

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

Subject: SI/5/2021/VS on how the European Commission ensures respect for human rights in the context of international trade agreements

I. BACKGROUND

Since the entry into force of the **Lisbon Treaty** in December 2009, which explicitly provided that the EU's international action shall be guided by shared values, such as the rule of law, sustainable development and respect for human rights,¹ the Commission has systematically incorporated these values into its external action including in the field of trade policy.² The EU had already since the early 1990s included **human rights clauses** in its international political or association agreements that also contained trade components. That approach is now embodied in the 2009 Council's "Common Approach on the use of political clauses"³, which provides that all EU political framework agreements should include provisions on *inter alia* human rights.

Over the years, in parallel to promoting human rights as per the Common Approach, EU trade strategy communications have promoted the use of trade policy to advance sustainable development more broadly, across a wide range of actions and initiatives. Since the **Global Europe Communication** adopted in 2006⁴, this has notably taken place through the inclusion of Trade and Sustainable Development (TSD) chapters in EU trade agreements. The **2012 Communication on Trade, Growth and Development**⁵ recognised that the EU's trade policy is guided by core values, such as the respect and promotion of human rights and sustainable development. The **2015 Communication on Trade for All**⁶ identified various areas for action, such as prioritising work to implement effectively the core labour standards (abolition of child labour, forced labour, non-discrimination at the workplace, freedom of association and collective bargaining), as well as health and safety at work in the implementation of FTAs and GSP, and mainstreaming the analysis of the impact on human rights across a range of trade initiatives. The **2017 EU Aid for Trade Strategy**⁷ highlighted the need to strengthen engagement with civil society, social partners and local authorities and to connect EU's aid to social and environmental objectives. In line with the **EU Action Plan on Human Rights and Democracy**⁸, the **2021 EU Strategy on the rights of the child**⁹ put

¹ See Article 3 TEU as well as Article 207 TFEU on trade policy which refers explicitly to these principles.

² For instance, on 19 November 2020, the EU adopted the third EU Action Plan on Human Rights and Democracy 2020-2024, endorsed by EU Member States via Council Conclusions. The EU Action Plan reaffirms the EU's strong commitment to advance universal values and lays out the key principles, objectives and priorities for the EU's external policies on human rights. Human rights are promoted consistently and coherently in all areas of EU external action, including trade policy.

³ This link was further clarified in the "Common Approach on the use of political clauses", approved by the Council in COREPER on 3 June 2009. Further details on the Common Approach are set out in the answer to Question A.1 below.

⁴ COM(2006)67 final.

⁵ COM(2012)22 final.

⁶ COM(2015)497 final.

⁷ COM(2017)667.

⁸ EU Action Plan on Human Rights and Democracy 2020-2024.

forward the commitment from the EU to step up efforts to ensure the supply chains of EU companies are free from child labour, notably by promoting sustainable corporate governance.

In February 2021, the Commission adopted a new trade strategy entitled “An Open, Sustainable and Assertive Trade Policy”.¹⁰ This has put sustainability at the heart of the EU’s trade policy, together with the other core objectives of openness and assertiveness. Openness and the attractiveness of the EU Single Market provide leverage to incentivise trading partners to uphold universal values, human rights (including the rights of the child), core labour standards, and gender equality. Assertiveness means stepping up the implementation and enforcement of the existing trade tools, including those relating to sustainable development.

The EU’s promotion of human rights through trade and investment is also included in the EU’s human rights instruments. Thus, the **EU Action Plan on Human Rights and Democracy 2020-2024**¹¹ includes as a priority the strengthening of the implementation of human rights provisions in EU trade policy, including through the GSP and by promoting labour rights in the context of FTAs.

One of the tools the Commission relies on to leverage the protection of human rights and labour and good governance standards are political and trade agreements with partner countries. Labour standards – in particular those reflected in the fundamental International Labour Organization’s (ILO) Conventions – have featured in TSD chapters in the EU free trade agreements (FTAs). Since the EU-Korea FTA, all EU FTAs include provisions relating to such core labour standards.

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 (VCLT), including trade concessions.

The promotion of human rights, labour and good governance standards also features in other trade policy tools, such as the Generalized Scheme of Preferences (GSP), through which the Commission grants unilateral tariff preferences to developing and least developed countries. In particular, the grant of benefits under the specific incentive arrangement for sustainable development and good governance (GSP+) is conditional upon the ratification and effective implementation by the beneficiary countries of certain human rights, all core labour standards and good governance conventions. Moreover, the Commission can withdraw the tariff concessions in case of serious and systematic violations by a GSP beneficiary country of the principles of certain core human rights and labour conventions.¹²

As announced in the 2021 trade strategy, both TSD chapters and the GSP instrument are being reviewed, with a view to reinforce their contribution to the promotion of labour and

⁹ COM(2021) 142 final.

¹⁰ COM(2021)66 final, available at https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

¹¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005>.

¹² In 2020, the European Commission partially withdrew GSP benefits under the Everything But Arms arrangement from Cambodia due to serious and systematic violations of the International Covenant on Civil and Political Rights.

other human rights, climate objectives and other important values. The TSD review, for which a public consultation was launched in July 2021, is expected to be concluded in 2022. This will take a critical look at all relevant aspects related to TSD implementation and enforcement. On 22 September 2021, the Commission presented a proposal for a new GSP Regulation with the aim of further strengthening the Regulation's objective of reducing poverty and creating jobs in developing and least developed countries based on international values and principles, such as labour and other human rights.

II. SUMMARY OF THE FACTS

On 7 July 2021, the European Ombudsman informed the Commission of the opening of an inquiry on how the Commission ensures respect for human rights in the context of international trade agreements.¹³

The inquiry intends to examine how the Commission prepares the so-called "human rights clauses" contained in international trade agreements signed by the EU (see "questions regarding the preparatory stage" below) and how, once trade agreements enter into force, it monitors the application of these clauses (see "questions regarding the implementation stage" below).

The Ombudsman requested the Commission to reply by 29 October 2021. The Commission provides the replies below to the questions raised by the Ombudsman.

III. COMMISSION'S ANSWERS TO THE OMBUDSMAN'S QUESTIONS

A. Questions regarding the preparatory stage:

1) **How does the Commission decide whether to include a human rights clause in an international trade agreement? What are the principles and criteria on which it bases its decision?**

For the purpose of replying to this question, "human rights clauses" refer to provisions concerning human rights included in political framework and trade agreements concluded by the EU with partner countries. Trade agreements also generally include clauses on the promotion of corporate social responsibility (CSR) and responsible business conduct (RBC) addressing the respect for human rights by private companies.

(i) Political framework agreements: essential elements clauses

Trade agreements are often concluded under the umbrella of, or in parallel to, political framework agreements with third countries. For example, in the case of agreements with neighbourhood or some Latin American (Mexico, Chile) countries, FTAs were concluded as part of Association Agreements that include a human rights "essential elements" clause; in the case of more recent trade agreements (e.g. Korea, Canada, Japan, Singapore), political agreements were negotiated in parallel to FTAs. Political framework agreements contain "essential elements" clauses, which constitute tools for the EU to pursue some of its most

¹³ See at <https://www.ombudsman.europa.eu/en/correspondence/en/144069>.

important external policy objectives, e.g. the respect for human rights, democracy and the rule of law and non-proliferation of weapons of mass destruction (WMD). Human rights “essential elements” clauses are provisions – generally featuring among the first articles of the agreement – which set out obligations for the Parties to respect human rights. These obligations are enforced through so-called “non-fulfilment” clauses. In particular, if a Party fails to fulfil obligations stemming from a human rights “essential elements” clause, the other Party is entitled to take appropriate measures, in accordance with international law, and proportional to the violation, including the suspension, in whole or in part, of concessions under the trade part of the agreement. This is in line with Article 60 of the VCLT, which allows a Party to terminate or suspend the operation of a treaty in whole or in part, in case of a material breach. Such material breach constitutes “*the violation of a provision essential to the accomplishment of the object or purpose of the treaty*”.

The general framework on the use of “essential element” clauses in political framework agreements is contained in the “Common Approach on the use of political clauses”, approved by the Council in COREPER on 3 June 2009.¹⁴ The aim of the Common Approach was to promote EU values and political principles in external relations, enhance the effectiveness and coherence of EU policies, and the EU's negotiating leverage vis-à-vis partner countries.

The 2009 Common Approach provides that all EU political framework agreements should include provisions on human rights, non-proliferation of WMD and counter-terrorism, the International Criminal Court and small arms and light weapons. Among those, the respect for democracy, rule of law, human rights and non-proliferation, constitute essential elements of the political framework agreements. The Common Approach has been systematically implemented since its adoption in 2009, with the inclusion of human rights clauses in all political framework agreements concluded since then. The 2021 trade policy review Communication announced that the Commission would propose to make the respect for the Paris Agreement on Climate Change as an essential element in all future agreements concluded by the EU. This has already been included in the EU-UK Trade and Cooperation Agreement.¹⁵

Political Framework Agreements are linked to trade agreements through a so-called “passerelle clause”, which provides for a legal link between the two agreements. Moreover, when a trade agreement is concluded in the absence of a political framework agreement, essential elements clauses on human rights and non-proliferation of WMD are included in the trade agreement itself. The latter was for instance the approach adopted in relation to the trade agreement with Colombia, Peru and Ecuador.

An example of a human rights essential elements clause can be found in the Framework Agreement between the EU and Vietnam, concluded prior to the EU – Vietnam FTA. Article 1 of the EU-Vietnam Framework Agreement provides:

“The Parties confirm their commitment [...] to the respect for democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments to which the Parties are

¹⁴ Partially declassified version available at <https://data.consilium.europa.eu/doc/document/ST-10491-2009-REV-1-EXT-2/en/pdf>.

¹⁵ Article 772 of the EU-UK Trade and Cooperation Agreement, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.01.0010.01.ENG&toc=OJ%3AL%3A2021%3A149%3ATOC

Contracting Parties, which underpin the internal and international policies of both Parties and which constitute an essential element of this Agreement.”

Article 57 of the EU-Vietnam Framework Agreement contains the fulfilment of obligations clause, which in its paragraph 2 provides that “[i]f either Party considers that the other Party has failed to fulfil any of its obligations under this Agreement it may take appropriate measures.” Appropriate measures are defined in paragraph 4 as “measures taken in accordance with international law which are proportionate to the failure to implement obligations under this Agreement”. The Parties further appended a joint declaration, which clarifies that a “violation of an essential element of the Agreement” would amount to a “‘material breach of the Agreement’ [...] in line with Article 60 (3) of the Vienna Convention on the Law of Treaties”. Article 60(1) of the Vienna Convention on the Law of Treaties, in turns, establishes that “[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part”.

The EU-Vietnam FTA is linked to the EU-Vietnam Framework Agreement’s essential elements clause by means of Article 17.18 of the FTA, which provides that:

“If a Party considers that the other Party has committed a material breach of the Partnership and Cooperation Agreement, it may take appropriate measures with respect to this Agreement in accordance with Article 57 of the Partnership and Cooperation Agreement.”

(ii) Trade agreements: TSD chapters

Trade agreements include references to human rights in their preamble¹⁶ and in TSD chapters. The latter contain binding commitments to respect core labour standards, which are part of internationally recognised human rights. TSD chapters seek, on the one hand, to leverage trade in order to promote sustainable development and, on the other hand, to mitigate potential negative impacts of trade (‘do no harm’) in the social and environmental area. They are based on internationally agreed standards, including the International Labour Organization (ILO) and Multilateral Environmental Agreements (MEAs), thus strengthening the rules-based international order. Additional provisions on trade and gender issues have been recently included in some negotiations with the purpose of promoting non-discrimination and gender equality.

In particular, TSD chapters include commitments on the ratification and effective implementation of fundamental ILO conventions covering subjects that are considered to be fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. TSD chapters aim at ensuring the effective implementation of these commitments through cooperation, monitoring and implementation and, as appropriate, enforcement. Moreover, they establish specific mechanisms, with the participation of civil society, including social partners, to reinforce accountability, transparency and dialogue in their implementation.

¹⁶ See e.g. the preamble of the EU-Vietnam agreement: “*REAFFIRMING their commitment to the Charter of the United Nations, signed in San Francisco on 26 June 1945, and having regard to the principles articulated in The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948...*”

In case of failure by one of the Parties to respect the provisions of TSD chapters, the other Party can activate – as a last resort when government-to-government consultation fails to resolve the issue – a specific State-to-State dispute settlement procedure the outcome of which will be reflected in a public report by a panel of experts. Once the report is issued, the Parties will discuss and implement it, followed by regular monitoring. Such process is transparent and entails engagement and participation – as observers or *amicus curiae* ("friend of the court") – by a number of stakeholders, including civil society and relevant international bodies and organisations.

The TSD dispute settlement mechanism was activated for the first time in relation to a dispute under the EU-Korea FTA regarding failure by South Korea to proceed with the ratification of four outstanding ILO fundamental conventions and to effectively implement ILO fundamental principles and rights at work, in particular the freedom of association.¹⁷ The panel of experts' report confirmed that Korea's trade union legislation was not fully in line with the international standards on freedom of association. It also confirmed the binding nature of the TSD provisions that were at stake in this dispute. The EU is engaging with Korea through the TSD Committee established under the EU-Korea FTA, to monitor the implementation of the panel findings. As a result of this engagement, Korea advanced the ratification process of outstanding fundamental ILO conventions. In particular, on 26 February 2021, the Korean National Assembly completed the ratification process of three fundamental ILO conventions: No 87 on the Freedom of Association and Protection of the Right to Organise, No 98 on the Right to Organise and Collective Bargaining and No 29 on Forced Labour. Korea also revised its Trade Union law, including some of the provisions where the panel found inconsistencies regarding the freedom of association. The monitoring of Korea's implementation of the panel report by the TSD Committee is ongoing.

(iii) Corporate Social Responsibility and Responsible Business Conduct

The EU also uses EU trade agreements to promote the uptake by the private sector of international principles and guidelines on CSR and RBC. In particular, the most recent TSD chapters refer explicitly to internationally agreed instruments on RBC, including the OECD Guidelines for Multinational Enterprises, the UN Global Compact and Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Such principles and guidelines aim at preventing and addressing the risk of adverse impacts on human rights and labour rights of business activities in areas such as child and forced labour, gender equality, non-discrimination, freedom of association and collective bargaining.

2) How does the Commission decide on the content of the human rights clause in a particular case? Are there any objective criteria for determining what the Commission decides to include in such clauses?

As explained in reply to question A.1, in order to establish the content of essential elements human rights clauses the EU relies on the basic parameters set out in the 2009 Common Approach. A standard human right clause is typically proposed to our partners and included in broad political agreements. It can also provide a basis to suspend trade commitments.

¹⁷ 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/>.

The content draws from the international human rights framework, which includes the 1945 Charter of the United Nations, the 1948 Universal Declaration of Human Rights (UNDHR) as well as other human rights treaties and instruments to which the Parties to the agreement are Contracting Parties. These include, for example, the international covenants on civil and political rights (e.g. non-discrimination, prohibition of torture and other cruel, inhuman or degrading treatment including slavery, prohibition of use of child and forced labour, right to take part in decision-making, full exercise of freedom of association and peaceful assembly, religion, opinion and expression), and on social, economic and cultural rights (e.g. right to education, to decent work, to an adequate standard of living).

TSD chapters in trade agreements incorporate “core labour rights” set out under the ILO fundamental conventions. These constitute human rights and are part of the general framework referred to above. The basic model for labour rights commitments in trade agreements was first set out in the EU-Korea FTA and has been further developed and adapted in subsequent agreements. All FTAs include commitments to ratify and effectively implement the fundamental ILO conventions.

3) How does the Commission determine the relevant human rights standard to be used as a benchmark in a given case?

The Commission uses as a reference the standards laid down in relevant international instruments in the field of human rights and core ILO fundamental labour conventions, described in the answer to Question A.2, and in particular the recommendations and conclusions contained in the reports of relevant international monitoring bodies and mechanisms, such as those under the UN and ILO.¹⁸ The Commission also relies on information received from various actors that actively engage and participate in the monitoring and implementation of human rights commitments by trading partners, such as EU Delegations in partner countries, Member States, other EU institutions, civil society, workers’ and business representatives.

Such information can have an impact on a decision to continue negotiations with trade partners. For example, in the aftermath of the *coup d’état* in Thailand, in 2014 the Council adopted Conclusions suspending high-level bilateral visits and putting on hold the signature of the bilateral Partnership and Cooperation Agreement which had just been initialled¹⁹. Negotiations on a Free Trade Agreement with Thailand were paused as well.

B. Questions regarding the implementation stage:

1) How does the Commission monitor the implementation by its trading partners of their human rights obligations? Could the Commission describe the administrative framework it has in place for this monitoring?

The EU monitors the implementation of human rights by trading partners through a variety of tools in different policy areas, ranging from political and foreign policy instruments to development cooperation initiatives and trade-related instruments and procedures. These actions are integrated and mutually reinforce each other.

¹⁸ <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm>

¹⁹ https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/143330.pdf

EU foreign policy remains the primary instrument for the EU to promote and monitor human rights in third countries, both through bilateral dialogues with partner countries and engagement in international fora. Within the framework of bilateral political or association agreements, the respect for human rights is, therefore, addressed in bilateral political dialogues under these agreements, with a dedicated sub-committee on the Rule of Law, Democracy and Human Rights being established under each agreement.

Beyond the framework of bilateral agreements, the Union relies on a variety of tools in the area of foreign policy, such as:

- political, human rights and sectoral policy dialogues with third countries and regional organisations. The EU Special Representative for Human Rights plays an important role in these dialogues and in the development and implementation of many of the operational tools listed below;
- human rights and democracy country strategies;
- EU Annual Reports on Human Rights and Democracy;²⁰
- Council Conclusions;
- thematic and geographical programmes under the 2021-2027 multiannual financial framework, in particular the new Neighbourhood, Development and International Cooperation Instrument (NDICI);
- actions in multilateral and regional human rights fora, including promotion of EU-led thematic and geographical resolutions on human rights issues, support for other relevant resolutions, EU statements and interventions, participation in interactive dialogues, public debates and briefings, organisation of events in support of human rights and democracy;
- public diplomacy and strategic communication activities, awareness raising campaigns, public statements, declarations and *démarches* condemning human rights violations and abuses, and recognising steps taken to promote and protect human rights and democracy;
- advocacy for ratification and implementation of key international human rights treaties, including core labour rights conventions, international humanitarian law instruments, as well as relevant regional human rights instruments;
- observing trials of human rights defenders and providing direct support to human rights defenders;
- the EU Human Rights Guidelines – instruments and tools for EU Delegations and Member States Embassies to advance EU human rights policies;²¹
- election monitoring missions and their follow-up;
- regular dialogue and consultations with civil society, human rights defenders, national human rights institutions, the business sector and other relevant stakeholders – both in Brussels and in third countries;
- reports from and cooperation with multilateral human rights institutions and UN human rights treaty bodies and Special Procedures;
- imposing CFSP restrictive measures, including where appropriate under the EU Global Human Rights Sanctions Regime;
- carrying out targeted training sessions for staff in EU Delegations.

²⁰ https://eeas.europa.eu/topics/human-rights-democracy/8437/eu-annual-reports-human-rights-and-democratisation_en

²¹ https://eeas.europa.eu/regions/asia/65018/eu-human-rights-guidelines_en

The Commission also integrates the promotion and monitoring of the rule of law, democracy and human rights, as well as the respect for key international conventions on labour rights and CSR/RBC in a number of development cooperation instruments. For instance, the European Instrument for Democracy and Human Rights (EIDHR) has funded more than 1200 projects in over 100 countries to support to civil society initiatives promoting democracy and human rights worldwide. 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. The Commission also works with the ILO in the context of the “Trade for Decent Work” project to improve application of the ILO Fundamental Conventions in third countries through strengthening social dialogue and effective reporting on labour standards between governments and civil society partners.

In the area of trade policy, the Commission regularly monitors compliance by GSP beneficiary countries on the respect and implementation of core human rights, labour and good governance conventions, in particular with regard to GSP+ countries. In this context, it receives information from various stakeholders, including EU institutions, EU Delegations, Member States, civil society and trade union representatives and conducts monitoring missions in the GSP countries.

The Commission also receives and examines information provided by third parties, including civil society and the monitoring bodies of international organisations, concerning compliance by third countries with TSD commitments and organises meetings and discusses regularly TSD matters with the civil society and other institutions, including in the context of regular Civil Society Dialogues (see the answer to question B.8). At the bilateral level, the EU engages in regular dialogue with third countries and discusses concerns about the implementation of TSD commitments in the context of the specific committees and sub-committees established under FTAs.

- 2) Does the Commission have in place a mechanism allowing interested parties, including the victims of human rights violations and civil society organisations, to report human rights concerns? The Commission’s 2020 Annual Report on Implementation of EU Trade Agreements mentions the creation of a new single entry point for stakeholders’ complaints on a variety of issues (centralised complaints procedure). From the wording of the online complaint form it appears that stakeholders who would like to file a complaint about human rights violations could do so by selecting the option ‘Trade and Sustainable Development (TSD) commitment or Generalised Scheme of Preferences (GSP) regulation provision violated’. Could the Commission confirm that this indeed is the case and share its experience so far with complaints related to human rights violations that have been submitted (number of complaints, their nature, complaint handling procedure, and the outcome)?**

As explained in the answer to question B.1, the Commission receives and examines information about the lack of compliance with TSD commitments in FTAs or GSP/GSP+ provided by stakeholders through different channels (e.g. letters, meetings, submissions). It also examines the information contained in the reports of international human rights monitoring bodies.

Since November 2020, the Commission has in place a new platform, the Single Entry Point (SEP), for stakeholders to submit complaints to the Commission concerning violations of

sustainability commitments by trading partners and market access barriers in third countries. The creation of the SEP reflects the efforts by the Commission to step up the monitoring, enforcement and implementation of commitments in trade agreements, including those in TSD chapters. It follows the appointment, in July 2020, of the Chief Trade Enforcement Officer (CTEO) in charge of ensuring stronger implementation and enforcement of trade agreements. The SEP provides a responsive, structured and focused process for the examination of complaints, under the control of the CTEO.²²

Through the SEP, stakeholders can submit complaints concerning violations of TSD chapters and GSP/GSP+ commitments using the TSD/GSP complaint form available online on the “Access2Market” portal.²³ The Commission has published operational guidelines on how to fill in the complaint form.²⁴ The Commission also engages in pre-notification contacts with stakeholders to provide assistance on preparing complaints.

Since the launch of the SEP in mid-November 2020, the Commission has had one preliminary contact with a stakeholder in relation to a potential TSD complaint. It expects that the SEP will be used more extensively in the future to deal with TSD complaints.

3) Could the Commission describe the internal procedures it has in place to determine what action to take when it discovers that a country with which the EU has a trade agreement has breached human rights standards?

The internal procedures for the Commission to determine actions to take in reaction to breaches of human rights by trading partners depends on the type and seriousness of such breaches.

If the EU considers that the breach arises to the level of a violation of an essential elements clause, it can activate the termination or suspension of the agreement, following the procedure set out in the relevant political framework agreement. Within the EU, the decision to suspend the operation of an agreement is taken by the Council based on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy pursuant to Article 218(9) TFEU. The Parliament is kept informed at all stages of this procedure.²⁵

If the breach concerns a commitment in a TSD chapter, the Commission would typically first carry out diplomatic *démarches* and engage in dialogue with the third country, particularly in the context of specialised committees and sub-committees established under the FTA. If these attempts do not resolve the matter, the Commission may activate the dispute settlement procedure set out under the FTA for TSD matters. Such procedure typically entails the following successive steps:

²² More information about the SEP and the CTEO is available at <https://ec.europa.eu/trade/trade-policy-and-you/contacts/chief-trade-enforcement-officer/>. A guidance on how the SEP operates is available at https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

²³ See at https://trade.ec.europa.eu/access-to-markets/en/contact-form?type=COMPL_TSD_GSP

²⁴ See at https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

²⁵ See Article 218(9) TFEU which provides: “*The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement [...]*”

- State-to-State consultations;
- setting up of a panel consisting of independent experts on trade, labour or environment (depending on the subject matter of the dispute);
- Written submissions by the disputing parties and an oral hearing, as well as possible submissions by external stakeholders as amicus curiae and consultations of relevant international organisations.
- Drafting by the panel of experts of a report which is public;
- Monitoring of the implementation of the report.

During the dispute settlement procedure, the Union is represented by the European Commission pursuant to Article 335 TFEU. The Commission decides on the launching and on conduct of the dispute settlement procedure.

If the breach concerns a serious and systematic violation of the principles of human rights and core labour rights conventions referred to under the GSP Regulation, the Commission can initiate a procedure for the temporary withdrawal of tariff preferences from the beneficiary country. Such procedure is currently set out in Article 19 of the GSP Regulation.²⁶ The Commission adopts a decision initiating the withdrawal procedure. During the procedure, the Commission assesses the situation in the beneficiary country during a 6-month monitoring and evaluation period. Third parties are associated with the procedure and are heard orally and in writing by the Commission. At the end of the monitoring period the Commission submits a report to the beneficiary country setting out factual and legal findings; the beneficiary country can reply in writing. If the Commission concludes that the findings of serious and systematic violations are confirmed, it adopts a delegated act withdrawing the preferences in whole or in part. The withdrawal will apply 6 months after the adoption of the delegated act.

This procedure was recently applied in relation to Cambodia. On 12 February 2020 the Commission adopted Delegated Regulation 2020/550 partially withdrawing tariff preferences from Cambodia for reason of serious and systematic violation of the principles laid down in Articles 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights (ICCPR). The European External Action Service (EEAS) was fully associated with the procedure.

4) Could the Commission provide details on how it uses the Charter of Fundamental Rights as a benchmark when verifying compliance in the context of trade agreements?

Compliance by trading partners is assessed on the basis of international instruments, such as UN or ILO conventions and the EU Charter of Fundamental Rights serves as further guidance for the actions of the EU. Such conventions reflect principles and values which are also incorporated in the EU Charter.

5) The European Charter of fundamental rights is fully compliant with international human rights law, including the UDHR and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural

²⁶ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L303, 31.10.2012, p. 1.

Rights respectively. International human rights treaties and instruments provide an agreed set of human rights principles and standards, with which compliance is verified. How does the Commission identify human rights concerns in countries with which the EU has concluded a trade agreement? How does the Commission measure a decrease in the level of human rights protection in countries with which the EU has concluded a trade agreement? What circumstances would trigger the application of the so-called ‘non-execution’ clause or ‘suspension’ clause in a specific case?

As mentioned above, assessment of compliance by trading partners with human rights principles and standards is primarily based on the available recommendations and conclusions of relevant ILO and UN bodies monitoring the implementation of human rights and labour rights.

For the assessment of the overall human rights situation and the identification of specific human rights concerns in a country, the Commission and the EEAS rely on the instruments listed in the reply to question B.3.

For a breach to constitute a “material breach” within the meaning of Article 60(3) of the VCLT, the Commission needs to rely on evidence. Commentaries on Article 60 of the VCLT and related case-law of the International Court of Justice can provide interpretative tools for the application of this provision. Any decision concerning the suspension of the agreement must be proportionate to the violation.

6) What actions and/or sanctions has the Commission taken so far in cases where a trade partner breached its obligations under the human rights clause? Has the Commission invoked the human rights clause in order to suspend trade preferences? Does the Commission have internal rules or guidelines for its work in this area?

To date, the EU has taken 'appropriate measures' for non-compliance with political clauses (including human rights) in the context of the Cotonou Partnership Agreement with the African, Caribbean and Pacific (ACP) states in over 20 cases. Such measures have consisted in the suspension of development aid and cooperation by the EU.

Moreover, on 2 September 2011, the EU suspended certain trade commitments of the 1977 Cooperation Agreement with Syria due to breaches of the human rights principles referred to in the Preamble to the agreement²⁷.

In general, the purpose of essential elements clauses should not be considered as limited merely to the withdrawal of concessions from trading partners. The primary aim of essential element clauses is rather to create a platform for discussion on human rights so as to incentivise partner countries to engage in political dialogues, consultations and cooperation efforts and to improve their track record with regard to the respect of human rights and democracy.

²⁷ See Council Decision 2011/523/EU of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, OJ L 228, 3.9.2011, p. 19.

Finally, as mentioned above, the Commission has also temporarily suspended unilateral trade concessions under the GSP framework in cases of serious and systematic violations of human rights principles. The most recent of such cases concerns Cambodia. Other – less recent – instances in which suspensions of GSP preferences were applied relate to Myanmar in 1997, Belarus in 2007 and Sri Lanka in 2010.

7) How does the Commission ensure the transparency of its actions in relation to the implementation of human rights clauses (reporting, monitoring, enforcement)? How does it facilitate public participation in this context? Which entities/actors are given a say, and how are different inputs weighed at every stage: from the negotiations to the implementation of trade agreements?

Transparency is a core value of EU trade policy and external action. The Commission ensures transparency of trade policy in various ways.

Assessments and evaluations of trade agreements

Prior to the launching of and during negotiations, the Commission conducts *ex ante* assessments to identify (positive and negative) human rights impacts of envisaged trade agreements and make recommendations on how to best address them.²⁸ In particular, proposals to launch trade negotiations are generally preceded by **Impact Assessments** which look at relevant impacts of the proposed agreements, including impacts on human rights both within the EU and in the third country. During the negotiations, a **Sustainability Impact Assessment** analysing potential economic, social, environmental, and human rights impacts is generally carried out to support the negotiators. After the conclusion of the agreements, the Commission also carries out *ex post* evaluations to assess how trade agreements have delivered on their objectives and draw lessons for the future. Such *ex-post* evaluations are conducted after several years of implementation of a trade agreement. EU stakeholders, including civil society, are involved and consulted throughout these processes.

Proactive publication

The European Commission publishes information on the implementation of the TSD chapters, including deliverables under the 15-Point TSD Action Plan of 2018, as part of the annual reports on the implementation of FTAs.²⁹ Minutes of TSD committee meetings as well as reports on the compliance record of GSP beneficiaries are published on DG Trade website.

The 15-Point TSD Action Plan

The European Commission has made substantial efforts to improve the implementation and enforcement of TSD chapters in recent years. In February 2018, after discussions with the European Parliament, Member States and other stakeholders, the Commission published a non-paper with a 15-point TSD Action Plan.³⁰

²⁸ http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf (Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives)

²⁹ Information on past reports: <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> The most recent information will be available in the forthcoming *2021 Annual Report on Implementation and Enforcement*. Expected date for its publication is second half of September 2021

³⁰ Non-paper of the European Commission services. *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements* of 26 February 2018. http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

The 15-point TSD Action Plan reflects the outcome of the 2017/2018 debate that pointed to the need to promote close long-term engagement with the FTA partners and capacity building, on the one hand, while stepping up monitoring efforts and being more assertive on enforcement of the existing commitments, on the other. The Plan proposed actions in four main areas:

- Working together (partnering with the European Parliament, Member States, and working with international organisations);
- Enabling civil society and social partners to play their role in the implementation of TSD chapters;
- Delivering results (assertive enforcement, early ratification of TSD-related international conventions and agreements); and,
- Transparency and communication.

In the 2021 Trade Policy Review Communication, the European Commission announced the early review of the 15-Point Action Plan (initially scheduled by 2023) indicating that: *“The review will cover all relevant aspects of TSD implementation and enforcement, including the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential elements clause as well as the institutional set-up and resources required.”*

As an essential part of this review process, and in line with the EU’s commitment to engage in a transparent way with citizens and stakeholders, the Commission launched in July 2021 an open public consultation to gather inputs on TSD relevant themes and questions. The Commission encourages input from all stakeholders, including social partners, European institutions, Member States, civil society, industry, international organizations and citizens. The European Commission is also seeking views on the process of monitoring the implementation of TSD chapters in trade agreement and about the involvement of stakeholders. The responses received will help the Commission to formulate the direction of EU trade and sustainable development policy for the future.

In parallel to the open public consultation, and in order to feed the review with additional evidence-based inputs, the Commission launched at the end of May 2021 a comparative study to assess the approaches adopted by certain selected countries with regard to TSD commitments in trade agreements, their implementation and enforcement.

8) In the context of EU trade policy, the EU has created a growing number of entities with different roles: these include joint committees, specialised sub-committees, working groups, advisory groups and civil society forums, etc. Could the Commission please explain what role these different entities play in ensuring respect for human rights in the application of EU trade agreements?

The EU relies on various groups, committees, other entities and fora to ensure the respect of human rights in the context of trade policy. In particular, the EU typically establishes joint institutional structures with trading partners in the context of trade agreements that provide platforms for representatives of the Parties to engage in dialogue, implementation or decision-making in relation to specific chapters of the agreements. The most relevant in relation to human rights are the Trade and Sustainable Development Committees.

The EU also relies on advisory bodies composed of external stakeholders, i.e. the Domestic Advisory Groups, to monitor the implementation of TSD chapters in trade agreements. It also regularly engages in discussion with external stakeholders on various topics related to trade policy in the context of civil society dialogues or other fora.

Finally, the EU relies on the technical advice of expert groups, mostly composed of Member States representatives or technical experts, in relation to trade policy tools other than free trade agreements, typically established in EU legislation. Discussions in the context of these expert groups may also cover issues related to human rights. This is for instance the case for the Surveillance Technology Expert Group which operates in the context of the dual use Export Control Regulation (Regulation (EU) 2021/821) by addressing the risk of cyber-surveillance dual use items being used in connection with internal repression or the commission of violations of human rights and international humanitarian law. Other expert groups are created also in the context of the GSP Regulation, or the Conflict Minerals Regulation.

Beyond trade agreements, the EU also counts on a number of human rights dialogues. These dialogues offer the opportunity for the EU to engage with third countries on human rights issues and reinforce discussions that take place already in the context of trade policy tools.

The Commission services also established regular contacts with the international organisation such as the ILO to exchange up-to-date information on trade partner countries that have human rights issues. A more detailed description of these committees, fora, dialogues, operating in the context of trade agreements and other international agreements of the EU with third countries, is provided below.

Trade and Sustainable Development Committees

All recent FTAs incorporate Trade and Sustainable Development (TSD) Committees or sub-committees whose role is to effectively monitor and follow up on the operation of the TSD Chapter. The principles underlying the work of TSD Committees are transparency, regular dialogue, involvement of civil society and close cooperation between the Parties. TSD Committees thus provide for an effective channel of communication and a means for reaching common positions between the Parties on any matter related to the TSD Chapter including on labour issues. Conclusions and recommendations of TSD Committee meetings are reported to the trade agreement's high-level Joint Trade Committee for further consideration by the Parties.

TSD Committees meet at least once a year and discuss issues identified by both parties or brought to their attention by the advisory mechanisms (Domestic Advisory Groups – see further below). TSD Committee meetings are usually followed by back-to-back meetings with Domestic Advisory Groups and the civil society forum. Summary of the discussions of the Committee are published on dedicated DG Trade webpages.³¹

Domestic Advisory Groups

Dedicated civil society advisory groups (Domestic Advisory Groups or “DAGs”) bring together representatives of environmental, labour, and business organisations to discuss the implementation of the TSD chapters of EU trade agreements. DAGs can bring much value to monitoring the implementation of the trade agreements and offer a concrete way to intensify

³¹ See e.g. for CETA at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>

the delivery of measures aimed at implementing the agreed provisions on labour and environment.

Since the introduction of new generation FTAs (covering matters beyond goods), TSD chapters have been including the set-up of DAGs. The first DAG was set up under the EU-Korea trade agreement in 2012. Currently, there are 11 EU DAGs in total. Each Party has its own advisory bodies.

The DAGs have an advisory role. They help the Parties by monitoring the implementation of the provisions in the TSD Chapter. The EU draws on the expertise of groups affected by trade policy to ensure its trade deals are in the European interest and work in practice.

EU DAGs meet regularly (usually two to three times a year) to advise the EU on the implementation of trade-related environmental and labour issues. They also prepare the joint open meeting that typically takes place once a year with the civil society representatives of the other Party. This meeting generally takes place in a back-to-back session with the Parties' TSD Committee. The aim is to allow other civil society organisations who are not members of the DAGs to have a seat at the table and have their voices heard at least once a year.

EU DAGs are typically composed by three categories of stakeholders: employers, workers, and non-governmental organisations (NGOs)/others. EU DAGs have around 24 members and represent in a balanced manner employers, workers and NGOs. EU DAG members elect a chair and two vice-chairs and decide on their rules of procedures that will help managing the DAG meetings. The European Economic and Social Committee (EESC) also appoints its members for the EU DAGs, ensuring balanced participation across its three groups (employers, workers, NGOs/others). This mirrors the role of its members under the EU treaties as the organised voice of civil society in the EU. Typically, the EESC nominates three members for each EU DAG – depending on the size and level of interest in that EU DAG. EU DAG members need to have expertise in one of the fields related to trade and sustainable development, in line with the TSD chapter.

The secretariat of the External Relations Section within the EESC acts as secretariat of the EU DAGs. It coordinates the EU DAG meetings, supports the EU DAG members and maintains contacts with civil society partners worldwide. Independently from the Commission, the DAG members choose from within the TSD chapter what topics they wish to advise upon. During their DAG meetings, they prepare a report that they subsequently deliver to the Parties at the joint TSD Committee meeting.

Civil Society Dialogues

Civil society organisations also participate in DG Trade's Civil Society Dialogues (CSDs). CSDs gathers together NGOs, employers' organisations, trade union organisations, environmental and consumer associations, business associations, human rights organisations, faith-based groups, as well as representatives of the EESC. The topics of the CSD meetings reflect DG Trade's most recent trade initiatives and policy-making.

Human rights organisations are systematically invited to CSD meetings, where they can share their opinions and make comments on EU Trade's policies.

Other civil society fora

Civil society organisations specialised in human rights are in general regular interlocutors of the EU, and their contribution is of critical importance to set up the objectives of the EU's external policy on human rights. Ad-hoc consultation meetings, bringing together representatives of both national and Europe-based civil society organisations, are routinely

organised in preparation for Human Rights Dialogues between the EU and partners countries and ahead of and during the GSP+ monitoring missions. Furthermore, representatives of civil organisations may intervene in the Human Rights Dialogues and raise their human rights concerns with representatives of partner countries' government and the EU.

Human Rights Dialogues

Trade policy also supplements policies led by other services in the area of human rights, notably by the EEAS. In particular, the European Union has established human rights dialogues with a number of countries, which are key instruments for EU bilateral engagement with trade partners on human rights. Different types of dialogues exist, including dialogues based on regional or bilateral treaties, agreements or conventions or strategic partnerships dealing with the issue of human rights. In addition, in the context of various cooperation or association agreements (which often exist in parallel to trade agreements), there are specific sub-committees or groups dealing with the human rights issue (usually called "Good Governance, the Rule of Law and Human Rights" groups). Furthermore, the EU also holds human rights consultations with likeminded countries.

For example, in 2020 human rights dialogues and consultations were held in VTC format with a number of trade partners such as Canada, Colombia, Georgia, Jordan, Mexico, the Republic of Moldova, Ukraine, Vietnam and Japan. A press release summarising the discussion and identifying areas of cooperation and follow up is released after each human rights dialogue, where possibly jointly with the partner country. Despite the COVID-19 pandemic, dedicated consultations with civil society were carried out prior to human rights dialogues, and briefings were held on the outcomes.

The mutually supportive leverage between human rights dialogues and other policy objectives has been particularly evident in the case of the GSP+ scheme, the latter acting as a catalyst for renewed interest by partner countries in holding meaningful and structured human rights discussions with the EU.

- 9) The Ombudsman previously inquired into whether the Commission should have carried out a prior human rights impact assessment in the context of trade negotiations with Vietnam. Since August 2020, the EU-Vietnam trade agreement is in force. Could the Commission provide information on what measures/instruments it has put in place to identify and address the impact of the free trade agreement on human rights in Vietnam?**

Since the entry into force of the EU-Vietnam Free Trade Agreement, the EU's main policy approach remains one of positive engagement with Vietnam. Under the EU-Vietnam Partnership and Cooperation Agreement, the EU continues to promote respect for human rights through the annual human rights dialogue, but also through public statements and *démarches*, interaction with human rights defenders and civil society at large, and financial support for human rights projects.

In this framework, the EU-Vietnam Free Trade Agreement has opened an additional avenue under the TSD Chapter for discussing labour rights, monitoring and ensuring that Vietnam continues the labour reforms initiated before the ratification of the FTAs and applies the new Labour Code, as well as involving Vietnam's civil society in the monitoring of the implementation of the agreement.

Since the entry into force of the agreement on 1 August 2020, the Commission has worked closely with Vietnamese authorities to ensure the setting up of the institutional structure

underpinning the implementation of the agreement's provisions. This includes the setting up of: government-to-government bodies established under the Agreement, such as the TSD Committee; platforms for stakeholders' involvement, including Vietnam's DAG; annual joint fora reuniting the EU and Vietnam's DAGs, and upon joint agreement, including also other interested civil society organisations.

While these actions had been slowed down by the pandemic as well as 2021 political events in Vietnam, including the elections and appointment of a new government, these bodies, platform and fora have now been set up and will be meeting for the first time in November 2021. Once fully operational, these platforms will bring more transparency on the rule of law, closer interaction with civil society, and the creation of further channels to engage with the Vietnamese authorities and contribute to improving the general human rights conditions in the country.

IV. CONCLUSIONS

The Commission has made its best effort to provide comprehensive answers to the Ombudsman's questions. It remains available for any follow-up question or request for clarification by the Ombudsman and welcomes the opportunity to meet the Ombudsman's team to explain in more detail the wide range of actions and initiatives it takes to ensure the respect of human rights in the context of trade agreements and trade policy tools.

*For the Commission
Valdis DOMBROVSKIS
Executive Vice-President*