

Complaint to the European Ombudsman

Alleging maladministration by the European Commission in its failure to investigate the status of Bangladesh under the GSP

Executive Summary

This complaint to the European Ombudsman by the International Trade Union Confederation (ITUC), the Clean Clothes Campaign (CCC), and the HEC-NYU EU Public Interest Clinic alleges maladministration in the European Commission's failure to launch an investigation into Bangladesh's status under the GSP Regulation. The Commission's current process for determining whether to investigate a GSP beneficiary country is opaque and does not include any meaningful opportunity for NGOs or other third parties to participate.

Bangladesh benefits from preferential tariffs on its exports to Europe under the EU's Generalised Scheme of Preferences (GSP), an EU instrument which was enacted to encourage sustainable development in beneficiary countries. The GSP requires those beneficiary countries to maintain certain labour standards and to respect human rights. As a UN classified least developed country, Bangladesh benefits from the most favorable regime under the GSP, the "Everything But Arms" arrangement (EBA). As the name suggests, the EBA scheme grants duty-free and quota-free access to the EU Single Market for all export products except for arms and ammunition. Bangladesh is the most significant beneficiary of the EBA, and the EU is Bangladesh's primary trade partner. The Ready-Made-Garment industry accounts for a large majority of Bangladesh's exports and employs four million workers.

Bangladesh has committed serious and systematic violations of workers' fundamental rights. Conditions are unsafe for millions of workers in Bangladesh. Additionally, the labour laws of Bangladesh create significant obstacles to the exercise of the right to freedom of association, to organise and to bargain collectively. Further, the government has not effectively enforced even these flawed laws, and workers complaints to authorities are routinely ignored. Without bargaining power or legal recourse, workers have been forced to live in extreme poverty. The GSP negatively conditions benefits on respect for human rights, and provides a tool for the European Commission to ensure that economic development does not leave workers behind. The Commission has urged Bangladesh to improve conditions, but has not launched a formal investigation concerning Bangladesh's GSP status.

In this complaint, we argue that the Commission's failure to investigate the status of Bangladesh under the GSP constitutes maladministration. While the Commission enjoys broad discretion under the provisions of the GSP regulation, that discretion is not unfettered. The Commission is bound to conduct its international and trade policy in line with the basic principles which govern the EU itself, including universal human rights and respect for human dignity. Finally, the Commission's failure to create a transparent and objective process for deciding whether to investigate a beneficiary country also constitutes maladministration.

To: THE EUROPEAN OMBUDSMAN

COMPLAINT ABOUT MALADMINISTRATION

1. Complainant

Complainant: International Trade Union Confederation (ITUC)

Additional complainants: Clean Clothes Campaign (CCC)
HEC-NYU EU Public Interest Clinic

2. Against which European Union (EU) institution or body do you wish to complain?

The European Commission.

3. What is the decision or matter about which you complain? When did you become aware of it?

The European Commission has failed to respond to the ITUC's calls for an investigation into the status of Bangladesh under the GSP regulation despite serious and systemic human rights violations.

Our awareness of the current situation in Bangladesh and the Commission's failure to investigate began with the ILO Committee on the Application of Standards special paragraph on Bangladesh, published in June of 2016. Secondly, the December 2016 strikes, during which 34 people were arrested and 1,600 workers were laid off, brought the severity and continuing nature of the human rights violations in Bangladesh to our attention.¹

4. What do you consider that the EU institution or body has done wrong?

The case for maladministration

By failing to investigate the eligibility of Bangladesh under the GSP Everything But Arms program and by failing to respond meaningfully to the ITUC and other trade unions confederations' urging to do so, the European Commission fails to fulfill its human rights obligations, to uphold the EU's principles, and to respect its duty of good administration. The Commission commits maladministration in three distinct ways:

¹ See the answer to question 4 for further discussion.

1. By failing to conduct an investigation into the eligibility of Bangladesh under the GSP despite serious and systemic human rights violations²
2. By failing to respond to ITUC requests for an investigation or justification for the decision not to investigate, displaying arbitrary decision making³
3. By failing to create a process by which NGOs or other interested third parties can petition the Commission regarding GSP investigations⁴

Factual Context

Bangladesh and the GSP

Bangladesh is a beneficiary of the European Union’s Generalised Scheme of Preferences (GSP).⁵ Bangladesh is the main beneficiary of the “Everything But Arms” (EBA) arrangement, making up 66% of all EBA preferential imports into the EU in 2016.⁶ These trade preferences are negatively conditioned on a lack of “serious and systematic” violations of international human rights standards.⁷ This scheme has also made the EU Bangladesh’s largest trading partner.⁸ Because approximately 90% of Bangladesh’s exports to the EU come from the Ready-Made Garment (RMG) industry, Bangladesh relies heavily on the EBA arrangement for preferential trading terms.⁹ As of 2017, the RMG sector employs around 4 million workers,¹⁰ approximately 80-85% of whom are women.¹¹

Following the Rana Plaza collapse in April 2013, the EU took several steps to address substandard working conditions in Bangladesh. The EU worked together with the ILO and the Government of Bangladesh to issue the Sustainability Compact for Continuous Improvement in Labour Rights and Factory Safety in Ready-made Garment and Knitwear Industry in

² See Section I.

³ See Section II.

⁴ See Section III.

⁵ The GSP provides preferential tariff treatment to developing countries in order to help those countries develop in a socially, economically, and environmentally sustainable manner.

⁶ “Report from the Commission to the European Parliament and the Council: Report on the Generalised Scheme of Preferences covering the period 2016-2017”, Jan. 19, 2018.

http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156536.pdf The UN has classified Bangladesh as a least developed country (LDC) and therefore under the GSP, the country benefits from the most favorable regime under the GSP, the (EBA). The EBA scheme grants duty-free and quota-free access to the EU Single Market for all export products except for arms and ammunition. See the European Commission’s informational packet, “The EU’s Generalised Scheme of Preferences”, Aug. 2015.

http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf

⁷ See Article 19 of 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 (‘GSP Regulation 2012’).

⁸ Manpreet Ark, et al., “The Integration of EU Development, Trade and Human Rights Policies” Frame Report, September, 2016, 6.

⁹ *Id.*

¹⁰ “Trade Information” Bangladesh Garment Manufacturers and Exporters Association, <http://www.bgmea.com.bd/home/pages/tradeinformation>. Last accessed March 21, 2018.

¹¹ “In Bangladesh, Empowering and Employing Women in the Garments Sector”. *The World Bank*, Feb. 7, 2017. <http://www.worldbank.org/en/news/feature/2017/02/07/in-bangladesh-empowering-and-employing-women-in-the-garments-sector>; Ark, *supra*, 6.

Bangladesh.¹² While Bangladesh subsequently revised its Labour Act in July 2013, the changes made were nominal and the Act continues to fall short of ILO standards.¹³ The ILO high level tripartite mission which visited Bangladesh in April, 2016 noted that the Labour Act continues to discourage union membership by requiring, for example, 30% membership in order to form a union. Furthermore, the government continues to actively violate fundamental labour rights such as the freedom of association.¹⁴ Events like the 2016 Ashulia Incident¹⁵, where the Government of Bangladesh responded to a worker's strike for higher wages by closing factories and firing workers for alleged participation in the strikes, stand as a reminder that the Government of Bangladesh has not made adequate progress in its mission to improve labour conditions in the state. It is widely recognized that the Sustainability Compact has been a failure and is unlikely to provoke further reforms as there are no consequences for failure to comply.¹⁶

I. The Commission has committed maladministration by failing to conduct an investigation into the status of Bangladesh under the GSP despite human rights violations

The basic normative principles of the EU require investigation

The Commission has discretion regarding when to launch an investigation under the GSP. Nonetheless, Article 21 of the Treaty on European Union requires the EU to conduct foreign affairs in accordance with certain values including respect for human rights and human dignity.¹⁷ The failure to launch an investigation in the presence of serious violations of human

¹² ILO “Support the Implementation of the Sustainability Compact”, http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS_396191/lang--en/index.htm.

¹³ See internal section “Continuing Violations: Bangladesh’s Insufficient Progress Following the Compact”

¹⁴ ILO, “Report of the High-Level Tripartite Mission to Bangladesh” April 17-20, 2016. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf

¹⁵ See internal section “The Ashulia Incident, 2016”

¹⁶ Jeffrey S. Vogt, “The Bangladesh Sustainability Compact: An Effective Tool for Promoting Workers’ Rights?” *Politics and Governance*, 5(4).

¹⁷ TEU, art. 21. “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

....

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”

rights and labour standards amounts to maladministration. Through continued trade preferences, despite knowledge of Bangladesh's continued violation of the labour rights standards contained in the GSP, the EU is complicit in dangerous labour practices.

Human Rights Violations Have Continued after the Collapse of Rana Plaza

On April 24, 2013, the five-story Rana Plaza collapsed in Bangladesh, killing 1,134 people¹⁸ and seriously injuring an additional 2,500 people¹⁹. After cracks were discovered in the building on April 23, Rana Plaza was immediately evacuated. The building owner stated later in the day that the building was structurally safe and that workers should return the following day. Factory owners threatened to withhold wages if the garment workers did not return for work. When the garment workers showed up the following morning for work, the building collapsed.²⁰

Phil Robertson, Deputy Asia Director of Human Rights Watch (HRW), commented on the event, noting that “if their workers had more of a voice, they might have been able to resist managers who ordered them to work in the doomed building a day after large cracks appeared in it.”²¹

In fact, only 10% of the 4,500 garment factories in Bangladesh have registered unions²² and it is estimated that only 4% of RMG workers are union members today.²³ One of the main barriers to forming unions is the Bangladesh Labour Act (BLA), which includes a 30% minimum membership requirement to form trade unions.²⁴ The government also has significant power to cancel any registration that might cause “serious hardship to the community” or is “prejudicial to the national interest”, terms that are undefined and therefore subject to abuse.²⁵ Further barriers to unionisation include retaliation by factory owners including dismissal of union leaders, surveillance and physical abuse, as well as an environment of impunity where employers face no consequences for their illegal actions.²⁶

Almost five years have passed since the Rana Plaza tragedy and the Government of Bangladesh has taken few steps to guarantee respect for the rule of law, especially in the areas of

¹⁸ Tansy Hoskins, “Reliving the Rana Plaza factory collapse: a history of cities in 50 buildings, day 22” *The Guardian*, April 23, 2015. <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings>

¹⁹ “Bangladesh factory collapse toll passes 1,000”. *BBC*, May 10, 2013. <http://www.bbc.com/news/world-asia-22476774>

²⁰ Red Marriott “The House of Cards: the Savar Building Collapse”. *Libcom*, April 26, 2013. <http://libcom.org/news/house-cards-savar-building-collapse-26042013>

²¹ “Bangladesh: Garment Worker’s Union Rights Bleak” *Human Rights Watch*, April 21, 2016. <https://www.hrw.org/news/2016/04/21/bangladesh-garment-workers-union-rights-bleak>

²² *Id.*

²³ Ibrahim Hossain Ovi “Garment Workers’ Rights Still a Far Cry” *Dhaka Tribune*, April 23, 2017. <http://www.dhakatribune.com/tribune-supplements/business-tribune/2017/04/23/garment-workers-rights-still-far-cry/>

²⁴ European Commission, “Implementation of the Bangladesh Compact: Technical Status Report”, Oct. 2017. http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf

²⁵ Ark, *supra*, 37.

²⁶ Ovi, “Garment Workers’ Rights Still a Far Cry”.

freedom of association, collective bargaining and workplace safety.²⁷ Systemic abuses continue, as evidenced by events like the Ashulia Incident where Bangladesh cracked down on a strike in Dhaka in December 2016 where garment workers called for living wages. Bangladeshi authorities arrested or detained at least 34 union leaders and worker rights advocates, fired over 1,600 and shuttered union offices.²⁸ Baseless criminal cases continue against a number of union leaders.

EU response to labour violations

In response to the Rana Plaza collapse, the EU voiced its commitment to working with Bangladesh to improve labour rights and factor safety in the garment industry.²⁹ Cognizant of the fact that the RMG sector makes up a majority of the country's GDP and that the EBA terms have assisted Bangladesh in cutting extreme poverty and hunger³⁰, the EU did not want to immediately trigger a withdrawal process or impose sanctions on Bangladesh. The EU chose instead to issue in collaboration with the ILO and the Government of Bangladesh the Sustainability Compact for Continuous Improvement in Labour Rights and Factory Safety in Ready-made Garment and Knitwear Industry in Bangladesh (the Sustainability Compact) in July 2013.³¹

The Compact is built on short- and long-term commitments related to three main pillars: 1) respect for labour rights 2) the structural integrity of buildings and occupational safety and 3) responsible business conduct.³² Central to this project is the goal of protecting freedom of association and collective bargaining.³³ Accordingly, the Sustainability Compact laid out a

²⁷ See "ILO Committee of Experts' 2018 Report Confirms: No Real Progress in Bangladesh." *Clean Clothes Campaign and ITUC*, 2018. https://www.ituc-csi.org/IMG/pdf/bangladesh_evaluation_ilo_experts_2018_final_ituc_ccc.pdf. Attached as Appendix C.

²⁸ "Bangladesh: Stop Persecuting Unions, Garment Workers" *Human Rights Watch*, Feb. 15, 2017. <https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers>

²⁹ European Commission DG Trade, "Joint Statement by EU Trade Commissioner Karel De Gucht and Bangladesh Foreign Minister Dr Dipu Moni following recent disasters in the Bangladeshi garment manufacturing industry", (Brussels, 28 May 2013). http://europa.eu/rapid/press-release_MEMO-13-469_en.htm

³⁰ Reaz Ahmad, "Millennium Development Goals: Dhaka Ready to Face New Challenges", *The Daily Star*, Sept. 16, 2011. www.thedailystar.net/backpage/dhaka-ready-face-new-challenges-143818

³¹ The Sustainability Compact is a partnership between the EU, the International Labour Organization (ILO), and the Government of Bangladesh which aims to "improve labour, health and safety conditions for workers as well as to encourage responsible businesses in the ready-made garment industry" in Bangladesh.

http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS_396191/lang--en/index.htm. The U.S. joined as a compact partner in 2013 and Canada followed in 2016. European Commission, Bangladesh's progress under the Compact is monitored by a high-level group, referred to as the 3+5+1 Group, which regularly reviews the progress Bangladesh has made on the implementation of the Compact. This group is comprised of three Secretaries of the Government of Bangladesh of Labour, Commerce and Foreign Affairs, as well as the ambassadors of the EU, the US, Canada, the United Kingdom - as the chair of the Private Sector Development (PSD) Working Group of the Local Consultative Group (LCG) and one other EU Member State on a rotating basis, together with the ILO. See "Implementation of the Bangladesh Compact: Technical Status Report", Oct. 2017.

http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf

³² "Implementation of the Bangladesh Compact: Technical Status Report", Oct. 2017.

http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf. Technical status reports are regularly published by the Commission.

³³ Ark, *supra*, 83.

number of commitments to be followed by the Government of Bangladesh, including the obligation to adopt amendments to the Bangladesh Labour Act to conform with ILO rules.³⁴

Importantly, the Compact also states that the EU must take joint responsibility for improving the labour rights of RMG workers but the Commission reports tend to focus on Bangladesh's progress and does not give much attention to the effectiveness of EU's actions to help foster Bangladesh's improvement.³⁵

Continuing violations: Bangladesh's insufficient progress following the compact

The Bangladesh Labour Act of 2006 was revised in 2013, nominally improving rights to the freedom of association, collective bargaining and workplace safety.³⁶ Unfortunately, the amended Act and its implementing rules still fall short of ILO standards. The law continues to be prejudiced against unions by making founding, registering and operating a union very difficult.³⁷ While there was an initial increase in trade union registrations after the Compact was adopted, the 2013 legislation gave the government great discretion to refuse to register trade unions and many unions have since been busted or are now inactive.³⁸

In April 2016, an ILO high level tripartite mission visited Bangladesh and issued a critical report laying out the government's continued violations of the freedom of association.³⁹ The report noted that the government continues to discourage unions by requiring 30% membership in order to form a union.⁴⁰ The mission also "noted with concern the numerous allegations of anti-union discrimination and harassment of workers, including harassment by the industrial police and local musclemen, dismissals, blacklisting, transfers, arrests, detention, threats and false criminal charges combined with insufficient labour inspection, lack of remedy and redress and delays in judicial proceedings."⁴¹

Then, in June 2016, the ILO's Committee on the Application of Standards (CAS) was so concerned with the government's failure to conform with Convention 87 on the freedom of association that it wrote a special paragraph in their report to the ILO. A special paragraph is meant to signal a serious failure on the part of a government to apply a ratified convention.⁴² The CAS "noted with deep concern that the government has failed to make progress on the repeated and consistent conclusions of this Committee despite the substantial technical assistance and

³⁴ *Id.*

³⁵ *Id.*, 83-84.

³⁶ European Commission, "Implementation of the Bangladesh Compact: Technical Status Report", Oct. 2017. http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf. On September 16, 2015 the Government of Bangladesh issued the implementation rules of the Bangladesh Labour Act.

³⁷ Ark, *supra*, 37.

³⁸ *Id.* 84.

³⁹ ILO, "Report of the High-Level Tripartite Mission to Bangladesh" April 17-20, 2016.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Jeffrey S. Vogt, "The Bangladesh Sustainability Compact: An Effective Tool for Promoting Workers' Rights?" *Politics and Governance*, 5(4), 82.

financial resources provided by donor countries.”⁴³ This is evidence of the fact that the cooperation-based approach of the EU is no longer working and that an investigation is necessary.

The Compact’s Technical Status Report of 2017 reflects these same concerns noting that, “further amendments to the BLA 2006 are still needed to bring it on a par with international standards, particularly with respect to freedom of association and collective bargaining. For instance, the 2013 revisions do not address a number of concerns, including a 30% minimum membership requirement to form trade unions and the extension of the freedom of association and collective bargaining to workers in labour-intensive RMG industries.”⁴⁴

Amendments to the BLA and draft EPZ law were submitted to the ILO on August 31, 2017 and were reviewed by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) when it met in November 2017. The ILO CEACR continued to express concerns over Bangladesh’s progress regarding the amendments in its most recent report submitted to the 107th Session of the International Labour Conference to take place in June 2018.⁴⁵ In response to Bangladesh’s proposed amendments to the BLA, the ILO noted that, “many of the changes [the CEACR] has been requesting for a number of years have either not been addressed or addressed only partially.”⁴⁶ The CEACR concluded in urging Bangladesh “to continue to review and amend the relevant provisions of the BLA in order to ensure that any restrictions on the exercise of the right to freedom of association are in conformity with the Convention.”⁴⁷ It is clear that in the view of the CEACR, Bangladesh has not made sufficient progress in bringing their labour laws in conformance with the Convention.

The Ashulia Incident, 2016

In December 2016, the government of Bangladesh cracked down on workers who went on strike seeking higher wages. The majority of protesters were from factories that had no unions and the national union federations deny they had any role in or prior knowledge about these strikes. Nonetheless, the government used these strikes as a justification to arrest national union federation leaders and labour activists for their participation in the strikes.⁴⁸ At least 34 union

⁴³ International Labour Conference, “Report on the Committee of the Application of Standards: Part Two” 105th Session, Geneva, May–June 2016. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489124.pdf

⁴⁴ European Commission, “Implementation of the Bangladesh Compact Technical Status Report”, Oct. 2017. http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156343.pdf. See also Clean Clothes Campaign, “The European Union and the Bangladesh garment industry: the failure of the Sustainability Compact”, Oct. 2017. <https://cleanclothes.org/resources/publications/the-european-union-and-the-bangladesh-garment-industry-the-failure-of-the-sustainability-compact>.

⁴⁵ “Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part A)”, International Labour Conference, 107th Session, 2018. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_617065.pdf

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ “Bangladesh: Stop Persecuting Unions, Garment Workers” *Human Rights Watch*, Feb. 15, 2017. <https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers>

organizers and worker rights advocates were arrested.⁴⁹ Additionally, employers responded to the strike by closing 59 factories and at least 1,600 workers were fired for their alleged participation in the strikes.⁵⁰ “When a worker is suspended or sacked by a factory owner, they don’t easily get a job again,” Taslima Akhter, a labour leader, said, “the owners make a list of those workers and distribute their names and photos close to the particular factory. They never get jobs again in that area.”⁵¹

At the 106th Session of the International Labour Conference, the Worker Members reminded the ILO CEACR that following the 2016 crackdown, the Government failed to address the incident until major international garment brands announced that they would boycott the Dhaka Apparel Summit in February, 2017 in response to these events.⁵² An agreement was reached between industry representatives, Bangladesh, and the IndustriALL Bangladesh Council but Bangladesh failed to implement that agreement too.⁵³ The Worker members also alleged that on May 27, 2017, local thugs threatened and physically attacked workers and leaders in Chittagong. Union leaders were warned that if they continued to organize unions they would be killed. The local police watched as union leaders were assaulted. A poster with the union’s president in a noose had been circulated in Chittagong.⁵⁴

The CEACR responded to these allegations in its 2018 report, writing that “the Committee further notes with concern the new allegations of arrest, detention, surveillance, violence and intimidation of workers contained in the 2017 ITUC communication ... the Committee expresses deep concern at the continued violence and intimidation of workers and emphasizes in this regard that a truly free and independent trade union movement can only develop in a climate free from violence, pressure and threats of any kind against the leaders and members of such organizations.”⁵⁵

Incidents like these continue to affect the labour rights of Bangladeshi garment workers and exemplify the government’s lax attitude towards its commitments under the Compact and the GSP Regulations, especially those relating to the freedom of association and collective bargaining.

The Commission’s limited response

In the first half of 2017, the European Commission sent two letters to Bangladesh.⁵⁶ These letters demanded concrete progress with respect to labour rights and threatened the

⁴⁹ *Id.* See also Clean Clothes Campaign, *supra* note 37.

⁵⁰ “GSP Eligibility for Bangladesh” Letter from ITUC/ETUC. Jan 18, 2017. Attached as Appendix B.

⁵¹ Michael Safi, “Bangladesh Factories Sack Hundreds After Pay Protests” *The Guardian*, Dec. 27, 2016.

<https://www.theguardian.com/world/2016/dec/27/bangladesh-garment-factories-sack-hundreds-after-pay-protests>

⁵² ILO “Individual Case Discussion on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)”, 106th ILC Session, 2017.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ “Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part A)”, International Labour Conference, 107th Session, 2018. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--relconf/documents/meetingdocument/wcms_617065.pdf

⁵⁶ Tara Donaldson, “EU Threatens to Pull Bangladesh Free Trade Benefits” *Sourcing Journal*, Mar. 27, 2017. <https://sourcingjournalonline.com/eu-threatens-pull-bangladesh-free-trade-benefits/>

launching of an investigation. The EU set a deadline for response and asked Bangladesh to treat the situation as a “matter of urgency.” While these letters did not include any guarantee that an investigation would take place, they do demonstrate that the EU is aware of the violations and considers them to be serious. Bangladesh continues to violate the terms of the EBA agreement under the GSP and continues to receive trade benefits. As of the submission of this complaint, no investigation has been launched by the EU.

Article 19(1) of GSP Regulation 978/2012 foresees that trade preferences may be suspended for “serious and systematic violation of principles laid down in the conventions listed in Part A of Annex VIII.” Part A of Annex VIII lists fifteen conventions regarding genocide, civil rights, discrimination, the rights of children, equal pay, degrading treatment, and, most pertinently, labour standards.

The actions that the Commission has taken so far do not fulfill its duty to conduct its trade policy in accordance with respect for human rights and human dignity. Because the Government of Bangladesh has proven not to be responsive to letters from the Commission or reports from the CEACR, as explained above, actions short of a formal investigation do not seem to be effective means of fulfilling the EU’s obligations. In light of the persistent and serious violations outlined above, an investigation into Bangladesh’s status under the GSP regulation is necessary.

The Commission has improperly relied on the ILO special paragraph, an ineffective trigger mechanism for investigation

DG Trade’s position is that the trigger for an investigation is at least two consecutive special paragraphs in the reports of the ILO Committee on the Application of Standards.⁵⁷ The Commission either fundamentally misunderstands the ILO supervisory system or has adopted a standard that ensures that a GSP investigation will never be triggered.⁵⁸ The Regulation itself does not support the idea that two special paragraphs are necessary for an investigation. Further, the ILO has never stated that the existence of two special paragraphs was meant to be interpreted (exclusively) as evidence of the existence of serious and systematic violations. This interpretation ignores the entirety of the ILO supervisory system. Indeed, the CAS is in part a political body which provides guidance to the country supervised based on the reports of the Committee of Experts. A special paragraph is based in part on the merits but often is the result of a negotiation between employers’ and workers’ representatives. Workers most often are the demanding party, thereby relying on the agreement of the employer representatives, who have an interest not to grant the second special paragraph in order to avoid potential business impacts on employer members.

The ILO CAS included a special paragraph on Bangladesh in its 2016 report after Bangladesh failed to improve conditions over the preceding year – and in light of the recently concluded ILO high-level tripartite mission. In 2017, the employers representatives in the CAS refused to agree to a second special paragraph – in order to avoid a GSP investigation. DG

⁵⁷ Jeffrey Vogt, *A little less conversation: the EU and the (non) application of labour conditionality in the generalized system of preferences*. INT’L J. OF COMP. LABOUR LAW AND INDUST. REL. 31(283).

⁵⁸ *Id.*

Trade's reliance on the ILO's special paragraphs to determine whether to investigate inevitably impacts the CAS's decision making. Furthermore, the delegation of important EU discretion to an external body raises issues of democratic legitimacy. The Commission may not avoid its responsibility to conduct its international affairs in accordance with Article 21 by substituting an automatic trigger for its discretion.

It is perfectly plausible that the ILO issuing two consecutive special paragraphs on a beneficiary state could be an effective indicator of the need for an investigation. However, using that as the only triggering mechanism improperly insulates the Commission from its responsibility to determine whether an investigation is necessary under all of the circumstances. In practice, this standard prevents the Commission from ever investigating.

Failure to act can constitute maladministration, even in cases involving discretion

There is recent precedent in the context of trade policy for the Ombudsman finding maladministration for failure to act. The Ombudsman found failure to conduct a human rights impact assessment to be maladministration even where the Commission had discretion, rather than a legal obligation to conduct it.⁵⁹ That case centered on human rights concerns accompanying a trade agreement with Vietnam. The Ombudsman decided that it was necessary for the EU to investigate the human rights concerns in order to satisfy Article 21 TEU.⁶⁰ Article 21 requires that EU relations with nonmember states conform to principles including universal human rights, respect for human dignity, democracy, and the rule of law.⁶¹

While trade agreements are designed to be good for the economy, it is not necessarily the case that they always bring benefits in the same way for all the peoples of the countries concerned as we can all acknowledge. Trade agreements may at times have negative consequences for the human rights of the peoples affected by those agreements. Consequently it is important to know whether the EU's Agreement with Vietnam might have negative consequences for the people of Vietnam - a country about which human rights concerns already exist.⁶²

In light of those circumstances, which apply to Bangladesh as well, the Ombudsman wrote that even though the EU enjoyed discretion, the failure to investigate violated the spirit of Article 21. The Ombudsman suggested that the standard for good administration can be higher than simply fulfilling express obligations. The Ombudsman's decision states:

While the Commission may not have been legally obliged to conduct a prior human rights impact assessment, its decision not to do so reflected a failure to act in a manner consistent with the highest values and principles on which the EU is based. This, to me, was maladministration.⁶³

⁵⁹ European Ombudsman's Decision on the failure of European Commission to conduct a prior human rights impact assessment of the EU Vietnam free trade agreement,

<https://www.ombudsman.europa.eu/activities/speech.faces/en/64453/html.bookmark>.

⁶⁰ *Id.*

⁶¹ TEU, art. 21.

⁶² See *supra* note 52.

⁶³ *Id.*

The example of the Vietnam case makes it clear that inaction by the Commission can constitute maladministration, even where action was not expressly legally required. While the GSP is not a trade agreement but a regulation enacted unilaterally by the EU, the Commission's responsibility to act according to the EU's principles applies in equal force here.

II. The Commission has committed maladministration by failing to respond to ITUC requests for an investigation or justification for the decision not to investigate, displaying arbitrary decision making

Process maladministration: where EU institutions have discretion, that discretion may not be exercised in an arbitrary manner

The Ombudsman is empowered to examine not only the outcomes of the Commission's decision making, but its process as well.⁶⁴ Good administration requires more than "compliance with legal rules and principles."⁶⁵ EU institutions must exercise their discretion without being arbitrary. "The administration may not take decisions which are based on vague grounds or which do not contain individual reasoning."⁶⁶ The Commission is bound to justify its decision making "on the basis of objective criteria."⁶⁷

ITUC's response to continued violations

On 4 October 2016, along with several other trade unions, the ITUC wrote a letter to the European Commissioner for Trade, the High Representative of the Union for Foreign Affairs and Security Policy, and the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility.⁶⁸ The letter, which is attached as Appendix A, directly urges the Commission to commence an investigation:

It is clear that the GOB [Government of Bangladesh] is in breach of the labour conditionality of the EU GSP Everything but Arms scheme. Indeed, DG Trade considers that an ILO 'special paragraph' is *the indicator* to determine whether a country has violated the GSP labour provisions. Unfortunately, despite the GOB's obvious failure to comply with its international obligations, the European Commission is not taking sufficient action to hold the GOB to account. As a result, the GOB is convinced that it can continue to flout the terms of the Sustainability Compact and the EU GSP with impunity.

Therefore, we urge the EU to immediately commence an investigation on Bangladesh under the GSP. The potential loss of market access is the only thing

⁶⁴ Draft recommendations of the European Ombudsman in her inquiry into complaint 1125/2011/ANA against the European Network and Information Security Agency (ENISA) at §42.

⁶⁵ *Id.*

⁶⁶ *Id.* at 49.

⁶⁷ *Id.*

⁶⁸ Appendix A.

now that will demonstrate to the GOB that Europe is serious about workers' rights.⁶⁹

Following this precise request, the Commission has not launched an investigation. Furthermore, the Commission has not provided a clear and public explanation of its failure to do so to the ITUC.

The Commission's failure to respond

The Commission has failed to justify its ongoing decision not to investigate the status of Bangladesh under the GSP. While the Commission enjoys discretion in this area, it is bound by the principles of good administration to employ that discretion according to rational bases and to justify its decision making, which includes explaining the objective criteria used. On top of the failure to investigate itself, the lack of transparent, reason process that has led to the failure to investigate constitutes maladministration. The launching of an investigation does not necessarily result in a suspension under the GSP. Indeed, an investigation may provoke discussions with the beneficiary country that lead to improvements in labour standards that would obviate the need for a suspension.

It is important for the Commission to use an effective and transparent mechanism for monitoring the implementation of relevant international conventions, and for investigating allegations that a country's implementation record violates the GSP. Failure to investigate a beneficiary country, where factual evidence suggests that a temporary withdrawal of preferences should be considered, would result in an arbitrary exercise of the Commission's discretion.

III. The Commission has committed maladministration by not creating a transparent process for third party input

There is a systemic problem stemming from the Commission's lack of transparency in the investigation process. It is not clear how ITUC, CCC, or other interested parties can give input on any potential investigation under the GSP. The Commission exercises its discretion in this area without explanation and without inviting or responding to input. The Commission's failure to provide an avenue for NGO voices in its GSP decision making may itself constitute maladministration.

Not only is there no defined procedure under which NGOs may participate in the Commission's decision making, but the Commission does not even announce whether it is considering launching an investigation. The Commission's discretion as to whether or not to investigate a beneficiary of the GSP does not override the right of social partners to participate. The Commission's failure to invite input is compounded by its failure to even notify the public that it an investigation is a possibility. This lack of transparency leaves NGOs with no meaningful opportunity to participate. Such participation is important because diverse perspectives promote good decision making.

⁶⁹ *Id.* at 3.

IV. There is need for policy coherence between the EU's trade and development policies

The Commission is aware of Bangladesh's continued violations of ILO conventions. For example, the Commission has organized meetings with the government of Bangladesh⁷⁰ and has also sent two letters to Bangladesh demanding concrete progress with respect to labour rights and threatening the launching of an investigation.⁷¹ The Commission gave Bangladesh a deadline for response on this "matter of urgency", noting that a follow-up meeting would take place in May 2017 where progress would need to be demonstrated.⁷² Furthermore, the ILO has issued several reports that detail Bangladesh's continued violations of labour rights.⁷³

Additionally, in answer to a parliamentary question in May 2017,⁷⁴ Cecilia Malmström, the head of the DG Trade, stated that "the Commission services and the European External Action Service have made it very clear to the government of Bangladesh that the labour rights situation is of serious concern and that urgent and resolute action must be taken by Bangladesh". These letters and reports verify that the European Commission is aware of the violations and demonstrate that it considers them serious.

At the same time, the European Commission has repeatedly and publicly stated its commitment to fostering and respecting high standards in trade and investment agreements in areas such as labour standards and climate and environment protection.⁷⁵

⁷⁰ Most recently at the Sustainability Compact Meeting on March 18, 2017.

⁷¹ European Commission Letter to the Government of Bangladesh, March 16, 2017. "We will need to demonstrate to the European Parliament, Council of Ministers and to civil society that Bangladesh is taking concrete and lasting measures to ensure the respect of labour rights. This will be essential for Bangladesh to remain eligible for the EBA regime. Without such progress, our monitoring could eventually lead to the launching of a formal investigation, which could result in temporary withdrawal of preferences."

⁷² *Id.*

⁷³ See e.g., ILO, "Report of the High-Level Tripartite Mission to Bangladesh" April 17-20, 2016.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_488339.pdf; International Labour Conference, "Report on the Committee of the Application of Standards: Part Two" 105th Session, Geneva, May-June 2016.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489124.pdf; "Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part A)", International Labour Conference, 107th Session, 2018.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_617065.pdf.

⁷⁴ Cecilia Malmström's May 15th 2017 answer to Ivo Belet and Claude Rolin's parliamentary question E-001344/2017

⁷⁵ See e.g., European Commission "Reflection Paper on Harnessing Globalisation", May 10, 2017.

https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf "we should take forward efforts to improve social and labour standards and practices, in close cooperation with the International Labour Organisation, but also civil society, social partners and the private sector."; European Commission "DG Trade Management Plan 2017" http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154920.pdf "The Commission will continue to negotiate ambitious provisions for promoting respect of labour rights and protection of the environment in line with the international commitments. Once trade agreements enter into force, the Commission will work with trading partners to fully and effectively implement relevant provisions, thereby supporting decent work ... The Commission will also pursue a better link between trade policy instruments (e.g.

Furthermore, EU law requires all relevant EU policies, including trade policy, to promote sustainable development. The EU has, for example, committed to promoting UN Sustainable Development Goals in its trade policy,⁷⁶ including the goal of decent work and economic growth.⁷⁷

Finally, respect for human rights has become a requirement for the lawfulness of European acts.⁷⁸ Trade, as a European act, should not have a negative impact on human rights but should instead seek to promote human rights.

The Commission's simultaneous knowledge of the human rights violations in Bangladesh and their refusal to adequately address the issue while repeating its commitments to respecting these labour standards and human rights in trade show a lack of policy coherence between the EU's trade and development policies. Not only is this incoherence in contradiction with the EU's institutional standards, but it is also a threat to legal security as it weakens the Commission's reliability.

5. What, in your view, should the institution or body do to put things right?

The Commission should launch a formal investigation into the status of Bangladesh under the EBA program. The Commission has broad discretion to craft a creative, effective solution for European trade with Bangladesh. An investigation could open the door to partial sanctions or new conditions for continued benefits, which could be applied with surgical precision to spur change while minimizing unintended consequences. The launching of an investigation need not presuppose any particular outcome. Because the GSP regulation does not require automatic cancellation based on any results of an investigation, the Commission is free to respond to the investigation in whatever manner turns out to be most appropriate to protect workers and encourage development. Furthermore, an investigation would give the government of Bangladesh a six-month window to make concrete improvements. During that time, the Commission would have the ability to direct Bangladesh toward specific reforms.

Generalised Scheme of Preferences, sustainable development chapters in FTAs) and cooperation with the aim of promoting labour rights and environmental protection.”

⁷⁶ European Commission, “Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)”, July 11, 2017. http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf

⁷⁷ See United Nations Development Programme, “Goal 8: Decent Work and Economic Growth” <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-8-decent-work-and-economic-growth.html>

⁷⁸ See Article 6.3 TEU provides that “*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*” See also European Ombudsman's Decision 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, https://www.ombudsman.europa.eu/cases/decision.faces/en/75160/html.bookmark#_ftn14 “good administration means, in the first place, observance of and respect for fundamental rights; where fundamental rights are not respected, there cannot be good administration.”

The Commission's discretion in enforcement of the GSP must be exercised within certain limits, but investigating and seeking productive means of improvement is more appropriate than failing to investigate.

Alternatively, the Commission should comprehensively explain its decision not to investigate despite creating an expectation that it would. If the Commission decides not to investigate, its explanation should include a justification of how the failure to investigate is consistent with the basic principles of the EU.

Additionally, the Commission should publish specific and concrete criteria which it will use in determining whether to launch future investigations under the GSP. The Commission should also publish a clear process by which NGOs and other interested third parties can participate in that decision making.

6. Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes, particularly in the letter attached as Appendix A.

7. If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable

8. Has the object of your complaint already been settled by a court or is it pending before a court?

No

9. Please select one of the following two options after having read the information in the box below.

Please treat this complaint publicly.

10. Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that she is not entitled to deal with it?

Yes

Date and signature: