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Ms Liesje Schreinemacher
Minister of Foreign Trade and Development Cooperation
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Dear Minister,

I am writing you in reply to your letter of 7 June 2022, and as a follow-up to my letter of 6 May 2022 announcing the Commission's intention to publish the first major update to the Operating Guidelines of the Single Entry Point (the 'SEP').

I would like to thank you once again for the useful contribution you have shared regarding our work on implementation and enforcement, and in particular, the operation of the SEP. I would also like to extend my thanks to the Dutch Senate for their invaluable contribution to the debate on the operation of the SEP and the follow up questions you transmitted.

You will find below my replies to all the questions raised by the Dutch Senate, but first and foremost I would like to address the issue of the timelines the SEP will follow in handling complaints related to Trade and Sustainable Development ('TSD'), which is very important to your domestic discussion.

In this respect, I am pleased to inform you that after further reflection we will include in the updated Operating Guidelines specific timelines for the assessment of TSD complaints by the SEP. The relevant text will be:

"In taking forward TSD complaints, the Single Entry Point will work as a general rule with the following timelines:

- i. acknowledge the receipt of the complaint within 10 working days from receipt by the Single Entry Point;*
- ii. first follow up with the complainant within 20 working days from the receipt of complaint; and,*
- iii. finalisation of the preliminary assessment of the complaint within 120 working days from the receipt of the complaint. That preliminary assessment will also identify the appropriate next steps.*

Where further information is needed from the complainant, the Single Entry Point may suspend the 120 working day deadline, or where it requests further information from an international intergovernmental organisation with expertise relevant for the investigation. In these cases, the period restarts once the complainant or the organisation has provided full information.

The timeline may also be suspended when the Single Entry Point needs more time to conclude a complex analysis, or the facts of the case have changed (e.g. new information has come to light that affects the assessment of the case). In these situations, the SEP will keep the complainant updated with regard to changes in the timeline of their case."

It is important to point out that the above timelines concern the preliminary assessment of the case up to the point where the Commission services are able to conclude whether or not the issue raised in the complaint would constitute a violation of the TSD obligations accepted by the respective third country and, if so, the identification of the most appropriate steps to address that violation.

The updated Operating Guidelines will also clarify that, once the Commission has carried out its preliminary assessment, and provided the issue raised by the complaint indeed constitutes a violation of a TSD obligation, it will publish information on the Trade part of the Commission's Europa website, which would include the most relevant factual information concerning the issue raised.

As regards the point you raise on the information the Commission will share if the complaint is deemed inadmissible, let me confirm that we will inform the complainant of the results of the preliminary analysis including in situations where the conclusion is that a particular complaint is considered not to constitute a prima facie violation of TSD obligations.

With this initial clarification, I am pleased to reply to the questions of the Dutch Senate below.

1. Why has the European Commission decided not to adopt the following suggestions for the SEP from Dutch stakeholders?

a. Creation of clear timelines for the responding to complaints and deciding on follow-up action.

As indicated above, and after further reflection, we will include in the updated Operating Guidelines specific timelines for the assessment of TSD complaints by the SEP.

b. Providing the opportunity to signal possible breaches involving trade and sustainable development (TSD) without mandatory substantiation of the claim, in

order to prevent possible violations being missed owing to an overly strict threshold for making an official SEP complaint.

The SEP system has been created with the intention of increasing the efficiency and effectiveness of the implementation and enforcement action by the Commission. The complaint system has therefore been designed to allow the Commission to act on the basis of complaints providing a certain minimum base of information concerning the alleged violation in order to allow the Commission to identify possible TSD violations and respond more quickly. The Commission services remain ready to assist in the formulation of complaints.

Additionally, it is important to point out that complaints are not and will not be the only source of the information that feeds into the Commission's implementation and enforcement action, as we will as well continue independently to monitor trading partners' compliance with their obligation and commence implementation and enforcement action if necessary.

- c. Providing the opportunity to bring complaints against the EU and EU member states, as they too could violate TSD clauses in trade agreements and affected parties in third countries cannot always rely on the protection of their own government.***

A range of remedies and routes exist for stakeholders to seek redress if they consider that the EU or a Member State is in breach of any obligation under the trade agreements. Please see also the reply to question 2.

- d. Creation of clear prioritisation criteria to ensure that TSD complaints are not prioritised over market-access complaints from companies, and clear feedback on what follow-up and enforcement measures have been taken and why.***

First and foremost, I want to reassure that the SEP will treat complaints concerning market access issues and complaints concerning TSD issues on equal footing.

Secondly, both the current and updated Operating Guidelines clarify the guiding principles for the prioritisation of cases, regardless of whether they are TSD cases or market access cases. I would like however to underline that prioritisation will be dynamic, depending on the political outlook and situation on the ground, allowing the SEP to 'prioritise' and 'de-prioritise' complaints to allow the SEP to focus resources on the most relevant cases that have more chance of being positively resolved or to achieve positive developments at any given moment and to quickly and efficiently respond to the changes in circumstances.

- e. Role for the EU Domestic Advisory Group (DAG) in the prioritisation of complaints and the provision of rights to information and advice on complaints regarding a trade agreement with which they are involved.***

I share the importance attached to DAGs by you and the Dutch Senate. The role of DAGs is strengthened in the context of the TSD review, including by making it clear that EU DAGs can file SEP complaints on violations of TSD commitments and – if warranted - represent the interests of a party located in a partner country. Furthermore, the revised SEP Operating Guidelines indicate that

DG TRADE is ready, for example, when smaller stakeholders are considering submitting a complaint, to discuss the scope of the information available. This can be made in the framework of pre-notification contacts on a voluntary basis in order to prepare the formal submission of a complaint.

- 2. Does the European Commission agree with the Dutch government that it is not necessary to file complaints against the EU and its member states when they fail to fulfil their TSD obligations, because EU and national legislation provides strong safeguards to protect labour law and the environment, and because nationals of third countries would be able to turn to their own government if TSD obligations were violated by the EU?***

TSD obligations included in EU FTAs correspond to the level of labour and environmental protection in the EU and in EU Member States as guaranteed by national, EU and international law. If these standards are violated by Member States, there are various mechanisms of enforcing these obligations both at national and EU level including through court and infringement proceedings. These complaints can be sent by stakeholders through various channels including via EU delegations abroad. The SEP complaint mechanism was created as a targeted tool of gathering complaints concerning the application of the commitments taken by a third country under EU Trade Agreements. This applies both to market access commitments and to alleged violations of TSD Chapters.

- 3. Is the European Commission of the opinion that EU and national legislation does not provide strong safeguards to protect the rights of investors?***

The European Commission is of the opinion that EU and national legislation does provide strong safeguards to protect the rights of investors. As the Court observed in its Opinion 1/17 of 30 April 2019, *“the purpose of inserting in the CETA provisions concerning non-discriminatory treatment and protection of investments, and the creation of tribunals that stand outside the judicial systems of the Parties to ensure compliance with those provisions, is to give complete confidence to the enterprises and natural persons of a Party that they will be treated, with respect to their investments in the territory of the other Party, on an equal footing with the enterprises and natural persons of that other Party, and that their investments in the territory of that other Party will be secure.”*

In that regard, the level of protection preserved under CETA for Canadian investors corresponds to the level of protection EU investors enjoy domestically within the EU. By including investment protection provision in CETA, the EU ensures that EU investors operating in Canada benefit from the comparable level of protection they enjoy in the EU.

- 4. Why should non-EU investors have the option of bringing claims against the EU and its member states by way of investment arbitration, when non-EU civil society organisations do not have the opportunity to file complaints?***

Contrary to traditional investment arbitration under the existing investment treaties in force between EU Member States and Canada (or other partners of EU investment agreements), all Investment Court proceedings under CETA (or other EU investment agreements) will be fully transparent, hearings will be open to the public, and interested third parties, such as non-governmental civil society organisations, will be allowed to make submissions to the Investment Court. This ensures that

all human rights and sustainable development aspects in an investment disputes will be effectively heard by the Investment Court.

Non-EU civil society organisations would normally have the possibility to file complaints about investors conduct in the host country before domestic courts. In addition, Canada and most EU Member States are adherents to the OECD Guidelines for multinational enterprises. The Guidelines' grievance mechanism allows affected individuals and communities to address adverse social and environmental impacts caused by corporate misconduct to seek remedies for harms and to stop harmful corporate activities from going forward. The Guidelines may be (and often are) applied extra-territorially, i.e. to capture an alleged misconduct of EU multinationals operating in third countries.

As regards the possibility of non-EU civil society organisation to lodge TSD complaints under the SEP, the current operating guidelines (and the revised ones as well) clearly indicate that they can do so if they are represented by EU based stakeholders. I believe that this does not unduly hamper the possibility of non-EU based stakeholders to lodge complaints on TSD issues, while preserving the EU character of the SEP. Moreover, this reflects our experience prior to the creation of the SEP, where non EU-based stakeholders always joined forces with EU based stakeholders when dealing with the Commission on TSD and other issues.

5. Does the European Commission recognise that not all countries outside the EU respect the rights and interests of their citizens and that there is room for improvement with regard to respect for the rule of law in many parts of the world? Who, in the view of the European Commission, should these people and organisations turn to if the EU or its member states violate TSD obligations and their national government does not represent them in this regard?

The reply to this question is included in replies to question 2 (the specific role of the SEP complaint mechanism) and question 1(e) – role of DAGs in gathering input from stakeholders from third countries.

6. Why should we accept CETA in its current form despite the major discrepancy between, on the one hand, its strong legal rights and options for investors and, on the other, its weak sustainability standards and a lack of scope for civil society organisations to enforce them?

As other TSD chapters of EU trade agreements already in force, the CETA TSD chapter contains ambitious and far-reaching sustainability commitments. According to these provisions, the EU and its trading partners must abide by international labour and environment standards and agreements, effectively enforce these as well as their respective labour and environmental laws, not deviate from labour or environmental laws to encourage trade or investment, sustainably trade natural resources and combat illegal trade in threatened and endangered species of fauna and flora, etc.

In line with international practice, the EU favours a cooperation and dialogue-based approach in order to secure the effective implementation of these commitments, as this is the best avenue to achieve sustainable and long-lasting effects on the ground. EU trade agreements are instrumental to create platforms for enhanced exchange with its privileged trading partners. EU regularly sets up

cooperation and regulatory dialogues and provides targeted technical assistance to its trading partners, as necessary.

Nevertheless, the TSD commitments under CETA are also legally binding and enforceable through a dedicated dispute settlement mechanism based on an independent and transparent review by a panel of experts. This enforcement mechanism comes into play when the cooperation-based engagement fails, and action through an adjudicative process is necessary to ensure that the party brings itself into compliance with its agreed TSD commitments. The EU has already used this mechanism to secure the effective implementation of concrete TSD commitments with other partners than Canada and will continue to rely on it as required. Nevertheless, to date, no information has been brought to the Commission's attention about possible shortcomings or possible non-compliance with CETA provisions.

Concerning civil society, the EU is at the forefront of civil society involvement in TSD policies through trade agreements. The Commission regularly and frequently consults interested parties through a well-established horizontal structure of Civil Society Dialogues, where trade and sustainable development issues are routinely raised and discussed. EU trade agreements provide specifically for civil society's involvement during the implementation of TSD commitments, including through the DAGs (which are funded for their logistical support and functioning after the agreements enters into force). Well substantiated and evidence-based contributions from civil society organisations are essential for the Commission to identify, prioritise, and act upon TSD matters.

More specifically in relation to the enforcement of the EU's ambitious TSD commitments, DAGs and civil society may decide to have an active role for instance by submitting TSD-related complaints to the Single Entry Point, by submitting amicus curiae briefs before a dispute settlement panel of experts or by attending their hearings. The TSD review will further enhance the role of civil society, for instance by inviting DAGs at meetings with Member States' representatives, where they will be able to contribute specific expertise, and more closely associate DAGs in preparing the TSD Committee meetings with partner countries, in particular on the identification and the monitoring of implementation priorities.

Yours sincerely,

Bescherming persoonlijke levenssfeer

Valdis Dombrovskis