However, and for the sake of completeness, the Ombudsman regrets to have to note that the effort referred to above does not seem to have had a lasting effect. As a matter of fact, the complainant's e-mail of 4 January 2008 was only answered on 20 May 2008, and following another intervention by the Ombudsman's services. The Ombudsman further notes that this reply, in contrast to the Commission's letter of 22 November 2007, did not contain an apology or explanation for the delay. However, given that the complainant has not made any specific comments concerning this further delay, the Ombudsman considers that there is no need to deal with it in the present inquiry.

2.7 As regards the content of the complainant's requests, the Ombudsman will first examine the Commission's position concerning the substantive issue the complainant raised, namely, his view that development aid to Argentina should be suspended. Subsequently, the Ombudsman will look at a number of questions which, according to the complainant, have remained unanswered.

2.8 In reply to the complainant's view that development aid for Argentina should be suspended, the Commission essentially submitted that it was difficult to interpret the default on Argentina's debt and the subsequent negotiations with bondholders as a "*fundamental and persistent violation of human rights*" as the complainant had claimed. The general human rights situation in Argentina was considered to be satisfactory, which was why neither the Commission nor the Member States had, in their political assessment of the situation in Argentina, considered the suspension of development cooperation. Moreover, the Commission did not have any mandate or specific competence to act in relation to the situation of the bondholders who had not accepted the bond exchange. This remained a bilateral issue between the Argentine government on the one hand and the private investors and the respective EU Member States on the other. It went on to point out that bilateral investment treaties between Argentina and several EU Member States existed and could constitute the legal basis for challenging the Argentine government's actions with respect to the default.

2.9 The Ombudsman considers that, in examining whether the Commission provided a satisfactory justification for its position, two issues need to be distinguished: First, it has to be determined whether the situation described by the complainant constituted a breach of human rights that would have warranted consideration by the Commission as to whether action needed to be taken. Second, in the event that the first question is to be answered in the affirmative, the question is whether the Commission acted properly by deciding not to take any action.

2.10 As regards the first question, the complainant argued that, by failing to fulfil its obligations towards private bondholders, Argentina severely infringed a human right, namely, the right to property. It is uncontested that the right to property is such a human right. This right is laid down, for example, in Article 17 of the Charter of Fundamental Rights. Moreover, the Commission does not appear to exclude the possibility that there was a violation by Argentina of the complainant's right to property. However, the Commission argued that it was difficult to interpret the default on Argentina's debt and the subsequent negotiations with bondholders as a "*fundamental and persistent violation of human rights*" as the complainant had claimed. The



Commission added that the general human rights situation in Argentina was considered satisfactory.

2.11 The Ombudsman recalls that the complainant based his view in this respect exclusively on Article 2 of Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (7) ("Regulation 443/92"). According to Article 2, in the event of "*fundamental and persistent violations of human rights*", the suspension of development aid may be envisaged. The Ombudsman considers that it is clear that an assessment as to whether a potential violation of human rights is "fundamental and persistent" in the sense of Regulation 443/92 necessarily involves a judgment on the part of the Community and thus gives it a margin of discretion. In the Ombudsman's view, it has not been established that the Commission exceeded this margin of discretion by essentially taking the position that Argentina's treatment of bondholders like the complainant did not amount to a violation of such a degree.

2.12 Therefore, the Ombudsman finds no maladministration in the Commission's position on the substantive issue raised by the complainant. He thus does not need to examine the second question mentioned in point 2.9 above.

2.13 It might be useful to add that Regulation 443/92 has now been repealed and replaced by Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (8) ("Regulation 1905/2006"). Article 37 of the latter Regulation provides that:

*" (...) where a partner country fails to observe the principles referred to in Article 3(1) (9), and where consultations with the partner country do not lead to a solution acceptable to both parties, or if consultations are refused or in cases of special urgency, the Council (...) may take appropriate measures in respect of the assistance granted to the partner country under this Regulation. Such measures may include full or partial suspension of assistance. "*

Given that the qualification of violations as "fundamental and persistent" has not been retained in Regulation 1905/2006, it cannot be excluded that the threshold from which sanctions may be envisaged has been lowered under the new rules. This would mean that violations no longer need to be "fundamental and persistent" in order to justify the consideration of a suspension of aid. However, the Ombudsman also notes that both Regulation 443/92 and Regulation 1905/2006 explicitly provide for a margin of discretion in the Community's decision as to whether or not to suspend aid ("*the Council (...) may take appropriate measures (...)*" and "*the Community could amend or even suspend the implementation of cooperation*").

2.14 As regards the specific questions that the complainant had submitted to the Commission, the Ombudsman notes that, in its letters of 22 November 2007 and 20 May 2008, the Commission provided rather detailed replies to those of the complainant's questions which it had identified as having remained unanswered so far. However, the complainant insisted that some of his questions had still not been addressed satisfactorily.



2.15 As far as the Ombudsman can see, there appear to be essentially three such questions. First, the complainant considered the Commission's reply as regards access to the financing agreements to be unsatisfactory. Second, as regards the competent jurisdiction in matters relating to the agreements, the complainant considered that the Commission had not informed him as to which authority was competent in the event of "judicial disturbances" between the EU and Argentina. It also appears that, in this context, the complainant wished to know how he could hold the Commission accountable. In particular, he mentioned garnishments. Third, the Commission had still not provided any concrete answer as regards the criteria for evaluating violations of human rights.

2.16 The first of the above issues has been addressed under point 1.3, and does not therefore need to be examined here. The other two questions will be examined in the following paragraphs.

2.17 As regards the competent jurisdiction, the Commission, in its e-mail of 20 May 2008, informed the complainant that, according to the "framework financing agreement" between the European Community and Argentina, for disputes which could not be settled among the parties arbitration was to be sought in conformity with the "Facultative Arbitration regulation of the Permanent Court of Arbitration for International Organisations and States (The Hague)". However, if the Ombudsman understands the complainant correctly, the complainant wished to know what would happen in the event that conflicts remained, that is, essentially, in the event that arbitration was not successful.

According to Article 81 of the 1907 revised version of the "Convention for the Pacific Settlement of International Disputes" (10), the award of the Permanent Court of Arbitration, "*duly pronounced and notified to the agents of the parties, settles the dispute definitely and without appeal*". Therefore, it appears that there is no jurisdiction that could deal with potential conflicts which cannot be solved by arbitration.

As regards the complainant's reference to garnishments, the Ombudsman is not entirely sure that he correctly understands what kind of measures the complainant had in mind. In any event, a garnishment presupposes that a court has confirmed the existence of a debt and has ordered that it be paid. However, given that the complainant does not appear to have obtained a judgment against the Commission, it is difficult to see how the enforcement of debts by way of garnishment could come into play in the complainant's relationship with the Commission.

If the complainant considers that he suffered damage which resulted from the Commission's behaviour towards him, he, in principle, has the possibility to sue the Commission for compensation before the Court of First Instance. However, the Ombudsman recalls that, according to the settled case-law of the Community Courts, in order to establish liability on the part of the Communities, applicants have to prove that (i) the alleged conduct of the institution is *illegal*; (ii) the damage suffered is *genuine*; and (iii) there is a *causal link* between the conduct in question and the damage alleged (11). In view of the Ombudsman's considerations in points 2.11 to 2.13 above, he considers it doubtful whether the complainant would be in a position to establish that the first of these conditions is fulfilled in his case.



2.18 As regards its criteria for evaluating violations of human rights, the Commission stated that violations were established based on a political assessment by the Commission and the Council of Ministers and were measured against the main international human rights instruments. The Ombudsman considers that this reply was sufficiently clear.

2.19 In view of the above, the Ombudsman finds no maladministration as regards questions which have allegedly remained unanswered.

2.20 Therefore, the complainant's claim that he should be provided with a comprehensive reply to his e-mails lacks a sufficient basis.

### **3 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, he concludes that further inquiries as regards procedural issues, in particular the timeliness of the Commission's replies to the complainant, would not be justified.

As regards the content of the Commission's replies to the complainant, there appears to have been no maladministration.

The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See article "Argentine debt restructuring" on <http://www.wikipedia.org> [Link].

(2) OJ 1992 L 52, p. 1. This regulation has in the meantime been repealed and replaced by Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ 2006 L 378, p. 41).

(3) Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice (COM/2005/0184 final).

(4) OJ 2001 L 145, p. 43.

(5) OJ 2006 L 378, p. 41.

(6) OJ 2001 L 145, p. 43.



(7) OJ 1992 L 52, p. 1.

(8) OJ 2006 L 378, p. 41.

(9) Article 3(1) refers to "*the values of democracy, the rule of law, respect for human rights and fundamental freedoms*".

(10) This legal text and its original version of 1899 are available on the website of the Permanent Court of Arbitration ( <http://www.pca-cpa.org> [Link]).

(11) Case T-307/01 *François v Commission* [2004] ECR-SC I-A-183 and II-823.