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THE EUROPEAN UNION EXTERNAL ACTION, ADMINISTRATIVE FUNCTION AND HUMAN RIGHTS PROTECTION UNDER THE LENS OF THE EU OMBUDSMAN AND A RECENT STRATEGIC INITIATIVE

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1. Introduction

On the 9th of July 2021 the European Ombudsman (hereafter EO), Emily O'Reilly, opened a strategic initiative on "how the European Commission ensures respect for human rights in the context of international trade agreements" (SI/5/2021/VS) [1]. In her letter to the Commission, the EO asked how this Institution ensures respect for human rights in its international trade policy and how it manages the so-called human rights clauses (HRC) [2]. The strategic initiative was closed with a Note on the 15th of July 2022. As will be further discussed, the questions addressed to the Commission concern the preparatory stage (how it decides to include a human rights clause in an international trade agreement and how it defines the specific content of the provision) and the implementation stage (how the Commission ensures the execution of the clause).

Double blind peer reviewed article.

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[1] Strategic iniziative SI/5/2021/VS. https://www.ombudsman.europa.eu/it/case/en/59519. All documents and cases cited in this article are available on the Ombudsman website.

[2] Further questions were asked in preparation for a follow-up meeting attended by representatives from various DGs of the European Commission (DG TRADE, DG INTPA, DG EMPL, and DG JUST), and by representatives from the European External Action Service. After the meeting, the EO website reported a summary of the discussion.

The EO's strategic inquiry provides an opportunity to question the increasingly active role of the EO in monitoring the behavior of EU institutions and bodies in their external activities. The EO ascertains the procedural correctness, integrity, and fairness of the EU administrative functions and verifies through which procedures and instruments the European Union contributes to the protection of human rights in its external policies[3]. Activities such as impact assessment, definition of negotiating guidelines, monitoring, preparation and implementation of projects, influence the way in which external policy objectives are attained[4].When carrying out these activities, EU institutions and bodies are bound to follow obligations provided for in EU law (including international obligations[5]), to respect the rule of law, principles of good administration (article 41 of the Charter) and human rights.

This article will discuss, in general terms, the functions and mandate of the EO (paragraph 2) and how, in some selected cases, she[6] has interpreted her role (paragraph 3). The context and scope of the EO's inquiry, the questions raised by the EO, and the answers provided by the Commission will then be debated (paragraph 4). Some conclusions will finally be drawn (paragraph 5).

2. European Ombudsman's strategic inquiries and initiatives: an overview

The EO mandate is defined in article 228, paragraph 1, TFEU. This provision establishes that the EO is "empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report

[3] M. CREMONA, P. LAINO, *Is There an Accountability Gap in EU External Relations? Some Initial Conclusions,* in *European Papers*, 2017, Vol. 2, No. 2, pp. 699-708. The Authors noted that "External action is in fact a rich field in the application of administrative law". I. VIANELLO, *Acknowledging the Impact of Administrative Power in the EU External Action*, in *European Papers***,** Vol. 2, 2017, No 2, pp. 597-616; M. INGLESE, *EU Agencies External Activities and the European Ombudsman*, in H. C.H. HOFMANN, E. VOS, M. CHAMON, *The External Dimension of EU Agencies and Bodies Law and Policy*, Edward Elgar, Cheltenham, Northampton, 2019, pp. 164-181. C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, p. 1.

[4] I. VIANELLO, *EU External Action and the Administrative Rule of Law. A Long-Overdue Encounter, PHD Thesis, EUI*, Florence, 2016: "Preparatory and rule-making instruments arguably belong to some of the most influential areas of administrative activity…Preparatory acts inform final decisions and indicate which topic shall be put on the policy agenda", p. 76. In the *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* the Commission specified: "impact assessments and evaluations are policy tools which provide a structured approach to gathering and analysing evidence that will be used to support policy making".

[5] Case 530/98/JMA on the handling of a project funded by the European Development Fund, case opened 2.7.1998.

[6] The EO in charge at the time of writing is Emily O'Reilly. She was first elected in July 2013, and she was re-elected in December 2014 and again in December 2019. Previously, the position of European Ombudsman was held by N. Diamandouros (2003-2010) and J. Soderman (1995-2003).

on them"[7]. Maladministration is not defined in the Treaty, but it has been broadly interpreted[8]. Significantly, the European Ombudsman, since 1995, has linked maladministration, *inter alia*, to a lack of respect for fundamental rights. The entry into force of the European Charter of Fundamental Rights along with the Lisbon Treaty has unquestionably reinforced the EO role as the Charter recognizes the fundamental right to good administration (article 41) and qualifies the recourse to the EO as a fundamental right (article 43). The Charter also strengthens the EO's broad interpretation of maladministration to cover human rights. The present Ombudsman, Emily O'Reilly has interpreted the EO's role extensively, as she intends the EO's task as contributing to reinforcing transparency, human rights, accountability, the ethical behaviour of the EU administration. To carry out this mission, she appointed an own-initiative investigation coordinator and established a dedicated Unit on systemic inquiries[9].

Article 228, second paragraph of the TFEU empowers the EO to conduct inquiries based on a complaint[10] or on her own initiative. The Ombudsman's independent power of investigation (*own-initiative inquiry*) is not further clarified in the Treaty. Article 3, paragraph 1 of the Ombudsman Statute[11] reproduces (almost literally) the wording of the Treaty. Article 3, paragraph 3 specifies the conditions under which the Ombudsman can conduct *own-initiative inquiries*[12]. This happens *"*whenever he or she finds grounds, and

[7] This means that after the entry into force of the Lisbon Treaty the mandate of the EO extends to the activities of the European Council and agencies and offices. See Annual Report of the EO 2005, p. 38. See also R. MASTROIANNI, *New perspectives for the European Ombudsman opened by the Lisbon Treaty*, in C.H. H. HOFMANN; J. ZILLER (eds.), *Accountability in the EU*, Edward Elgar Publishing, 2017, p. 178-197. The abolition of pillars by the Lisbon treaty extended the EO mandate to actions undertaken in the former second pillar.

[8] As pointed out by Soderman, the then Ombudsman, in his first Report (1995): "the experience of national ombudsmen shows that it is better not to attempt a rigid definition of what may constitute maladministration. Indeed, the open-ended nature of the term is one of the things that distinguishes the role of the Ombudsman from that of a judge." See the *European Code of Good Administrative Behaviour* where it is specified that "maladministration is broader than illegality". The Ombudsman proposed the following definition of maladministration in his 1997 Report: "Maladministration occurs where a public authority fails to act in accordance with a rule or principle that is binding upon it". See also the Speech by the European Ombudsman, in office at the time, N. DIAMANDOUROS, 17.9. 2007, Sofia, available at ombudsman.europa.eu. See A. AVTONOMOV, *Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance,* in *Laws* 2021, available at https://doi.org/10.3390/laws10030051. See R. MASTROIANNI, *op. cit*., p. 189.

[9] She clarified how she sees the role of the EO in several documents See, for example, *European Ombudsman Strategy Towards 2019*, of 17.11.2014, and *European Ombudsman Strategy Towards 2024* of 7.12.2020.

[10] The EO shall first evaluate the admissibility of the complaint according to the rules contained in the Statute. If the complaint is not admissible the EO may decide to start an investigation *motu proprio*. See case OI/11/2010/AN *on the refusal of the EU Delegation to Sierra Leone (the 'Delegation') to reimburse the travel expenses of an expert involved in Europe Aid project*, decision of 17.1.2013.

[11] Regulation 2021/ 1163 of the European Parliament of 24 June 2021 *laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom*, O.J. L 253, 16.7.2021, p. 1.

[12] The Commission agreed with the European Parliament proposals, "as long as the Ombudsman acts within the limits of its mandate, i.e. maladministration". See Commission Communication COM (2019) 533 final of 6.5.19, on *a draft Regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman and repealing Decision 94/262/ECSC*, EC, Euratom, p. 9.

in particular in repeated, systemic or particularly serious instances of maladministration, in order to address those instances as an issue of public interest". The inquiries are functional to a proactive intervention of the EO, who "may also make proposals and initiatives to promote administrative best practices within Union institutions, bodies, offices and agencies". Thus, the task of the EO is not only to address cases of maladministration but also to suggest how a critical structural situation can be redressed[13]. The first hypothesis mentioned in article 3, paragraph 3 of the Ombudsman Statute, corresponds to a consolidated practice that allows the EO to start inquiries when she/he receives complaints on the same issue[14]. Repeated cases of maladministration can be indicative of a deep and widespread problem that requires investigation. When carrying out inquiries the EO can launch consultations[15], has the power to investigate and has access to the files of the institutions. As an illustration, one can mention inquiries on transparency in the preparatory bodies of the Council[16], in trialogues[17], in the Council during the COVID-19 crisis; the EO also started an inquiry into the functioning of the European citizens' initiative (ECI) procedure[18] .

A separate category of the EO's own-initiatives consists of *strategic initiatives*[19], which are also defined with reference to their objective: Strategic initiatives aim at "sharing suggestions with the institutions on important topics, to draw attention to matters of public interest or to find out more about a particular issue before deciding whether it is necessary to open an inquiry"[20]. The Ombudsman "pursues important topics to encourage the EU administration to be as open, accountable, ethical and responsive to

[13] For example: "The purpose of this inquiry is to see to it that the Commission does all in its power to ensure that EU funds do not finance actions which violate fundamental rights". OI/8/2014/AN *regarding the extent of the compliance of the European Commission EU cohesion policy with the fundamental rights enshrined in the Charter of Fundamental Rights*, decision of 5.5.2015. For the ex-post control on the ways the institutions involved responded to proposals made in EO's inquiries, see *Putting it Right! How the Institutions Responded to the Ombudsman*, reports annually published in the EO website.

[14] For example, the significant number of individual complaints alleging maladministration in the use of age limits for recruitment justified the European Ombudsman's inquiry 626/97/BB, decision of 4.11.1998.

[15] The EO can also carry out targeted consultations. The Commission in the above cited Communication on the Ombudsman Statute, suggested the drawing up of specific criteria for cases where public consultations are expected and for what purpose, see COM (2019) 533, *op. cit.*, p. 8.

[16] *Strategic initiative on transparency of Council preparatory bodies in the negotiation of EU legislative acts*. Case OI/2/2017/TE, decision of 15.5.2018; *strategic initiative on the transparency of the three preparatory bodies that are involved in preparing Eurogroup meetings* OI/1/2019/MIG, decision of 3.12.2019.

[17] Case OI/8/2015/JAS *on the transparency of trilogues*, decision of 2.7.2016 containing specific proposals. For a more recent case on a complaint regarding access to trilogue see case 360/2021/TE *on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions*, decision of 20.10.2021.

[18] The Ombudsman opened the own-initiative inquiry after receiving a number of complaints from citizens who had tried to launch ECIs. OI/9/2013/TN *on the European Citizens Initiative*. The aim was to encourage and to support efforts to improve the procedure. On 15 July 2014, the Ombudsman sent the results of its inquiry, together with the contributions received in reply to its consultation, to the Commission, which later issued guidelines to ameliorate the ECI.

[19] These are classified as *proactive work*, see for example, the EO *Annual Report 2020*.

[20] See European Union Ombudsman Report, *Putting it Right? How the EU institutions responded to the EO in 2019*, p. 13.

citizens as possible, without necessarily launching an inquiry"[21]. A strategic initiative is conceived as a less "intrusive action than an inquiry and allows the EO to collect information, to form a clearer picture of the situation also with a view to a possible future inquiry.

Strategic initiatives respond to public interest, especially in cases where private individuals cannot make a complaint, that is when no alternative tools exist in the EU legal order to consider the issue. They might have a "anticipatory" function[22], as in the strategic initiative requiring the proactive publication of key negotiating documents in the context of Brexit negotiations[23]. A similar function is performed by the strategic initiative in the context of the upcoming revision of EU legislation related to tobacco products (SI/1/2021/KR[24]). It is also possible that strategic initiatives accomplish a guiding function when the EO comes up with recommendations[25].

These activities have been contested because they would not be linked to complaints addressed to the EO and they would conflict with the principle of conferral[26]. The present author does not consider strategic initiatives and inquiries incompatible with the rationale of the EO's task of contributing to the strengthening of good administration in the EU, as long as they concern "administrative activity". For example, the Council opposed the above-mentioned EO trilogue inquiry as not falling within the mandate of the EO as "the organization of the legislative process cannot be considered an administrative activity"[27]. Indeed, the inquiry did not concern the organisation of the legislative process but the issue of access to documents and thus it fully fitted within the EO's competencies. Through strategic initiatives the EO controls "the administration in general, to enhance its accountability and to help improve its quality"[28]. Thus, as long as the EO does not get

[21] European Ombudsman, *Own initiative inquiries*, Thematic Paper, 9.10.2017, available at https://www.ombudsman.europa.eu/en/thematic-paper/en/84478. According to the *Annual Report 2020*, *op. cit*., "In addition to the Ombudsman's core work on complaints, the Ombudsman also conducts wider strategic inquiries and initiatives into systemic issues with EU institutions", p. 27.

[22] In her speech of 30.5.2012, *The Role of the European Ombudsman in the Protection and Promotion of Human rights*, the EO specified that "Proactivity means (a) taking action to anticipate the needs of citizens and other stakeholders, (b) putting in place policies and procedures capable of channelling behaviour in appropriate ways and (c) preventing problems from arising".

[23] SI/1/2017/KR, decision of 11.2.2019, where the EO asked the European Commission "to ensure transparency during the upcoming Brexit negotiations".

[24] SI/1/2021/KR, case closed the 12.7.2021.

[25] The strategic initiative on multilingualism closed with a set of 'practical recommendations', to guide the EU administration on the use of official EU languages when communicating with the public. SI/98/2018/DDJ. Strategic initiative SI/7/2021D delivered a short guide for the EU administration on policies and practices to give effect to the right of public access to documents. See also the initiative on ECI, OI/9/2013/TN, *op. cit*.

[26] T. STEIN, *"A Supervisory Agency of Its Own Making?: The Questionable Political Agenda of the Current European Ombudsman, VerfBlog,* 2019/9/01, https://verfassungsblog.de/a-supervisory-agency-of-its-own-making/, According to the author *Strategic initiatives with no real link to complaints look like a political agenda.*

[27] https://www.politico.eu/article/emma-oreilly-ombudsman-eu-juncker-transparency/.

[28] A. PETERS, *The European Ombudsman and the European Constitution*, in *Common Market Law Review*, 2005, 42, 3, pp. 697-743.

into the merits of the legislation[29], the EO initiatives are legitimate and compatible with her/his mandate.

Truly, the EO's competence does not only extend to cases of alleged maladministration as an instrument of non-judicial protection of EU citizens but covers the promotion of good administration. According to R. Mastroianni[30], there is a new concept of good administration, one that positively influences EU public bodies when they "shape" rules. The new approach consists in adopting a proactive approach[31] and in preventing cases of maladministration rather than reacting to them. This is made clear, for instance, when the EO suggests way of improving a situation[32] also in cases where no maladministration is found[33] or in strategic initiatives such as the one commented in this paper, where the EO decides to turn her attention to a specific topic that she considers worth monitoring[34].

Another Author correctly notes: "since its inception in the beginning of the 19th century, an Ombudsman as an institution has aimed at performing the following two functions: promoting the improvement of public administration and protecting human rights that have been violated as a result of actions or omissions of public authorities and civil servants. In the work of any ombudsman, both functions are tightly linked, one to the other, intertwined and manifested, although in specific conditions either one or the other may come to the fore"[35]. The same A. writes: "promoting good

[29] "In evaluating the actions of the Commission in formulating legislative proposals, the Ombudsman's role is not to substitute his judgment for that of the Commission but to check that correct procedures were followed and that there was no manifest error of appraisal." Case 875/2011/JF opened on Friday | 01 July 2011 - Decision on Thursday | 27 June 2013. See also European Ombudsman Case 417/2015/NF, point 11. In case of legislative initiative by citizens, European Ombudsman, Case 1609/2016/JAS the EO stated: "In the 'Stop Vivisection' complaint that the Commission has a 'duty to explain, in a clear, comprehensible and detailed manner, its position and political choices regarding the objectives of the ECI'. N. VOGIATZIS, *Between discretion and control: Reflections on the Institutional Position of the Commission within the European citizens' initiative process*, in *European Law journal*, 23, 3-4, 2017, pp. 250-271. See also on trilogue M. HILLEBRANDT, P. LEINO-SANDBERG, *Administrative and judicial oversight of trilogues*, in *Journal of European Public Policy*, 28, 1, 2021, pp. 53-71. See also Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, where maladministration was found. The EO submitted a Special report to the EU Parliament on the issue.

[30] R. MASTROIANNI, *op. cit*. p. 197.

[31] S. KOTANIDIS, *The European Ombudsman. Reflections on the Role and its Potential***,** European Parliamentary Research Service, November 2018, PE 630.282, p.9.

[32] See, for example, strategic initiative, SI/7/2016/KR, EU Transparency Register for interest representatives, 26.5.2016.

[33] Ombudsman makes suggestions to improve accountability of Frontex's work, and to ensure that people know there is a complaints mechanism they can use if their fundamental rights have been breached. OI/5/2020/MHZ, 17.6.2021.

[34] Another initiative that illustrates the proactive and the preventive approach of the EO is the strategic initiative on Artificial Intelligence, assessing the implications of artificial intelligence (AI) for public administrations. See SI/3/2021/VS -21.6.2022. One can also mention the public consultation to assess the transparency and public participation in EU environmental decision making, whose aim, according to the EO in the presentation of the consultation, is "to evaluate whether citizens have access to up-to-date information in an area of high public interest". The consultation runs until 15.12.2022.

[35] A. AVTONOMOV, *op. cit.* See also A. WILLE, M. BOVENS, *Watching EU watchdogs Assessing the Accountability Powers of the European Court of Auditors and the European Ombudsman*, in *Journal of European Integration*, 44, 2, 2022, pp.183-206: "The EO operates as a proactive creative system-fixer. Using the knowledge that the EO draws from handling complaints, it develops initiatives to improve

administration/repairing maladministration, on the one hand, and protecting human rights, on the other hand, are, to my mind, two sides of the same coin and that is why they are inseparable in the work of an ombudsman"[36].

3. European Ombudsman's scrutiny of the EU administrative function in external relations and human rights: a selection of cases on migration, asylum, and international agreements

To illustrate the growing attention of the EO towards the external actions of EU institutions and bodies and human rights one can refer to various strategic initiatives and inquiries.

The strategic inquiries aiming at scrutinizing the external administrative activities of the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Asylum were justified by the extended responsibilities and mandate of the two bodies[37]. Frontex's administrative functions have a considerable effect on human rights of the persons involved, as the Agency plays a key role in migration policy through, *inter alia*, joint operations and cooperation also with third countries, or cooperation regarding the readmission into third countries of those denied asylum in the EU[38]. Back in 2012 the EO launched her own initiative[39] on "how the European Border and Coast Guard Agency (Frontex) implemented Regulation 1168/2011 and on Frontex's strategy on the protection of human rights". The EO recommended the implementation of an individual complaint mechanism which was later established by regulation 1624/2016 and confirmed by regulation (EU) 2019/1896 (article 111). Afterwards, the EO opened an inquiry on her own initiative on "how Frontex has dealt with alleged breaches of fundamental rights

administration by EU institutions and goes beyond the mere handling of cases of maladministration. EU watchdogs are increasingly expected to become improvement oriented in their work promoting best practices and institutional learning".

[36] *Id*.

[37] See regulation 2019/1896 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, *OJ L 295, 14.11.2019, p. 1.* Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 *on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, in OJ L 468, 30.12.2021, p. 1. D. VITIELLO, E. DE CAPITANI, *Il regolamento (UE) 2019/1896 relativo alla riforma di Frontex e della guardia di frontiera e costiera europea: da "fire brigade" ad amministrazione europea integrata?*, in *SIDI Blog*, 6.12.2019; M. COMETTI, *La trasformazione dell'ufficio europeo di sostegno per l'asilo in un'agenzia per l'asilo: una lettura in prospettiva della proposta di riforma nel contesto del nuovo patto europeo su migrazione e asilo*, ivi, 2021, n. 2, pp. 71-94.

[38] See also the Africa-Frontex Intelligence Community (AFIC). AFIC – a framework for cooperation with 31 African States. On the externalization of border management and on the challenges that cooperation poses to the EU governance system and its values, see, *ex multis*, L. MARIN, *The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions*, in *European Public Law*, 2020, n. 1, pp. 157-180. M. SCIPIONI, *De Novo Bodies and EU Integration: What is the Story behind EU Agencies Expansion*?, in *Journal of Common Market Studies*, 2018, Vol. 56, n. 4, pp. 768-784.

[39] Case OI/5/2012/BEH-MHZ, case closed with recommendation on the 14.11.2013.

through its complaint mechanism"[40]. The inquiry identified areas of improvement and made some suggestions to strengthen the independence of the mechanism and to encourage people to use it. Another strategic inquiry was opened in March 2021 on "how Frontex complies with its fundamental rights and transparency obligations under Regulation 2019/1896"[41], that is how it decides to suspend, terminate or not launch an activity due to fundamental rights concerns, and how it ensures accountability in relation to its new enhanced responsibilities under Regulation (EU) 2019/1896[42]. The EO concluded the inquiry by identifying several areas where Frontex can improve its practices, which include publishing summaries of its operational plans, and further training its fundamental rights monitors. One could also mention a recent investigation by the EO following a complaint by several civil society organisations according to which Frontex does not carry out prior human rights risk and impact assessments (HRIA) in relation to its technical assistance engagement with non-EU countries. The case was opened on 5 October 2022 and has not been closed yet at the time of writing[43].

The strategic initiative concerning the European Union Agency for Asylum "How the EU Asylum Agency complies with its fundamental rights obligations and ensures accountability for potential fundamental rights violation" aims at verifying if the latter "has sufficiently anticipated challenges relating to accountability and its fundamental rights obligations deriving from its expanded mandate". More specifically, the EO asked several questions concerning: the Agency's monitoring mechanism, which will enter into force at the end of 2023; the Agency's engagement with non-EU countries; the complaints mechanism and fundamental rights office. This is a clear example of both preventive and promotional objectives pursued by the EO in contributing to EU good administration. The EO underlines that she intends "to draw the Asylum Support Office's attention to issues that enable [it] to give full and meaningful effect to these obligations". The strategic initiative has not been closed yet at the time of writing.

In two more recent cases, the Ombudsman made an inquiry, in this case following a complaint, on presumed maladministration by the Commission[44] and by the European Council[45] which refused to provide public access to certain informal migrant-return agreements that are in place with several non-EU countries. These are bilateral

[40] OI/5/2020/MHZ, decision of 15.6.2021.
[41] OI/4/2021/MHZ, decision of 17.1.2022.
[42] The new regulation created a standing corps that can be deployed to the EU's borders, and which carries out tasks related to border management, migration management, rapid border interventions and return operations. In a letter of 18 July 2022, the Ombudsman asked, inter alia "to clarify, what steps Frontex has taken to put in place the remaining fundamental rights measures foreseen in Regulation 2019/1896, and what information is available to the public about this". X/2021/MHZ.
[43] 1473/2022/MHZ. *How the European Border and Coast Guard Agency (FRONTEX) assesses the potential human rights risk and general impact before providing assistance to non-EU countries to develop surveillance capabilities*.
[44] Case 1271/2022/MIG on the *Commission's refusal to grant public access to the EU's informal readmission arrangement with the Gambia*.
[45] The cases concern informal migrant-return agreements with the Gambia (case 1271/2022/MIG), and other non-EU countries (case 815/2022/MIG). Case opened on the 2nd of May 2022 and closed on the 2nd of September.

instruments[46] governing technical matters of readmission. There is no room here to debate the nature of those instruments (the contracting parties declare in the text that these are non-binding acts)[47], but it is important to emphasize that the principle of good administration also applies to informal or non-binding international instruments, as previously confirmed in the EO's inquiry concerning the EU-Turkey Agreement of 18 March 2016. In that case the EO underlined that, irrespective of the political dimension of the agreement, impact assessment was required as the Commission was called upon to implement the Agreement through administrative actions[48]. More specifically, the EO considered that the political nature of the EU-Turkey agreement did not absolve the Commission of its responsibility to ensure that its activities are in conformity with EU human rights commitments. In her assessment, the EO clarified, consistent with the EO idea of good administration, that "for *all* policies and actions of EU institutions and bodies which impact on human beings, any evaluation should contain an *explicit* consideration of the human rights impact of those policies and actions"[49].

In the readmission case, the EO closed the inquiry with a decision of no maladministration, as she considered that the Council did not commit a manifest error in refusing disclosure of the texts of the required international instruments. The EO accepted the Council's reason to refuse access, that is "that disclosure would damage the climate of confidence with the non-EU countries concerned, thus weakening the EU's negotiating position and affecting non-EU countries' willingness to cooperate in the ongoing implementation of arrangements that have been concluded". While a wide margin of discretion is accorded to the Council, it was in any case made clear that "every effort should be made to reassure the public that the fundamental rights of migrants are respected, and adequate safeguards are in place in this process". In this case, the EO reiterated that the principle of good administration applies to informal agreements, and she demonstrates that great attention is paid to transparency of the procedures in the EU external policy.

A further illustration of the EO' attention for correct procedures that may respond to the obligation to respect human rights or not to contribute to their violations is provided by other investigations and inquiries. A complaint was lodged against the Commission because this institution did not present a human rights Impact Assessment of the EU FTA Agreement with Vietnam[50] and for lack of sustainability impact assessment before the

[46] These agreements are called "standard operating procedures", or "best practices", or "readmission procedures", or understandings, such as the *Joint Way Forward* concluded by the Union with Afghanistan.
[47] F. CASOLARI, *The Unbearable lightness of soft law: in the European Union's Recourse to informal instruments in the fight against irregular migration*, in F. CASOLARI, F. IPPOLITO, G. BORZONI, *Bilateral Relations in the Mediterranean - Prospects for Migration Issues*, Cheltenham, Northampton, Edward Elgar, 2020, pp. 215-228.
[48] Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18 January 2017.
[49] Emphasis on the original.
[50] The complaint was filed by the International Federation for Human Rights (FIDH) and the Vietnam Committee on Human Rights (VCHR). The central question was whether the Commission discharged its

end of the EU-Mercosur trade negotiations[51]**.** In both cases, the EO concluded that the failure of the Commission to carry out an impact assessment constituted maladministration. Following the EO decision the Commission reviewed its approach on how to evaluate impact of free trade agreements on human rights[52].

As for access to documents related to agreements one can mention the conclusion of the EO that the Council has committed maladministration by not providing full access to legal opinion related to the EU-UK trade agreement. For the EO full access to an opinion of the Legal Service of the Council of the EU on the legal nature of the EU-UK Trade and Cooperation Agreement should be made available[53]. Another EO own-initiative inquiry has been undertaken on the process of negotiations of TTIP[54]. In the letter addressed to the Commission to explain the reason for the inquiry the EO wrote: "The ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations are of significant public interest given their potential impact on the lives of citizens. As European Ombudsman, what is of particular concern to me is the extent to which the public can follow the progress of these talks and contribute to shaping their outcome".

4. The European Ombudsman's strategic initiative on human rights and international trade agreements

With the strategic initiative on human rights and international trade agreement the EO intends to seek information and to learn more about a symbolic but also much-debated instrument in the EU's external relation policy toolbox to support human rights compliance and democracy worldwide. The interest of this initiative goes beyond the human rights and trade nexus, as[55] it displays the value of procedures and the Commission's administrative function in external relations. All questions (and answers) are to be read in the perspective of good administration, as interpreted by the EO. The questions included in the EO 2021 July letter and in the document issued in preparation

obligation to assess human rights impacts by conducting the 2009 Trade SIA, or whether an additional human rights analysis of the planned EU-Vietnam trade agreement was required.

[51] European Ombudsman, Decision in case 1026/2020/MAS *concerning the failure by the European Commission to finalize an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations*, 19 March 2021, https://www.ombudsman.europa.eu/fr/press-release/en/139425. The Commission finalized the SIA in March 2021, see https://policy.trade.ec.europa.eu/news/commission-publishes-final-sia-and-position-paper-eu-mercosur-trade-agreement-2021-03-29_en.

[52] See answer of the Commission to the EO in case *SI/5/2021/VS Report on the meeting of the European Ombudsman's strategic initiative team with representatives of the European Commission and the European External Action Service* and the Staff Working Document was published on *Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement*.

[53] Case 717/DL/202, decision of 17.6.2022,

[54] N. VOGIATZIS, *The European Ombudsman and Good Administration in the European Union*, Palgrave MacMillan, 2018. See the own-initiative inquiry, OI/10/2014/RA (*Transparency and public participation in relation to the Transatlantic Trade and Investment Partnership ('TTIP') negotiations*, 29.7.2014.

[55] LAINO and CREMONA note "a tendency towards proceduralisation, constraining the ways in which policy discretion is exercised while avoiding interference with substantive policy choices", *op. cit*. p. 699.

for the 2022 February meeting with all the answers of the Commission have been jointly considered.

4.1. Human rights clauses and other human rights tools in EU international trade agreements

In the European Union's external policy, the issue of human rights can be approached from two different perspectives.

The first one is the prohibition of adopting any act that can either violate or that can negatively affect individuals' human rights. Human rights can be jeopardized by the application of an EU agreement which could contribute, although indirectly, to the violations of fundamental rights[56]. To verify such a possible interference, the Commission is required to carry out[57] human rights impact assessment, a procedural obligation through which possible human rights violations can be detected. To avoid those risks, the Commission can suggest the adoption of measures to prevent or to remedy such consequences.

The second perspective of the human rights in EU external action[58] is concerned with promoting respect for HR by third countries which conclude agreements with the EU. This objective can be pursued through positive (granting of benefits) or negative

[56] For example, enhancing competition and encouraging the reduction of labor unions' rights; the increase of agricultural product exports might cause a shortage in the country etc. See C. RYNGAERT, *EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations*, in *International Community Law Review*, *20*, 3-4, 2018, pp. 374-393 and J. ZERK, R. BEACOCK, Advancing *human rights through trade. Why stronger human rights monitoring is needed and how to make it work*, Chatam House, Royal Institute of International Affairs, Research paper, May 2021, available https://www.chathamhouse.org/sites/default/files/2021-05/2021-05-26-human-rights-trade-zerk-beacock.pdf.). They underline that the trade agreement might have effect on the economies of the trading partners, on the availability or prices of food, medicines or other essential items or services.

[57] For all policies and actions of EU institutions and bodies which have an impact on human beings, any evaluation should contain an explicit consideration of the human rights impact of those policies and actions. In her decision on the complaint 1409/2014/MHZ, the EO noted: *"*The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the project's life. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures must be decided upon before the agreement is entered into". On the own initiative *on export credits for coal-fired electricity generation projects* it was established that the European Commission had wrongly decided not to carry out a human rights impact assessment before agreeing to new provisions, which were developed within the Organisation for Economic Cooperation and Development (OECD). See also the Opinion of Advocate General Wathelet delivered on 13 September 2016 in case 104/16, *Council v. Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario)*, ECLI:EU:C:2016:677: para. 228 on the relevance of IA - assessing the risk of possible human rights violations.

[58] See E. BENVENISTI, *The E.U. Must Consider Threats to Fundamental Rights of Non-E.U. Nationals by Its Potential Trading Partners*, Global Trust, 13 December 2015, available on http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-tofundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners and A. GANESH, *The European Union's Human Rights Obligations Towards Distant Strangers*, in *Michigan Journal of international Law*, 37, 3, 2016, pp. 475-538. G. DE BURCA, *The Road not Taken: the European Union as a Global Human Rights Actor*, in The *American Journal of International Law*, vol. 105, no. 4, 2011, pp. 649-693.

conditionality (restrictive measures) which can take the form of human rights clauses contained in EU agreements. The EO's Human rights clause inquiry examined in this paper concerns the second perspective as the EO requires the Commission to explain how it manages human rights clauses included in EU agreements in the preparatory and enforcement phases. Although the EO's strategic initiative discussed in this paper mainly concerns human rights clauses, some of the questions addressed to the Commission also relate to Trade and Sustainable Development (TSD) chapters in free trade agreements concluded by the EU since 2009 (FTA with South Korea). In its answer, the Commission also refers to the GSP mechanism of conditionality[59].

The "essential element clause" – usually contained in the first part of an agreement, devoted to general principles – defines respect for non-trade values such as HR, democracy, the rule of law[60], as an essential element of the agreement[61]. Taken by itself this provision can be referred to as a legal basis for discussing issues related to non-trade values between the contracting parties. The Commission has defined the essential element clause as a "platform for discussion" with its partners. Indeed, the incorporation of an HRC in an agreement concluded by a third State with the EU makes it impossible for the Contracting Parties to claim that human rights, democratic principles, and the rule of law, are domestic issues and thus fall within the exclusive jurisdiction of the State. For the Commission the inclusion of an HRC into an agreement "is not a way of imposing EU standards on third countries but promoting compliance with international conventions and agreements on matters such as human rights". This means that no new standards are added but that an HRC is a tool to further compliance of international obligations that already bind the EU and its partner(s). The essential element clause is complemented by a non-execution clause establishing the right of one of the Parties to take "appropriate

[59] See also 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 L 303, 31.10.2012, p. 1.*

[60] For an example of negotiating directives including an HRC see Council of Ministers (2018) Negotiating Directives for a Partnership Agreement between the European Union and Its Member States on the One Part, and with Countries of the African, Caribbean and Pacific Group of States, on the Other Part, 8094/18, 21 June. Available at: https://data.consilium.europa.eu/doc/document/ST-8094-2018-ADD-1/en/pdf. See also *Recommendation for a Council Decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and conclusion of a Protocol with the Kingdom of Morocco*, COM (2018) 151 final.

[61] The underlying premise is to enter into a relationship with States that share the EU's fundamental values. The clause seems to assume that at the time of concluding the agreement no serious violation occurs. In January 1995 the European Parliament called for the suspension of the Partnership Agreement with Russia because of human rights violations committed by the Russian government in Chechnya, making direct references to the human rights clause. In 1997 the EU Parliament consented to the treaty because of the continuing cease-fire in Chechnya. HRC seems thus only concerned with the behaviour of the parties to the agreement after its entry into force. See the Opinion of AG Whetelet delivered on 13 September 2016 in case 104/16, *Council v. Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario)*, ECLI:EU:C:2016:677: "In my view, neither the Council nor the Commission nor any of the interveners put forward a convincing reason why, given these requirements, the EU institutions are not required, before the conclusion of an international agreement, to examine the human rights situation in the other party to the agreement and the impact which the conclusion of the agreement at issue could have there in this regard", para. 262.

measures", meaning that it can terminate fully or partially suspend the agreement (unilaterally) if it considers that the other Party has committed a serious breach of an essential element[62]. These *measures* are adopted after consultation with the other party, except in cases of extreme urgency, that is in case of very serious breaches of non-trade values. The combination of the two provisions allows the EU (or the other Contracting Party) to suspend the agreement or declare its termination according to the rules of the Vienna Convention on the law of Treaties (article 60).

Some of the questions addressed by the EO to the Commission related to Trade and Sustainable Development (TSD) chapters in free trade agreements concluded by the EU since 2009 (FTA with South Korea). Trade and Sustainable Development (TDS) chapters are a distinctive feature of the EU's more recent Free Trade agreements[63]. The rationale of those provisions is that trade is a driver for sustainable development, which, according to the UN approach, includes labour rights and environmental protection. Under TDS provisions, Contracting Parties are required to apply international labour and environmental standards by ratifying some ILO conventions and Multilateral Environmental Agreements (MEAs). Parties shall also abstain from lowering the environmental and labour legislation requirements to encourage international investment and are compelled to progressively increase the level of protection. TDS chapters represent a promotional model[64] as they establish cooperation and dialogue between the parties and civil society. Dispute settlement is provided for, which can eventually lead to a Panel report (as it happened with South Korea) but the winning Party cannot (yet) impose sanctions[65].

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[62] L. BARTELS, *A Model Human Rights Clause for the EU's International Trade Agreements*, (February 1, 2014). German Institute for Human Rights, 2014, Available at SSRN: https://ssrn.com/abstract=2405852.

[63] European Economic and Social Committee, *Trade and sustainable development chapters in EU Free Trade Agreements* available on the website of the EESC. For the different interpretations of the aims pursued by the TSD chapters see J. HARRISON M. BARBU, L. CAMPLING, F. EBERT, *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, in *World Trade Review*, *8*(4), 2019, pp. 635-657. The application of these provisions can positively affect the lives of workers in partners countries; improve the conditions of workers in internationally traded goods and services. Such a reading is supported by the fact that all TSD chapters contain an obligation to monitor the impact of the trade agreement itself on sustainable development.

[64] M. MOORE, C. SCHERRER, *Conditional or Promotional Trade Agreements - Is Enforcement Possible? How International Labour Standards Can Be Enforced through US and EU Social Chapters*, Core Labour Standards Plus, Friedrich Ebert Stiftung, 2017, www.academia.eu.

[65] See infra on the new approach of the Commission towards TDS. The dispute settlement process established with reference to provisions in TDS Chapters can be nonetheless effective. After the Panel conclusions in the dispute with South Korea, this country ratified three out of four fundamental International Labour Organization (ILO) conventions P. MAZZOTTI, *Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions*, European Law institute papers 2021, https://www.europeanlawinstitute.eu. Some consider TDS implementation one of the weakest elements of these chapters. J. HARRISON ET AL., *Governing Labour Standards through FTAs*, in *Journal of Common Market Studies*, 2019 Volume 57. Number 2. pp. 260-277; K. HRADILOVÁ, O. SVOBODA, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness*, in Journal of World Trade 2018, p. 1019- 1042; they argue that TSD chapter enforcement should be strengthened through civil society participation, cooperation between the Parties and monitoring. See also G. MARIN DURÀN, *Sustainable development chapters in EU free trade agreements: Emerging compliance*

4.2. The European Ombudsman's questions regarding the preparatory stage of human rights clauses

The EO questions to the Commission on the preparatory stage of human rights clauses focus on the principles and criteria to determine whether to include a human rights clause in an international agreement and on the content of the clause.

The decision to incorporate an HRC in all EU international agreements does not seem to raise any specific issue in the stage of pre-negotiation. In fact, HRCs are a well-established component of the EU external relations policy. According to several Commission communications dating back to 1995[66], HRCs have to be included in all EU agreements. However, an examination of the practice tells us another story. First, EU sectoral agreements do not usually contain an HRC. The reason is that HRCs are considered "political clauses" and, as such, they do not seem "appropriate" for sectoral agreements, according to a non-published document reporting the Commission's position[67]. One can understand the reasons of such exclusion, since an HRC often meets the opposition of the EU partners. The EU insists on the incorporation of the clause when an extensive relationship is being negotiated. The omission of an HRC in a sectoral agreement can be compensated by the so-called *passerelle* clause which links the sectoral (especially trade) agreement to the framework cooperation agreement concluded with the same partner and which contains an HRC (the essential element and the non-execution provisions), thus making it possible for the parties to adopt "appropriate measures" under the sectoral/trade agreement[68] as a consequence of serious violations of the values indicated in the essential element provision included in the Cooperation/association agreement. The inclusion of the "*passerelle* clause" in sectoral agreements is a compromise solution that is, however, not always available, as there are self-standing sectoral agreements. Unfortunately, the EO did not ask the Commission to clarify if it intends to apply a more consistent approach as regards the formulation of the *passerelle* clauses, as some agreements, such as the Framework Cooperation agreement with Korea,

issues, in *Common Market Law Review*, 2020, n. 4, p. 1031-1066, who criticizes a sanctions-based solution to improve enforcement of TSD chapters.

[66] Commission Communication, *Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries*, COM (95) 216 final, 23.5.1995. Council of the European Union, *Conclusions on human rights clauses in Community agreements with non-member countries of 29 May 1995*, Bulletin of the European Communities, 5/1995, 9, point 1.2.3. See also the *European Parliament Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries* (COM (95)0216 - C4-0197/95), OJ C *320, 28.10.1996, p. 261*.

[67] This unpublished document is mentioned by L. BARTELS, BENOIT-ROHMER ET AL, *Human Rights Mainstreaming in the EU's External Relations*, European Parliament Study, EXPO/B/DROI/2008/66, September 2009.

[68] See the agreement with Iraq OJ L 204 del 2012. See on the effectiveness of the linking clause, the EO inquiry on the lack of an IA for the Vietnam trade cooperation agreement, cited above.

are rather vague on the relationship between the trade agreement and the framework cooperation agreement[69].

It is worth mentioning that an HRC is not included in Investment agreements. This situation has risen concern on the part of non-intergovernmental organisations[70]. Recently, thirty-five civil society organizations issued a *Joint Appeal*[71] *on the Inclusion of Enforceable Human Rights clauses in the Eu-China Comprehensive Agreement on Investment*[72]. However, the inclusion of an HRC does not seem an appropriate tool for human rights protection in the framework of those agreements, because the suspension of an investment agreement as a form of sanction for HR violation by the State of investment might be detrimental for the investors of the Contracting Party which suspends the agreement[73].

Human rights (or other values such as health, protection of the environment, etc.) can be affected by investors' activities. Thus, a reference to human rights, environmental protection, labour rights, rights of indigenous people, health, etc. can be included in investment treaties[74] to establish that investments shall be consistent with those values. Investors do not have positive obligations – in the absence of a provision contained in the state-investor treaty – to respect human rights of the host State population[75] and this is why the European Parliament has called for the inclusion of a corporate social responsibility clause in international agreements concluded by the EO[76]. The above-

[69] L. BARTELS, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Expo/B/Droi/2012-09 February 2014, Pe 433.751.

[70] https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2542. The 2013 impact assessment envisaged the inclusion of an HRC (see *Final IA on EU-China trade and investment relations, authorizing the opening of negotiations on an investment agreement between the European Union and the People's Republic of China*, SWD(2013) 185 p. 48. The EU-China Agreement on geographical indication in force since March 1, 2021, does not contain a reference to human rights or an HRC. See European Parliament *non-legislative resolution of 11 November 2020 on the draft Council decision on the conclusion of the agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications* (08359/2020 – C9-0298/2020 – 2020/0089M(NLE)).

[71] The text is available in the FIDH website https://www.fidh.org/en/international-advocacy/european-union/joint-appeal-on-the-inclusion-of-enforceable-human-rights-clauses-in, 15.01.2021.

[72] The *agreement in principle* was finalized in December 2020. The Agreement ratification was suspended due to Chinese sanctions against members of the EU Parliament. The Agreement in principle contains a reference to the Universal declaration of human rights in the preamble. L. COTULA, *EU–China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section*, in *Business and Human Rights Journal*, 2021, 6(2), pp. 360-367.

[73] Investment protection agreements might address human rights issues by including a Corporate Social responsibility clause, as the one contained in the Comprehensive Economic and Trade Agreement (CETA) negotiated between the EU and Canada.

[74] F. G. SANTACROCE, *The Applicability of Human Rights Law in International Investment Disputes*", *ICSID Review, Foreign Investment Law Journal*, 2, 34, 1, 2019, p. 136-155. B. CHOUDHURY, *Human Rights Provisions in International Investment Treaties and Investor-State Contracts*, in S. SCHILL ET AL., eds., *Investment Protection, Human Rights, and International Arbitratio*n, Edward Elgar July 4, 2020, available at https://ssrn.com/abstract=3643407 or http://dx.doi.org/10.2139/ssrn.3643407.

[75] Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. República Argentina (ICSID Case NoARB/07/26), Award of 8 December 2016, para. 1209.

[76] States' parties can undertake the obligation to encourage and promote CSR schemes, thus affecting private companies' behaviour. Provisions in free trade and investment agreements are not addressed to private companies but CRS obligations recognize the effect that private companies' behaviour can have on

mentioned *Joint Appeal on the Inclusion of Enforceable Human Rights clauses in the Eu-China Comprehensive Agreement on Investment* also required the inclusion in a TDS chapter of a provision reaffirming the obligations of State parties to protect human rights, as set out in international law. This chapter should include the regulation of companies and the provision of effective access to remedies and tribunals when they violate human rights, cause detriment to or contribute to harming them.

From a different perspective, investment treaties might also be problematic for human rights because they might limit the regulatory space of the host State. From this angle, a possible solution could be modelled on the CETA (EU and Canada free trade agreement[77]) which exempts the parties from investment treaty obligations if they intend to protect health, environment or human rights.

The issue of the inclusion of an HRC can also be considered in relation to Readmission agreements (RA) concluded by the EU with a third State (a question not addressed by the EO). Readmission agreements do not provide for such clauses, and concern for human rights violations in RA materializes in a non-affection clause[78] contained in the preamble[79] or in a dedicated provision[80]. Among EU informal readmission agreements, only the *Joint Way Forward* with Afghanistan contains a non-affection clause. The inclusion of the non-affection clause seems a solution of compromise which accommodates the interest of the EU and its member States to ensure a return of illegal migrants from the territory of the EU to their country of origin, the effectiveness of readmission procedures and the protection of human rights. The inclusion of an HRC and a suspension clause in an RA is highly problematic. First the aim of the HRC is to allow the European Union to react to serious violations of human rights or of other non-trade values committed by the other Party and it is not an appropriate tool to

labour and environmental standards. See ILO Research Paper 13. J. WALESON, *Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investments*, in *Legal Issues of Economic Integration*, 42, 2, 2015, pp. 143-174. See also F. ROMANIN JACUR, *Corporate Social Responsibility in Recent Bilateral and Regional Free Trade Agreements: an Early Assessment*, in *European Foreign Affairs Review*, 23, 4, 2018, pp. 465-483.

[77] See the "EU-Canada Comprehensive Economic and Trade Agreement (CETA)" page of the official website of the European Commission, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en.

[78] See for example article 18 of the Readmission agreement between the EU and Belarus: "This Agreement shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and Belarus arising from international law including from international conventions to which they are party, in particular from the international instruments listed in Article 2, and from: international conventions determining the State responsible for examining applications for asylum lodged; international conventions on extradition and transit; and multilateral international conventions and agreements on the readmission of foreign nationals". OJ L 181, 9.6.2020, p. 3.

[79] The RA with Russia refers to the Universal declaration on Human Rights, to the UN civil and political rights covenant, to the Refugees' Status Convention, to the Convention against torture, OJ L 129 17.5.2007, p. 40; the RA with Pakistan makes a general reference to rights and obligations of the Parties under international law. See OJ L 287/52, 4.11.2010 p. 52. A list of readmission agreements is reported on the EU Website, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.

[80] RA with Cape Verde, article 17, *OJ L 282, 24.10.2013, p. 15; RA with Turkey article 18, OJ L 134, 7.5.2014, p. 3. RA with Azerbaijan, article 18, OJ L 128, 30.4.2014, p. 17.*

react to violations of human rights of returnees by the country of origin or of readmission. But at the same time, the non-affection clause does not appear an adequate solution either, especially if the EU partner has not ratified the key international human rights conventions for the protection of returnees or the Refugees Convention (as in the case of Pakistan). In this case, for example, the person readmitted in this country risks indirect refoulement[81].

In synthesis, what one can infer from the answer of the Commission, which is substantially descriptive of the current practice, is a confirmation that the Commission intends to propose the inclusion of HRC in all trade and political framework agreements, while excluding mere sectoral agreements and to continue the usage of the *passerelle* clause. In any case, the definition of HRC as a qualifying feature of the EU external (and trade) policy and the insistence of the European Parliament that all agreements should include an HRC confirms that the issue is far from settled[82].

As for the substantive content, although HRCs have a similar structure, there is no standard HRC even if the reference to the UN General Assembly Universal Declaration of Human Rights, to democracy and the rule of law is common to most HRC. Some HRC mention other instruments such as the UN Charter the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990; to market economy (agreements with former Soviet states). A reference to territorial integrity is found in the Association agreement with Ukraine[83]. The 2009 Common Approach provides for the inclusion of a reference to non-proliferation of WMD and counterterrorism, the International Criminal Court and small arms and light weapons. These, however, are not qualified as an "essential element" which refers only to HR, the rule of law, non-proliferation. This is a relevant difference since only the violation of essential elements can trigger "appropriate measures".

In the perspective of the evolution of the content of the Clause, the Commission states that it will propose the inclusion of "respect for the Paris Agreement on Climate Change[84]

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[81] C. MOLINARI, *The EU Readmission Policy to the Test of Subsidiarity and Institutional Balance: Framing the Exercise of a Peculiar Shared Competence*, in *European Papers*, Vol. 7, 2022, No 1, pp. 151-170.

[82] EP is a strong supporter of the inclusion of HRC in all agreements, especially in trade and cooperation agreements. This position has been reiterated in the *Annual report on human rights and democracy in the world and the European Union's policy on the matter* – annual report 2021 (para 42) (PE696.496v02-00) (September 2021). See also *Human rights and democracy in the world and the EU's policy on the matter – annual report* 2019, para 39.

[83] The final part of the HRC (article 2 of the Association Agreement) specifies: "Promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement. OJ L 161 of 29.5.2014, p. 3. See N. GHAZARYAN, *A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood*, in *European Law Review*, 2015, n. 3, pp. 391-410.

[84] The commitment to ratify and enforce the Paris Agreement on Climate Change represents an innovation. On the necessity to reinforce the nexus between trade agreements and the Climate change Paris agreement see Council of the European Union, *Strengthening coherence between EU free trade agreements and the Paris Agreement on climate change - Information from the French, Spanish and Luxembourg delegations*, doc. 7016/19, 1 March 2019 considering the inclusion of commitments on fighting climate change in the HRC. See the Commission Communication *Trade Policy Review – an Open, Sustainable and Assertive*

as an essential element in all future agreements concluded by the EU"[85] as provided for in the EU-UK Trade and Cooperation Agreement[86]. At the end of the day, as the Commission specifies in the answer given to the EO, "the final wording (of the clause) is a product of negotiation between two partners" but the Commission tries to adapt the HRC to the different situations of the EU Partner.

4.3. The European Ombudsman's questions regarding the monitoring and implementation stages of human rights clauses

The implementation of human rights clauses and other human rights obligations requires the definition of benchmarks (a)[87], a process of monitoring (b), and the application of enforcement mechanisms (c).

a) Benchmarks.

Benchmarks[88] can refer to specific targets, and timeline indicators; for example, if the goal of the provision (the conditionality mechanism in the GSP system[89]) is the

Trade Policy, Brussels, 18 February 2021 COM(2021) 66 final. In recent agreements, the issue has been regulated in a provision *ad hoc*, which does not create real obligations and does not take the form of the HRC. See for example article 12.6 of the FTA between the EU and Singapore: "The Parties affirm their commitment to reaching the ultimate objective of the UN Framework Convention on Climate Change (hereinafter referred to as 'UNFCCC'), and to effectively implementing the UNFCCC, its Kyoto Protocol, and the Paris Agreement of 12 December 2015 in a manner consistent with the principles and provisions of the UNFCCC. They commit to work together to strengthen the multilateral, rules-based regime under the UNFCCC building on the UNFCCC's agreed decisions, and to support efforts to develop a post-2020 international climate change agreement under the UNFCCC applicable to all parties".

[85] See COM (2021) 66 final p. 14, *op. cit*.

[86] This is the first agreement concluded by the EU to include the commitment to fight against Climate change as an essential element. The EU-UK trade and cooperation agreement follows a more complex structure as far as the essential element clause is concerned. Title II: "Basis of the cooperation" contains provisions on shared "values": democracy and the rule of law (article 763); Fight against climate change (article 764) Countering proliferation of weapons of mass destruction (article 765) Small arms and light weapons and other conventional weapons (766); The most serious crimes of concern to the international community (article 767) Counter-terrorism (768); Personal data protection (769); Global cooperation on issues of shared economic, environmental and social interest (article 770); article 771 named *essential element clause* specifies that "Article 763(1), Article 764(1) and Article 765(1) constitute essential elements of the partnership established by this Agreement and any supplementing agreement.". article 772 (Fulfilment of obligations described as essential elements) is the clause that provides for the termination or suspension of the agreement or any supplementing agreement in whole or in part, in case of "a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements".

[87] M. VIVONA, I. MEIER, V APOSTOLOVSKI, M. MÖSTL, K. STARL, *EU practices on measuring human rights*, in *European Yearbook on Human Rights*, 2015, pp. *307-316.*

[88] For the notion of benchmark, see A. MIHR, *Human Rights Benchmarks for EU's External Policy* Publications Office of the European Union, EXPO/B/DROI/2011/15, PE 457.059, 2011.

[89] One can note that the Commission's proposal for the new GSP broadens the conventions that beneficiary countries must ratify in order to benefit from GSP+. These are: The Convention on the Rights of People with Disabilities; the Optional Protocol to the Convention on the Rights of the Child on the Involvement in Armed Conflict; the ILO Convention on Labour Inspection No. 81; the ILO Convention on Tripartite Consultations No. 144; and the United Nations Convention against Transnational Organised Crime. See Commisison Communication, *Proposal for a regulation of the European Parliament and the Council on*

ratification of some conventions by a State, the benchmark is the number of ratifications within a certain period of time. But in HRC benchmarks are not defined, since the clause usually refers to general concepts, with some exceptions as in the Strategic Partnership Agreement with Canada,[90] and in the Cotonou agreement with reference to the rule of law[91]. One cannot expect the HRC to contain a clear definition of measurable standards and criteria, if one considers that the HRC (the essential element provision) is a legal basis for discussion, cooperation and dialogue with EU partners on the basis of a long-term relationship. Besides, well-defined benchmarks would make the negotiations with EU partners even more complicated.

The absence of benchmarks does not seem to be one of the causes of the poor enforcement of the HRC as the non-execution provision is triggered only in cases of serious violations of the principles referred to in the essential element part of the clause when there are no doubts that those values have been violated. This has been confirmed by the Commission in its answer to the EO's specific question on how "a decrease in the level of human rights protection is measured and what circumstances would trigger the application of the 'non-execution' clause".

An interesting question made by the EO refers to the use by the Commission of the Charter of Fundamental Rights when verifying compliance in the context of trade agreements. The question seems misplaced: the Charter does not provide a parameter for compliance applicable to third States but only to EU Institutions (and in some cases to Member States) and bodies. For example, the Charter in 2009 became binding, and, as a consequence, a new Frontex regulation[92] was adopted, which instituted mechanisms and instruments to promote and monitor compliance with Frontex's obligations to respect fundamental rights. The above-mentioned first EO own-initiative inquiry on Frontex was in fact motivated by the widespread interest by civil society in how this Agency carried out its tasks in accordance with its obligations under the Charter.

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applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM (2021) 579 final, 22.9.2021.

[90] OJ L 3.12.2016 L 329, p. 45. Article 2. 4 specifies: "The Parties recognise the importance of the rule of law for the protection of human rights and for the effective functioning of governance institutions in a democratic state. This includes the existence of an independent justice system, equality before the law, the right to a fair trial and individuals' access to effective legal redress". Article 28 of the same agreement specifies that: "a particularly serious and substantial violation of the obligations described in Articles 2(1) and 3(2) may be addressed as a case of special urgency".

[91] Article 9.2 of the *Partnership agreement between the members of the African Caribbean and Pacific (ACP) Group of States and the EC and its Member States signed in Cotonou on 23 June 2000,* OJ (2000) L 317/3 which defines the rule of law with reference to an effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law. See L. PECH, *Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law*, in D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, CUP, 2013, pp. 108-129. The Cotonou agreement was due to expire in February 2020, but its application has been extended until June 2023 unless the new Partnership agreement enters into force before that date.

[92] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 *amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, in OJ L 304, 22.11.2011, p. 1.

b) Monitoring.

Monitoring[93], that is the action of fact-finding, gathering information on human rights situations, verifying and analysing such information[94]. Different tools may be used to carry out monitoring which implies scrutiny of the other State's behaviour, ranging from examination of State reports, communication by private parties, fact-finding missions[95].

The notion of monitoring is interpreted rather extensively by the EU. The Commission's answer to the EO refers to various channels of information: letters, meetings, submissions, reports of international HR monitoring bodies, also including "exchanges of information, dialogue and visits and involves various stakeholders, including civil society". Civil society plays an increased role – at least in principle – in the dialogue/monitoring process[96], although its monitoring function may be limited by several factors, not least the often poor organisational capacity to monitor the implementation of the agreement[97].

The EU applies the procedures set out in the agreements containing the HRC, but it also uses external monitoring mechanisms established by international human conventions or by international organisations, such as ILO[98]. In the framework of GSP

[93] J. ZERK, R. BEACOCK, *op. cit.*

[94] *UN Training Manual on Human Rights*, monitoring "is a broad term describing the active collection, verification and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with Government authorities to obtain information and to pursue remedies and other immediate follow-ups". United Nations, Geneva, 2001, p. 9.

[95] The European Union Agency for Fundamental Rights website presents an overview of the different monitoring mechanisms with a human rights remit under the auspices of the United Nations, the Organisation for Security and Co-operation in Europe, the Council of Europe and the EU, see https://fra.europa.eu/en/content/monitoring-mechanisms. For the monitoring mechanism in the EU see P. ALSTON, O. DE SCHUTTER (eds.) *Monitoring Fundamental Rights in the EU*, Oxford, Portland, 2005.

[96] For an analysis of civil society participation in European Union (EU) trade policy L. DRIEGHE, J. ORBIE, D. POTJOMKINA, J. SHAHIN, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?* in *New Political Economy*, 2021, available at https://doi.org/10.1080/13563467.2021.1879763.

[97] Conclusion of the EU-Vietnam Free Trade Agreement (Resolution), 12 February 2020, *European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam* (06050/2019 – C9-0023/2019 –2018/0356M(NLE): (para 37) "involvement of independent civil society and social partners in monitoring the implementation of the agreement is crucial, and calls for the preparation and swift establishment of DAGs following the entry into force of the agreement, as well as for a broad and balanced representation of independent, free and diverse civil society organisations within those groups, including independent Vietnamese organisations from the labour and environmental sectors as well as human rights defenders; supports the efforts of civil society organisations in Vietnam to develop proposals in this regard, and will support capacity-building efforts".

[98] GSP Plus scheme combines the scrutiny of international bodies and of EU institutions. Article 19(6) of the GSP Regulation requires that the Commission take account of 'all relevant information' in determining whether GSP beneficiary countries duly comply with their human rights obligations, including information provided by civil society. Besides the dialogue that takes place within bilateral meetings (with the Commission, EU delegations; EEAS) which might include monitoring visits, dialogue is based on scorecards, working documents highlighting shortcomings in the implementation. Scorecards are not accessible to the public.

the Commission has the power to investigate whether the beneficiary State complies with its obligations including human rights. The Commission enjoys a discretionary power whether to initiate such an investigation[99]. The matter has also been referred to the Ombudsman by four Trade Unions organisations[100] on the alleged violation of labour rights by Bangladesh and the refusal by the Commission to initiate an investigation using the power it has under GSP[101]. The claimants argued that the Commission's failure to investigate and the lack of a transparent and objective process for deciding whether to scrutinize Bangladesh's behavior, constituted maladministration. The most interesting part of the EO's assessment (who concluded for a decision of no maladministration in this case) was to establish whether the Commission "has provided adequate explanations for its actions and the procedures it has in place". In fact, the Commission's discretionary power in this circumstance does not exempt the Institution from giving a convincing explanation for its decision[102]. In general terms, the implementation of human rights tools requires full respect of the limits posed by European law including administrative principles.

The monitoring process is functional to the phase of enforcement and a component of this process but, especially when the use or threat of coercion as a response to wrongful conduct is weak, monitoring might acquire an autonomous value as a form of pressure towards the other Contracting State which is requested to collaborate with an investigation and to provide the documentation required (the extent of such cooperation depends on the international obligations undertaken by the State being monitored)[103]. In other terms, even if the non-execution clause is not triggered, monitoring has an independent value in the field of human rights to improve States' compliance. Monitoring, scrutiny, and supervision by international institutions, but also by private parties, ONG, civil society organisations, trade unions, etc. are an integral part of the soft approach favoured by the Commission which prefers to suggest changes[104] rather than impose them. It is also clear that mere monitoring without the possibility of triggering a

[99] Article 19 of the regulation in force provides for the following steps: after a 6-month monitoring and evaluation period where third parties are heard (orally and in writing by the Commission) the Commission submits a report to the beneficiary country which it can reply to. If the Commission confirms that serious violations occurred, it adopts a delegated act withdrawing the preferences in whole or in part.

[100] The organisations filing the complaint were the International Trade Union Confederation (ITUC), the Clean Clothes Campaign (CCC), and the HEC-NYU EU Public Interest Clinic.

[101] Cases 1056/2018/JN and 1369/2019/JN *on the European Commission's actions regarding the respect for fundamental labour rights in Bangladesh in the context of the EU's Generalized Scheme of Preferences*. The Commission's main argument was that "The partial or full withdrawal of trade preferences should be a measure of last resort, also because the countries concerned are the least developed countries." The EO inquiry was closed the 24.03.2020.

[102] Cases 1056/2018/JN and 1369/2019/JN on the European Commission's actions regarding the respect for fundamental labour rights in Bangladesh in the context of the EU's Generalised Scheme of Preferences. Decision adopted the 24.03.2020.

[103] For monitoring without enforcement in another context see C. LACATUS, U. SEDELMEIER, *Does monitoring without enforcement make a difference? The European Union and anti-corruption policies in Bulgaria and Romania after accession*, in *Journal of European Public Policy*, 2020, n. 8, pp. 1236-1255.

[104] On the function of monitoring see D.L. DONOHO, *Human rights enforcement in the 21st Century*, in *Georgia Journal of International and Comparative Law*, 35, 1, 2006, pp. 3-52.

reaction in case of infringement of obligation, might, in some cases, weaken its role as a process functional to coercive enforcement. A careful balance between the two phases of the execution process is thus crucial and needs extreme attention[105].

TDS provisions contain an interesting innovation as monitoring is carried out by a committee made up of representatives of the parties, and by civil society mechanisms represented by the[106] Domestic Advisory Groups[107]. These are organised in three sub-groups (employers, trade unions and various interests, including environmental and consumer organisations, as well as other relevant stakeholders)[108]. In detail, the composition of the DAG depends on the decision of the EU institutions (Commission) and of the EU trading partners[109]. They raise several issues on transparency and scope of action. A correct process of monitoring which employs this mechanism requires an independent and a balanced civil society representation in these bodies. Therefore, it is crucial that the nomination procedure follows the above-mentioned principles. The Commission is hopefully considering including such a procedure[110] in future agreements. From the above it is clear that the process of monitoring requires well defined procedures, a clear definition of tasks performed by those bodies in charge of such an activity and that it is at least a partial responsibility of the Commission.

c) Enforcement mechanisms.

The weakest aspect of the HRC is the low level of compliance, a situation criticized by the EU Parliament which has suggested providing these clauses with mechanisms and procedures setting out clear and credible consequences that follow from breaches of non-

[105] The TSD chapters provide for a mechanism for collecting information from civil society organizations and stakeholders. D. MARTENS, M. OEHRI, *Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index*, in *European Foreign Affairs Review*, 23, 1, 2018, p. 41-61.

[106] Non-paper of the Commission services, *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*, 26.2.2018.

[107] DAGS are included in the most recent agreements: Canada, CARIFORUM, Central America, Georgia, Japan, Moldova, Peru-Colombia–Ecuador, South Korea and Ukraine. A Joint Civil Society Forum bringing together participants from both DAGs but also other CS groups. L. DRIEGHE, J. ORBIE, D. POTJOMKINA, J. SHAHIN, *Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion?* in *New Political Economy*, 2021, n. 4, pp. 581-596.

[108] See European Economic and Social Committee. *The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements*, Opinion Adopted on 23/01/2019, doc. REX/510-EESC-2018-EESC-2018-05144-00-00-AC-TRA, para 2.7.

[109] D. MARTENS, D. POTJOMKINA, J. ORBIE, *Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?", Friedrich Ebert Stiftung*, 2020, Available at: http://library.fes.de/pdf-files/iez/17135.pdf. J. HARRISON, *Governing Labour Standards*, *op. cit.*

[110] European Economic and social Committee, *Non-paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups*, available at https://www.eesc.europa.eu/sites/default/files/files/non-paper_of_the_eu_dags_strengthening_domestic_advisory_groups_oct2021_002.pdf www.eesc.europa.eu; the document contains a series of recommendations on the composition, organisation, best practice, transparency, improvement and reinforcement of DAGs' role. See V. KUBE, *EU Human Rights, International Investment Law and Participation*, Springer International Publishing, 2019.

trade values[111]. One of the recurrent criticisms is that the EU is not coherent in the enforcement of the clause[112]. One has to make a distinction between the political decision to enforce the HR clause (or to make the conditionality mechanisms operational) and the procedures followed by the Commission. The EO scrutiny cannot obviously extend to the first aspect, but she can ask the Commission which internal procedures it has in place to determine what action to take when it discovers that a State with which the EU has concluded a cooperation/association or trade agreement has breached human rights standards.

Enforcement may be ensured through soft mechanisms (dialogue, cooperation) or hard ones (sanctions). It has clearly been confirmed by the ECJ that the EU institutions enjoy broad discretion to decide whether to trigger the HRC clause[113]. If one considers the practice so far, the nonexecution clause has been activated only in case of *coup d'états* or serious violations of electoral processes.

The approach in TDS chapter is different because it is not conditional but "promotional": in fact, it does not include sanctions as enforcement tools[114]. However, a recent Communication of the Commission on TDS revision, anticipated the Commission's plan to enhance the effectiveness of the current TSD, providing for stronger implementation and enforcement, which includes the use of trade sanctions for material breaches of the Paris Climate Agreement and fundamental principles of ILO conventions although as measures of last resort[115]. Moreover, for example, to counter the

[111] The European Parliament is a strong advocate of supplementing the HRC with an enforcement mechanism *"*human rights clauses in Association Agreements should be systematically backed up by a mechanism to implement those clauses", European Parliament, *Resolution of 17 February 2011 on the situation in Egypt*, P7_TA-PROV (2011), available:http://www.europarl.europa.eu/meetdocs/2009_2014/documents/wgme/dv/201/201103/20110309_situationegypt_epresolution_en.pdf>[Lastaccessed26July2016].

[112] The necessity to improve coherence and consistency in the application of HRC has been acknowledge by the Council of the European Union, in Council conclusions on the Action Plan on Human Rights and Democracy 2015-2019 (20 July 2015), ST 10897 2015 INIT, par. 33, e). J. DØHLIE SALTNES, *The EU's Human Rights Policy. Unpacking the Literature on the EU's Implementation of Aid Conditionality*', *Arena Working Paper*, 2/2013. A. C. PRICKARTZ, I. STAUDINGER, *Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements*, in *Europe and the World: A law review*, 3, 1, 2019, pp. 2-23.

[113] General Court, judgment of 30 March 2006, *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights project* v. *Commission*, T-2/04, EU:T:2006:97. The case concerned the supposed failure by Turkey to comply with its pre-accession obligations in the field of HR and rights of minorities; the applicant asked the Commission to take into account such breaches of commitment by Turkey and then contested before the General Court the failure to act by the Commission which did not request the Council to take appropriate measures and to stop the progress report on Turkey. The Court dismissed the action excluding the right of an individual to require the Commission to take a position in this regard. See also General Court, judgment of 6 September 2011, *Muhamad Mugraby v. Council of the European Union and European Commission*, T-292/09, ECLI:EU:T:2011:418 on an action for failure to act seeking a declaration that the Council and the Commission unlawfully omitted to take a decision on the applicant's request concerning the adoption of measures against the Republic of Lebanon on account of the alleged violation by the latter of the applicant's fundamental rights. On the discretionary power of the institutions see para. 60.

[114] G. MARIN DURÀN, *op. cit.*, p. 1031.

[115] Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *The power of trade partnerships: together for*

weakness of TDS chapters obligations, the Commission is considering the adoption of a joining instrument to the EU-Mercosur FRA (an agreement signed but not yet concluded) to reinforce Mercosur States' engagement in the application of the TSD provisions, in particular those concerning environmental protection and climate change[116].

The EU GSP regulation provides for a negative conditionality mechanism, as GSP preferences can be suspended (or the GSP withdrawn) in case the beneficiary party does not ratify and does not ensure the application of the conventions on human and labour rights[117] listed in the GSP regulation. A partial withdrawal is foreseen in case of serious and systematic violations of the core 15 UN and ILO Conventions. The Commission[118] is the institution that is competent to decide the withdrawal, and the procedure requires a long preparatory stage and investigations, and it may take up two years for the Commission to reach a final decision. This circumstance had prompted the Commission, in its proposal for the new GSP system, to provide for a more rapid response mechanism (article 19 of the proposal)[119] which requires the Commission to take into account the socio-economic effects of the withdrawal of customs preferences in the beneficiary country, and it may suspend the withdrawal of benefits in exceptional circumstances (e.g., global health emergencies).

This short reference to the procedures makes it clear that the management of the GSP system and the application of conditionality is – also from an administrative point of view – particularly complex and structured and for this reason and for the serious consequences that decisions are likely to produce, transparency of procedures is mandatory.

Reports by individuals (not to mention individual claims) affected by violations, or by stakeholders, with a legitimate interest are considered rather efficient tools for monitoring human rights situations and possible breaches of international standards. These are not provided for in EU agreements[120] but individual complaint tools can be

green and just economic growth, COM (2022) 409 final 22.6.2022, see para 3.6., p. 10. See also a *France and the Netherlands non-paper* at ttps://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2020/05/08/non-paper-from-nl-and-fr-on-trade-social-economic-effects-and-sustainable-development/Non-paper+FR-NL+trade+vfinal.pdf. The European Parliament called for an improvement of TDS enforcement methods leaving sanctions as a last resort tool. European Parliament resolution of 26 November 2020 on the EU Trade Policy Review(2020/2761(RSP).

[116] See G. VAN DER LOO, *Mixed feeling about the EU-mercosur* Deal, EPC online, 2021, available at https://epc.eu/en/Publications/Mixed-feelings-about-the-EUMercosur-deal-How-to-leverage-it-for-su~3dad10.

[117] The proposal for the new GSP extends the conditionality to environmental and good governance conventions.

[118] Cases where GSP preferences were suspended concern Myanmar in 1997, Belarus in 2007 and Sri Lanka in 2010) (European Parliament adopted a resolution on April 29, 2021, asking the European Commission and the European External Action Service (EEAS) to review the GSP+ status of Pakistan.

[119] COM(2021) 579 final, 22.9.2021, Proposal for a regulation of the European Parliament and the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council.

[120]Non-State actors may file complaints on non-compliance with labour provisions in FTAS of US and Canada.

established in the EU legal system[121]. This latest issue has been the object of a specific question by the EO [122]. The Commission has created the so-called Single entry-point (SEP), which has been conceived for breaches of provisions on market access, but complaint can be filed for violations of the Trade and Sustainable Development ('TSD') provisions of EU trade agreements or under the EU's Generalised System of Preferences[123].

The objective of the system is to make the complaint filed by stakeholders (such as trade unions, labour rights organisations, human rights groups) a more accessible mechanism. In its answer to the EO, the Commission provides details about the working of the SEP and the most interesting part of its answer concerns the object of the complaints. These mainly focus on trade aspects and none, of the 35 formal complaints (out of 100 contacts) so far, dealt with human rights. As underlined in the Commission's answer SEP is not designed for HR complaints which might require forms of confidentiality to protect sources of information for the sensitive nature of most human rights complaints. As for the request of sharing data and the experience so far with the complaint mechanism, the Commission's answer refers to only one case in very general terms.

The Single Entry Point (SEP) is managed by a team under the leadership of the Chief *Trade* Enforcement Officer (*CTEO*)[124]. The CTEO's mandate is, in this context, rather broad: his[125] role "includes coordinative tasks relating to the implementation and enforcement of our trade agreements". The CTEO website page does not explicitly mention human rights (but TDS commitments, environment, labour rights) and in a statement made by the CTEO it is clarified that "The same way stakeholders can notify us of market access barriers, stakeholders can raise issues relating to non-compliance with obligations under the GSP. Complaints will be treated equally no matter whether they relate to market access or non-compliance of commitments made under GSP or Trade and Sustainable Development"[126].

Finally, a few words on transparency which is a very high priority for the Ombudsman and has been the object of several inquiries. The EO required the Commission to explain how it ensures transparency in the implementation of the HRC and public participation. The Commission describes the procedure of ex ante and ex post

[121] The necessity of setting up an individual complaining mechanism in Frontex was recommended by the EO in the above-mentioned own-initiative inquiry opened in 2012, case OI/5/2012/BEH-MHZ.
[122] Asking about the existence of a "mechanism allowing interested parties, including the victims of human rights violations and civil society organisations, to report human rights concerns".
[123] See European Commission, Directorate general for Trade, *Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*, 22.6.2022.
[124] https://gsphub.eu/news/cteo-interview. "Stakeholders can raise issues relating to non-compliance with obligations under the GSP. Complaints will be treated equally no matter whether they relate to market access or non-compliance of commitments made under GSP or Trade and Sustainable Development".
[125] Denis Redonnet was appointed by the Commission as first CTEO on the 24.7.2020.
[126] See Redonnet's interview https://gsphub.eu/news/cteo-interview (VEDI: https://epha.org/trade-for-health-strengthened-enforcement-could-be-a-double-edged-sword-for-public-health/ inclusion of health in TDS chapters).

assessment of (trade) agreements. As seen above, impact assessment is an important procedure that the Commission has undertaken to follow proposed internal legislation and international agreements[127]. Civil society and stakeholders are included in the process. The Commission's answer is very concise, but reference is made to some relevant documents such as the Commission's Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiative[128]. As for TDS chapters, information on the implementation of the TSD and on the compliance record of GSP beneficiaries is published on the DG Trade website. To gather input on TSD issues and questions, an open consultation was opened (July-November 2021) in the context of the Commission's review of the 15-Point Action Plan on Trade and Sustainable Development. The Single Entry Point has recently published the new version of its operating guidelines, explaining to stakeholders how it operates, how complaints can be filed and how they will be processed[129].

5. Concluding Observations

European Union institutions must act in compliance with human rights and with the values on which the European Union is founded and they must promote them both in their internal and external policies. The EO competence is to deal with instances of maladministration in the activities of the Community institutions and bodies (except for the Court of Justice and the Court of First Instance, acting in their judicial role). However, the EO mandate also extends to the promotion of good administration.

Against this background, there is a growing interest and concern about the administrative activities of EU institutions in the field of external actions. The EO has been very active in this field: she has not only responded to complaints by private and civil society organisations, but she has also launched some important strategic initiatives and own investigations on issues concerning, in particular, transparency, impact assessment, negotiations and access to documents of EU international agreements, actions of agencies working in the field of migration (Frontex) and asylum (E*uropean Union Agency* for *Asylum*). Among these EO activities, this paper has analysed a recent strategic initiative concerning the preparatory, monitoring and enforcement phases of the inclusion of human rights clauses in EU agreements.

[127] The 2012 Action Plan requires the Commission to incorporate human rights in all impact assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Council Document of 25 June 2012 *Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12; European Commission, Directorate General for Trade, document of October 2015, *Trade for all, towards a more responsible trade and investment policy strategy'* also stresses the importance of carrying out impact assessments, at 18, 23 and 26, available at: <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (footnote 82).
[128] http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf.
[129] Commission of the European Union, *Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements*, 22.6. 20220.

The EO's initiative concerns a tool that perhaps more than any other symbolizes the will of the European Union to appear as a defender and a promoter of fundamental rights in its external action. The incorporation of an HRC has a strong identity and highly symbolic value for the European Union. On the other hand, HRCs (and other human rights promoting tools) raise several issues in terms of consistency, definition of criteria, procedures to be followed, definition of benchmarks, consultation, investigations, all aspect which are qualified as administrative activities of the Commission.

The initiative of the EO on HRC should be evaluated positively, if one considers that strategic initiatives aim at collecting information, at encouraging the EU administration to be open, accountable, ethical and responsive to citizens and at improving its quality. The Commission has been required to explain the different phases of the procedure, the policy underlying the decision to include the HRC in an agreement, to clarify how it ensures monitoring and which are the conditions and the limits of enforcement. A transparent procedure, in which the parameters of actions are correctly and previously defined, contributes to improving the substance of HR protection and the quality of EU administration.

Since the Ombudsman is free to choose the subject of a strategic initiative (strategic inquiries are rather stimulated by systemic problems) the very fact that the Ombudsman has opened the HR initiative shows that the modalities and procedures concerning the inclusion of HRCs in agreements, and more specifically, the processes of monitoring and execution, deserve scrutiny. Above all, the various aspects considered in this initiative, whether to include the clause, whether to start an investigation, which standards have to be applied, the decision whether to trigger negative conditionality, etc., fall for many respects within the realm of the political and discretionary power of the institution involved (the Commission in this case). The EO's decision to start an HRC strategic initiative testifies that when the Commission carries out its functions such as negotiating an agreement which includes an HRC or when it exercises its monitoring or enforcement competences, the Commission is compelled to act within the boundaries of action defined by the principles of good administration. One of the merits of EO's strategic initiative is to highlight that the evaluation, on the part of the EU institutions, of the above-mentioned steps, although some are affected by the negotiating process, requires the Commission to give reasons and explain the choices that guide its action. The definition of benchmarks, criteria and in particular the definition of internal procedures not only are the right questions to ask but they help to define the perimeter of the Commission's discretionary power.

The initiative has addressed the most relevant aspects of the HR policy and has helped to systematically define all problematic issues of the HRC policy and in more general terms of the protection of human rights in external actions of the EU.

The EO has encouraged the Commission to create a mechanism for individual complaints, which is perfectly in line with the EO's task of promoting good administrative practices. The initiative should be read in the broader context of other initiatives and inquiries that confirm that the EU's external actions are "under the lens" of the EO and

of civil society which correctly requires that in external actions and international relations the EU institutions and bodies act in full respect of principles governing good administration.

In synthesis, the EO initiative on human rights in EU trade policy is part of the effort of the EO to reinforce good administration and the defence of human rights in third countries in line with the Lisbon Treaty obligations.

ABSTRACT: This paper examines the increasingly active role of the European Ombudsman in ascertaining by what procedures and instruments the European Union contributes to the protection of human rights in its external action. After an overview of the European Ombudsman's competencies and activities concerning the administrative function of EU institutions, this article discusses the context and scope of a recent European Ombudsman's strategic initiative on the incorporation of human rights clauses – and other human rights tools – in EU international trade agreements

KEYWORDS: European Ombudsman – administrative function – human rights clauses – monitoring – enforcement.