

Comments of the Commission on a request for information from the European Ombudsman

- **Complaint by *ClientEarth, Fern, Veblen Institute, La Fondation Nicolas Hulot pour la Nature et l'Homme and International Federation for Human Rights*, ref.1026/2020/MAS**
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I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The Council approved the Negotiating directives for an Inter-regional Association Agreement with Mercosur in 1999. The negotiation process itself started in 2000 and continued until 2004, when negotiations were suspended. The negotiation process resumed in 2010 and in May 2016 the EU and Mercosur injected new dynamism into the negotiation, exchanged revised market access offers and intensified the pace of work by holding negotiation rounds and meetings at regular intervals. After an intensive negotiation process, the European Union and Mercosur, following a meeting at ministerial level, reached a *political* agreement on 28 June 2019 on a comprehensive Trade Agreement.

In the course of 20 years of negotiations the European Commission contracted out not one but two Sustainability Impact Assessments (SIAs), something which is not usual in trade negotiations.

- The first one was initiated in 2005 and completed in 2009 and assessed the impact of the Agreement on the respective economies as well as social and environmental impacts.
- A second SIA was launched in 2017 to inter alia include the most recent data available and focus on human rights' aspects. The inception report was published in January 2018, the draft interim report was published in October 2019 and the draft final report was published in July 2020. It is expected that the final report will be finalised in October 2020.

Since SIAs are launched during the negotiation process in order to accompany them, they are based on hypothetical scenarios. After the negotiations are concluded, the Commission publishes all the information on the negotiated outcome in its website (texts included). It also carries out an analysis of the negotiated outcome based on the actual text of the Agreement (EANO). This analysis is published generally at the time of the Commission proposal to the Council and the European Parliament for signature and conclusion of the Agreement.

In the framework of the current SIA the Contractor is the *Trade Consulting Hub @ LSE Consulting*, the consulting arm of the London School of Economics and Political Science (LSE). The LSE-led team, in line with what was foreseen in the Terms of Reference and the SIA Handbook, has given substantial importance to the stakeholder consultation as a key component of the SIA process. Such stakeholder consultations have been carried out as widely as possible in Mercosur partner countries and EU member states in order to reach the highest possible level of engagement. In particular, the following should be noted:

- The contractor organised four roundtables in Brussels on the selected sectors and range of sustainability issues. The events covered Social, Environmental, & Human Rights Issues (20 March 2018), the service sector (21 March 2018), issues concerning the manufacturing sector (21 March 2018), the agricultural goods sector (22 March 2018). The events were open to public registration and representatives across all four sectors were invited to each meeting.
- In addition, the contractor organised two consultation events in Mercosur, namely in Sao Paulo (Brazil) on 13 March 2018 and in Buenos Aires (Argentina) on 16 March 2018.
- Civil Society Dialogue meetings were organised following the publication of the draft inception report (13 October 2017), the draft interim report (15 October 2019) and draft final report (22 July 2020). The purpose of these meetings was to present and discuss the draft reports with civil society and collect comments and observations, in order to enable the contractor to consider them and take them into account for the finalisation of the respective drafts/reports.

II. THE COMPLAINT

In their submission, the five civil society organisations make several claims and take issue with the Commission's approach to this SIA process. In its communication informing the Commission of its decision to open an inquiry the Ombudsman refers to the fact that the complainants argue that the circumstance that the SIA report was not finalised before the end of the negotiation process constitutes maladministration based on two grounds:

- a) The allegation by the complainants that the Commission disregarded its own guidelines on the use of SIAs stemming from the Commission Communication ('Trade for all') and the Commission Handbook on the use of SIAs.
- b) The allegation by the complainants that the Commission breached Article 21 TEU, which contains sustainability goals for all EU trade.

Furthermore, the following points were noted by the Ombudsman:

- The complainants allege that the content of the interim report, which was published in the meantime, does not take on board the latest information available.
- The complainants allege that the fact that the interim report was not available when public consultations were conducted made it impossible to include comments on the interim findings when the negotiations were ongoing.

In a letter addressed to the Commission on 29 January 2020, three of the five organisations which later tabled the complaint – namely ClientEarth, Fern and Veblen Institute – requested an explanation of how the Commission integrated the potential economic, social and environmental impacts into the EU-Mercosur trade Agreement without the final report of the SIA. The Commission replied to the letter on 13 February 2020 providing the requested explanations but the organisations announced publicly on 15 June 2020 their decision to submit a complaint to the Ombudsman adding that they had never received a reply to their letter from the Commission. The Commission immediately reached out to the three organisations providing the proof of the transmission of the reply to all three NGOs. In reaction, the three organisations informed that the reply – which was sent to three organisations with different e-mail addresses – had all got lost in their spam mailboxes.

III. THE COMMISSION'S COMMENTS TO THE COMPLAINANTS' ARGUMENTS

III.1 Concerning the claim that the Commission is responsible for maladministration as it disregarded its own guidelines on the use of SIAs stemming from a Commission Communication ("Trade for All") and the Commission Handbook on SIAs

The Commission does not agree that it disregarded its own guidelines regarding SIAs. There is no legal requirement on the Commission to finalise an SIA prior to the conclusion of a trade negotiation. In fact, the complainants based their complaint on a sentence of the 2005 "Trade for all" communication of the Commission that refers to "impact assessments" (IA), and not SIAs: *"in line with the principles of the 'Better regulation' agenda, every significant initiative in the field of trade policy will be the subject of an impact assessment"*.

This text clearly refers to impact assessments (IAs) undertaken in the framework of the "Better Regulation" policy. IAs are produced before undertaking a policy initiative. In the case of the negotiation of an agreement, the IA is finalised before the Commission transmits to the Council the recommendation for negotiating directives. This contrasts with SIAs which are only launched after the negotiating directives are adopted by the Council. The Commission respectfully draws the attention of the Ombudsman to this clear misunderstanding on the side of the complainants and the confusion they make in this instance between IAs and SIAs.

The "Handbook for trade sustainability assessments" itself does not require in any way that the Commission finalises the SIA before the conclusion of negotiations. The Handbook clearly underlines that SIAs are processes that rely not only on a robust analysis of impacts, but also on continuous and wide ranging consultations running in parallel with negotiations.

SIAs are an instrument for transparent and evidence-based policy making, although as mentioned above they are not the only assessment that the Commission performs in the context of trade negotiations. The fact that the final stages of an SIA were only reached once the negotiations were finished does not per se entail that the Commission failed in its duty of good administration to take into account the economic, social and environmental considerations. The Commission is of the view that the complainants have adduced no substantive evidence to support this serious claim.

It should in fact be noted that the Commission carried out not one but two SIAs in the course of the EU-Mercosur negotiations. These two SIAs have given civil society extensive possibilities to provide their input and to enter into dialogue with the Commission negotiators on the economic, social and environmental impact of the potential Agreement and fed into the work of the negotiators as the negotiations evolve. The Commission is of the view that it took account of all relevant economic, social and environmental considerations provided by civil society and others during the SIA process. This is reflected inter alia in the fact that the Agreement contains an ambitious and extensive Trade and Sustainable Development chapter, provisions on animal welfare and antimicrobial resistance, a clear reference to the precautionary principle and that the Agreement forms part of a broader framework that includes human rights clauses as essential elements.

For completeness sake and even though the issue at hand is the SIA, the Commission draws the attention to the fact that in the course of the negotiations it has also conducted an economic impact analysis which was carried out by the consultant "Copenhagen Economics" and which was published in May 2011.

III.2 Concerning the claim that the Commission breached Article 21 TEU

The complainants argue that the Commission breached Article 21 TEU in particular, the European Union's commitment to step up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. The complainants argue that SIAs are an essential policy making instrument in that regard and that consequently, the failure to finalise an SIA prior to the end of the negotiations would not only render the SIA process and findings completely meaningless, but also deprive Article 21 TEU of its *effet utile*.

The European Commission is of the view that it has undertaken all the due diligence during the negotiations to ensure that the envisaged Agreement comply with existing human rights obligations, and does not lower the existing standards of human rights, social and environmental protection. On the contrary, the Agreement will in the Commission's view assist in furthering the cause of human rights in the Mercosur countries as well as the respect for the highest level of social and environmental standards. As mentioned above, the Commission did not conduct just one but two SIAs and while the second SIA was not concluded before the end of the negotiations, preliminary findings were already duly taken into consideration by Commission negotiators as they became available, well before the negotiations were concluded. Furthermore, SIA consultation activities that took place before the conclusion of the negotiations provided Civil Society Organisations with meaningful avenues to convey their views on the agreement. The text of the Mercosur Agreement – which is published – attests in fact to this. Therefore, the Commission respectfully disagrees with the contention that a failure to conclude an SIA before the end of the negotiations is tantamount to rendering the process and findings meaningless, and with the contention by the complainants that the Commission thereby breached Article 21 TEU.

On the latter claim, and without prejudice to the question whether Article 21 TEU imposes an obligation upon the Commission to carry out an SIA, it is the view of the Commission that Article 21 TEU would in any event not require the SIA to be completed by the end of the negotiations. The important issue here should be whether the Commission has taken the relevant considerations into account, within the realm of its competence and in line with the directives granted by the Council, and taking into account the margin of discretion that it enjoys, when concluding the negotiations with Mercosur. As mentioned above, the complainants have not adduced evidence other than the fact that the final report of the second SIA was not concluded before the political agreement was reached. However, the negotiations process, the broad consultations with civil society, the numerous impact assessments, the publication of reports after each negotiating round, and more in particular, the text of the Agreement in line with the highest human rights, social and environmental standards attest that the Commission has acted in conformity with the spirit of Article 21 TEU.

Link to the texts: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.

Explanation of the Agreement: <https://trade.ec.europa.eu/doclib/press/index.cfm?id>.

III.3 Concerning the claim that the interim report does not take on board the latest information available

The complainants claim that the interim report does not take on board the latest information available.

The Commission notes that the report contains the latest information available at the time of drafting of the draft report. It should be noted that the process of finalisation of a report of this nature from the moment the information is gathered until it is discussed and assessed requires a certain amount of time. From a practical and work-flow point of view, it is indispensable to stabilise the basis of work and the facts underpinning the analysis and it is therefore not feasible to ask the contractor to constantly update the information available until the last minute. Nevertheless, taking into account the sensitivity of certain issues, a specific effort was made to ensure that to the largest degree possible, the most recent data was included in the draft final report, notably on deforestation, on GHGs emissions and on violations of indigenous peoples' rights. See also answer to question IV.2 below.

III.4 Concerning the claim that the fact that the interim report was not available when public consultations were conducted made it impossible to include comments on the interim findings when the negotiations were ongoing

It is the view of the Commission that public consultations are important and should be conducted even in the absence of a report. It should in fact be noted that it is just as much the consultations which are supposed to feed into the interim report – as the other way around. Moreover, there was not just one public consultation session but several during the different phases of the SIA as outlined under point I above and the way of proceeding was fully in line with the Commission's "Handbook for trade sustainability impact assessment". See point IV.5.

Again, it should be recalled that the interim report was available for several months, and during such period civil society were able to provide comments and input to the Commission to address issues on the Agreement and its potential impact. It should also be noted that the Commission has consistently engaged with civil society including via specific meetings and replied to such input with the maximum respect of the principles of good administration.

IV. THE COMMISSION'S OBSERVATIONS ON THE OMBUDSMAN'S QUESTIONS

IV.1 Concerning the standard procedure for conducting SIAs and the internal manual of procedure

The procedure to conduct SIAs is described in the "Handbook for trade sustainability impact assessment".

It is important to bear in mind that this document draws from the Commission experience and explains the methodology in a general manner and it is drafted on the basis of a typical bilateral negotiation with one partner country. In reality, the degree of complexity of an SIA can vary significantly. It can cover several countries (like in the case of Mercosur), include a different number of sector analyses and specific case studies and there can also be differences in the size of the trading partner involved.

The process can be summarised as follows. The SIA process starts just after the Council gives the mandate to the Commission to start negotiations. The first steps are the setting up of an Inter-Service Group (ISG) within the Commission services and the drafting of the Terms of Reference (ToR), which outline the requirements for the SIA. Once the ToR are finalised, a Request for Service (RoS) is launched using the framework contract for evaluation of DG TRADE. The external contractors included in the framework contract submit their proposals for the study and the contract is then awarded through a competitive tendering procedure in strict observance of the EU's public procurement rules. Typically, the ToR

foresee three deliverables, an inception, an interim and a final report. Each draft report is submitted to DG TRADE, which then provides comments to the contractor on the basis of inputs and discussions with the ISG. Each deliverable is then discussed with civil society during Civil Society Dialogues where the external contractor presents the draft reports. In parallel, as part of its consultation strategy, the contractor conducts other consultation activities such as interviews, round tables, workshops and online surveys both in the EU and in the partner country. The final report is published together with the Commission position paper that contains the Commission view on the contractor findings, conclusions and recommendations.

IV.2 Concerning how the Commission ensure that SIAs contain the latest information available

The Commission seeks to ensure that SIAs are based on the most updated information possible. It is, however, also necessary to provide a stable basis of work for the contractor and therefore to decide on cut-off dates and deadlines. Notably, the process of finalisation of a report can take months. It is therefore not feasible to ask the contractor to constantly update the information in the report in the final stages. Taking these factors into account, the data used was the most recent it was possible to include at the time of drafting. For the data that was most pivotal to the analysis, extra efforts were deployed to ensure that the most recent data was used as soon as available.

The complainants argue that “*The failure to take recent data or events into account... is particularly critical across the different parts of the environmental analysis.*” It is for example the case that the interim report did not include full data on 2019 rates of deforestation in Brazil as they were not yet available. However, it did give the best data available at the time of the elaboration of the interim report and when the draft final report was published, it included the rate of deforestation for 2019 as reported by the Brazilian space agency, INPE, which is the standard reference. Likewise, while it is true that the interim report only took account of CO₂ in its assessment of the impact of the Agreement on greenhouse gas emissions, the report announced that other gases would be addressed in the final report as they indeed were. The complaints note that the calculations of CO₂ impacts do not account for the contribution of deforestation to CO₂ emissions. The coefficients used to infer CO₂ impacts from the modelling results were those from the GTAP database – the standard reference for this kind of exercise – which are indeed based essentially on fossil fuel use. However, the impact of the Agreement on deforestation was analysed separately.

As regards the economic modelling exercise, since SIAs are *ex ante* analysis they must be based on scenarios and a number of assumptions must be made at a very early stage on the basis of the available information. Changes to the assumptions or to the baseline once the study is at an advanced stage are not possible as this would imply restarting the analysis from the beginning. Therefore, the Commission respectfully disagrees with the request of the complainants that the SIA final report should assess the impact on the basis of the actual terms of the Agreement. This has never been the purpose of this or any other SIA. It is, however, the objective of the economic analysis of the negotiated outcome (EANO) in a number of areas as described below.

IV.3. Concerning whether the standard procedure for SIAs was followed in this case

The Mercosur SIA followed exactly the steps as described in point IV.1. As this was the second SIA conducted during the negotiations with Mercosur (the first one was concluded in

2009), the work on the study did not start right after the Council authorisation but after the negotiations had received new impetus in 2016. The delay to finalise the deliverables was somewhat longer compared to certain other SIAs, but this is notably due to the complexity of the negotiations that were involving four countries (Argentina, Brazil, Paraguay, Uruguay).

IV.4 Concerning why the SIA took longer than anticipated

In an ideal situation the SIA should be finalised before the end of the negotiations. This has indeed generally been the case in the past. However, in this case it was not possible to complete the second SIA before the end of the negotiations. It should be kept in mind that the negotiations of the EU-Mercosur Agreement lasted no less than 20 years and experienced unforeseen phases in terms of intensity of work and this made it impossible to predict in advance when they would be concluded. It also needs to be noted that it is not materially possible to fast-track an SIA just because the negotiation process suddenly picks up speed. The dynamics and pace of an SIA, consisting of extensive work by the contractor, analysis and consultations within the Commission, with civil society and stakeholders cannot be made dependent on the negotiation process.

In any case the Commission does not agree with the allegation that it took too long to complete this SIA, which is complex and took the time needed to provide a sufficiently solid result and to carry out the necessary consultations. It is very comprehensive and covers economic, social, environmental and human rights issues. It concerns the EU's relationship with four different countries and should include a serious and complete analysis on all sensitive issues and this is reflected, for example, in the chapter on environment that is one of the most detailed ever seen in an SIA. Special consideration was given to ten specific sectors of interest to key stakeholders. It should also be noted that in the case of the previous SIA (which was launched in 2005 and completed in 2009) the process was not shorter but in fact longer.

IV.5 Concerning in which way (if any) did the Commission's negotiators have access to the preliminary results of the interim report before the end of the negotiations and on how were the negotiators involved in the relevant public consultations

As explained above under point III.4, the Commission services and its negotiators had access to the preliminary results of the interim report. The Commission had received a first draft of the report as early as December 2017, but given the complexity of the modelling and the analysis, it required significant work and numerous iterations between the Contractor and the Commission services before it reached a quality level considered to be adequate for publication and the meetings with civil society organised by the contractor. It should, however, also be kept in mind that Civil society dialogues (CSD) meetings with the presence of the Chief Negotiator and separate from the SIA process were organised regularly. These events offered opportunities to engage on wide range issues, including sustainability issues covered by the SIA. The purpose of such meetings is indeed to inform civil society organisations on the state of play of the EU-Mercosur trade negotiations and to exchange views on any issue in this relation that Civil Society wants to touch upon.

Specific EU-Mercosur CSDs meetings took place on 22 November 2017, on 20 March 2018, on 6 September 2018, on 15 January 2019 and on 15 July 2019. This is in addition to regular CSDs undertaken by the Commissioner and the Director-General of DG TRADE on trade policy developments in general and which would also touch upon the Mercosur negotiations. Furthermore civil society dialogues took place in Mercosur countries back-to-back with negotiation rounds with presence of Chief Negotiators from Mercosur and the EU.

IV.6 Concerning how the Commission plan to use the SIA once it is finalised and how it will contribute to future decision making

The SIA consultants' work feeds continuously into the trade negotiations throughout the whole duration of the study. The final report includes recommendations and proposals for flanking measures to maximise the benefits of the possible Agreement and prevent or minimise potential negative impacts. The final report will be published together and at the same time with the Commission position paper, which will set out the Commission's views.

The Commission position paper will explain how the SIA has contributed to the negotiations, highlight the Commission services' views on the impacts identified in the SIA and on the measures proposed by the consultants and explain how the SIA findings have or will be used. It is also the hope of the Commission that the SIA will contribute to an informed debate during the ratification process. The findings and recommendations of the consultant, including the flanking measures, will also be of use in the implementation process of the Agreement, once it enters into force. The SIA also constitutes a very good basis in order to identify areas for cooperation and future work in the context of the implementation and application of the agreement.

It should also be noted that in accordance with current practice, exemplified by the finalised or ongoing *ex-post* evaluations (e.g. for the Agreements with Mexico, Chile, Korea, Colombia/Ecuador/Peru and with Central America), an *ex-post* evaluation of the Agreement will be launched approximately 5 to 8 years after entry into force of the Agreement with Mercosur.

IV.7 Concerning whether the Commission plans to update the content of the SIA to include the latest available information and the results of the negotiations and the eventual timeline

The Commission respectfully disagrees with the view that the SIA should include the results of the negotiations. This is not the purpose of SIAs which are *ex ante* studies and therefore based on hypothetical scenarios. These scenarios are elaborated once and for all at the beginning of the SIA process and do not subsequently change: this allows the SIA to retain a high degree of coherence throughout the process. Once the SIA is finished, the Commission services will set out their views on the consultants' findings and recommendations by means of a position paper.

In addition, before the Agreement is signed, an economic analysis of the negotiated outcome (EANO) for the EU will be prepared by the Commission services for the European Parliament and the Council. The EANO assesses the impact of the actual outcome of the negotiations in terms of tariff and non-tariff trade cost reductions (as distinct from IAs or SIAs, where estimation of the likely impact of the Trade Agreement to be proposed is based on assumptions about the level of such reductions that will be achieved). The EANO is currently under elaboration by the European Commission services.

IV.8 Concerning whether the Commission plans to hold consultations with civil society organisations before the publication of the final report

In line with the Commission's Handbook on SIAs consultations were held on the draft final report. It was published on 8 July 2020 and a Civil Society Dialogue meeting took place two weeks later on 22 July 2020. In accordance with best practice, civil society organisations were

given two weeks to submit their comments which will be taken into account by the Contractor for finishing the work on the final report.

IV.9 Concerning when the Commission plans to publish the final SIA report and a position paper on the report

The Commission's plan is to publish the final SIA report once the contractor has had the possibility to integrate the comments from civil society and produce the final version of the report. The Commission position paper will be published together with the final SIA report.

V. CONCLUSIONS

On the basis of the replies provided above the Commission disagrees with the contention of the complainants that the SIA process described above constitutes maladministration.

The Commission carried out the negotiations with Mercosur with the greatest due diligence. Over the years, the Commission has in fact conducted two independent SIAs, that have given civil society extensive possibilities to be informed, to comment and to provide input and which have provided the Commission with a series of findings on potential economic, social and environmental impacts of the Agreement.

The Commission acted in full respect of Article 21 TEU, as has been demonstrated above. The fact that the second SIA was not finalised before the conclusion of the negotiations is no ground to claim a violation of Article 21 TEU.

Furthermore, although the final report was not available at the time of the conclusion of the negotiations, the Commission considers that the SIA process, as well as more broadly the transparent negotiation process followed by the Commission, offered a solid platform for engaging with civil society and has duly and extensively informed the negotiators already during the negotiations.

Furthermore and partly due to the fact that the SIA contains recommendations, e.g. on flanking measures, the SIA will also be able to be useful in ensuring an informed societal debate during the ratification process and the following work between the EU and Mercosur on the implementation of the Agreement.

The Commission notes the complainants' suggestion that the Commission "*refrain from proposing the decision for signature by the Council until it has published the SIA final report and its Position Paper*". The Commission can confirm that it does not have the intention to adopt its proposal for the decision for signature by the Council before the SIA final report has been published and the Commission has finalised and published its Position Paper. As in the meantime the draft final report of the SIA has already been published, the final report should also be published soon taking into account the views expressed by CSOs.

The Commission disagrees with the suggestion by the complainants regarding the basis for the SIA. Contrary to what is suggested by the complainants, by definition and based on the working assumptions of the SIA process itself, the SIA does not include a sustainability impact assessment of the actual terms of the Agreement. In accordance with established practice, the SIA is based on two hypothetical *ex ante* scenarios.

In conclusion, for the reasons detailed above and on the basis of all the explanations and arguments provided the Commission is confident that the Ombudsman received a comprehensive set of elements which respond fully to the complainants' points. The Commission therefore respectfully submits that the complaint is not founded.

The Commission attaches great value to the contributions of all stakeholders and looks forward to a continued open, frank and honest dialogue with all of them, be it on this file or in general.

*For the Commission
Valdis DOMBROVSKIS
Executive Vice-President*