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THE TWENTY FIFTH PLENARY SESSION OF THE GENERAL ASSEMBLY
LEGAL AND POLITICAL AFFAIRS COMMITTEE

REPORT*

INSTITUTION OF OMBUDSMAN
IN THE BSEC MEMBER STATES

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I. INTRODUCTION

1. The Legal and Political Affairs Committee at its Twenty Fourth Meeting in Baku on 13 October 2004 following the proposal by the Azerbaijani delegation was of the opinion to examine the functioning of ombudsman institutions in the BSEC member states.
2. In this respect, the Twenty Fifth Meeting of the Committee in Sofia on 20-21 April 2005 is dedicated to “Institution of Ombudsman in the BSEC Member States” with a view to elaborate the Report and the Recommendation for further submission to the consideration of the Twenty Fifth Plenary Session of the General Assembly in Kyiv in June 2005.
3. The present report is designed to explore the place of the ombudsman in a democratic state and the manner in which an ombudsman can improve the operation of the administrative branch of government by serving as an accountability mechanism.
4. The Report benefited from the contribution by the national delegations of Azerbaijan, Georgia, Moldova, Romania, Serbia and Montenegro, Turkey and Ukraine. In addition, the reference material has been obtained by the PABSEC International Secretariat through other related sources.

II. INSTITUTION OF OMBUDSMAN IN THE BSEC MEMBER STATES

5. New concepts have been evolving in international law and policy in response to the increasing number of states that have adopted democratic forms of government. So the concept of good governance has been elaborated as a standard to be met particularly in the context of public administration. It also became a necessity to reinforce the system of human rights protection and to establish monitoring and control procedures of public powers activity. Hence, the ombudsman institutions protecting citizens before administrative structures and services started to be established in most states with democratic forms of government.
6. The transition to democratic forms of governance varied in strength and viability and, consequently, the process of democracy building and democratic consolidation differed substantially from country to country. Each nation’s transition to democratic governance has been unique depending upon its domestic political environment, the form of democracy, approaches in the democratic consolidation period, the domestic democratic culture and the influence of international factors. However, some regional similarities and trends in supporting democratic governance are evident both in the states located within a particular region and within the regional framework.
7. The BSEC member states as many others in Europe have set the target to follow the way of construction of democratic institutions adhering to the criteria based on the recognition of universal human rights and freedoms as a supreme value. The new democracies have been attempting to reduce inherited administrative inefficiencies and to eliminate human rights abuses committed by government officials. With the purpose to investigate complaints concerning maladministration in government conduct the

ombudsman institutions have been established. Well-functioning and effective ombudsman institutions became viable mechanism for strengthening of democratic accountability and promoting democratic development and good governance.

8. The word “ombudsman” itself is of Swedish origin and means “people’s representative”. The ombudsman institution serves as a mechanism which enhances transparency in government and democratic accountability. The institution can be described as an independent and impartial office responsible for maintaining and improving the quality of public administration to whom citizens can turn in confidence with complaints and who acts as a mediating body in relation to the authorities. Ombudsman institutions vary through the given mandate. One variation may concentrate more on the human rights along with the administrative oversight while others may be given the mandate including anti-corruption, environmental protection functions, etc. In Albania, Azerbaijan, Georgia, Moldova, Romania, Russian Federation and Ukraine the responsibilities of the ombudsman are specifically defined so as to include human rights.
9. However, as the ombudsman model has been established in the countries, the name used to represent the office has changed, often to a title more immediately expressive of the characteristics of the institution reflecting their mandate and are enshrined in the country’s constitution and supported by legislation. For example, there is: Albania People’s Advocate (1998 Constitution, 1999 Law); Armenian Human Rights Ombudsman (2003 law); Azerbaijan Human Rights Representative (2001 constitutional amendments and law); Bulgaria Ombudsman (2004 law); Georgia Public Defender (1996 law); Greek Ombudsman (1998 Regulations of the Ombudsman and 2001 constitutional changes and law); Moldova Parliamentary Advocates (1997 law); Romania People’s Advocate (1991 Constitution, 1997 law); Russian Federation Commissioner for Human Rights (1993 Constitution, 1997 law, in operation 1998) and a number of regional ombudsmen in Russia; Ukrainian Parliament Commissioner for Human Rights (1996 Constitution, 1997 law, in operation 1998); *(Turkey and Serbia and Montenegro are still in the process of establishing national ombudsman institutions)*.
10. The role of the ombudsman is to protect the people against violation of rights, abuse of powers, negligence, unfair decisions and maladministration in order to improve public administration and make the government’s actions more open and the government and its servants more accountable to members of the public. As an example, the Azerbaijan Human Rights Representative conducts inquiries on the basis of petitions by Azerbaijani citizens, foreigners, stateless persons, juridical personalities regarding violation of human rights; the Albanian People’s Advocate has the right to make recommendations and to propose measures when he observes violations of human rights and freedoms by the public administration; the Greek Ombudsman, as many other ‘Western European’ ombudsmen primarily act as mediators between citizens and the authorities with the view to protect citizens’ rights, combating maladministration and ensuring respect of legality; the Moldova Parliamentary Advocates consider complaints regarding decisions or actions by the local and central public administration bodies, institutions, organizations in the exercise of administrative functions; The

Romanian People's Advocate can conduct its own inquiries, ask the public administration authorities for any information or documents necessary to the investigation, hear or request statements from heads of public administration authorities as well as from any public servant who can provide the information necessary in order to solve the complaint. The Ukrainian Parliament Commissioner for Human Rights conducts inquiries and investigations on the basis of petitions by Ukrainian citizens, foreigners, stateless persons and their representatives, MPs, and of his own volition. Under the Ukrainian Law such petitions should be submitted to the Commissioner throughout one year from the date the violations of human and citizens' rights have been detected.

11. A well-functioning ombudsman is an important element of administrative governance, enhancing its accountability serving as both a horizontal and a vertical accountability mechanism. Horizontal accountability can be defined as the capacity of state institutions to check abuses by other public agencies and branches of government. Ombudsman is an entity which is part of the state governance structure but, at the same time, external to the executive/administrative branch and independent of all branches of government. The ombudsman improve legal and administrative horizontal accountability of government by impartially investigating the conduct of public administration; recommending changes to law, policy or practice when illegal or improper administration is uncovered; and reporting to the legislature and the public. Ombudsmen with anti-corruption or leadership code mandates can supply legal, administrative and financial accountability with their focus on misuse of public funds, fraud, etc.
12. The ombudsman also serves as a vertical accountability mechanism between the populace and the government, allowing members of the public to complain about government administration and have their concerns investigated, assessed and presented to the government as critical feedback. Yet, a hallmark of the ombudsman institution is that the office does not have the power to make decisions that are legally binding on the administration so that the executive or administrative branch is free to implement, in whole or in part, or to ignore the ombudsman's recommendations.
13. The institution of ombudsman is the best-known of all contemporary institutions for supervising the work of government bodies. Each country, due to its specific socio-political environment and differences in its political and judicial culture, creates its own model for protecting citizens' human rights from the arbitrariness of the public authorities, which has become more pronounced due to an increasingly developed and comprehensive state apparatus. As a rule, this function is performed by a single individual, but there may also be exceptions. For example there are three Albania People's Advocates each of them independent and with its own area of responsibility; and three Moldova Parliamentary Advocates composing an independent state institution called "Centre for Human Rights".
14. Ombudsman being a public sector institution serving as mechanism for democratic accountability promoting democratic development through supervising the administrative activities of the executive, receive and impartially investigate complaints from the public concerning the conduct of government administration.

Many ombudsmen are also given the power to launch own-motion investigations and, in certain cases, legislators or government ministers may render matters to the ombudsman for investigation. The ombudsman is given investigative jurisdiction over a wide variety of government departments, agencies, state corporations and their administrative officials. The ombudsman institution operates as another check on the executive/administrative branch of power, in addition to the controls exercised by the legislature, the courts and other public sector institutions. The general objective of the ombudsman is improvement of the performance of the public administration and the enhancement of government accountability to the public.

15. The holder of the ombudsman office is elected by parliament or appointed by the head of state or government by or after consultation with parliament. As an example, the Azerbaijan Human Rights Representative is elected by the Parliament upon the proposal by the President for 7 years without the right for re-election; there are three parliamentary advocates in Moldova appointed by the Parliament for 5 years. The Romania People's Advocate is appointed by the Senate of Romania and the Chamber of Deputies for a term of office of five years; the Ukrainian Parliament Commissioner for Human Rights is elected by Parliament for the period of five years and is entitled to another term.
16. The powers given to ombudsman include compelling the production of documents and the attendance and testimony of witnesses. After an impartial and objective investigation, the ombudsman makes a determination whether there has been improper conduct. However, if misconduct is uncovered by the investigation, the ombudsman has the power to make recommendations for changes to administrative practice and policy to terminate the administrative problem. Many ombudsmen also have the power to make recommendations for changes in laws. For example, in Georgia and Russia, the ombudsman may propose or request that administrative or disciplinary proceedings to be initiated; in Moldova the ombudsman may order that disciplinary proceedings be brought or may bring a court action for misconduct; in Greece Ombudsman may inform the prosecuting authorities of suspected criminal offences; In Romania the ombudsman may inform the relevant political authorities of any legislative or regulatory deficiencies. In Albania, Georgia, and Moldova the ombudsman may make proposals for improving legislation or regulations. In Albania, Moldova, Russia and Ukraine the ombudsmen may variously apply to the Constitutional Court for declarations of illegality or unconstitutionality, interpretations or invalidation.
17. The ombudsman also has reporting duties. In specific investigations, the ombudsman reports to the complainant, the government and if recommendations are not implemented by the administration, the ombudsman can report on the matter to the legislature. Further on, the ombudsman has the duty to make an annual report to the parliament on the activities of the office. Regular contact between the ombudsman and parliament allows the latter to keep abreast of ombudsman activities and of the development of any trends in misconduct by the executive. Some ombudsmen even can issue special reports based on particular, usually more serious, investigations.
18. In a truly democratic state ombudsman serves as a mechanism to improve the accountability of the administrative branch of government to members of the public.

Public accountability is identified as one of the indicators of legitimacy of governance since an effective democratic state rests upon legislative, administrative and judicial governance institutions which incorporate substantial public participation. The establishment, strengthening and activities of ombudsmen fall within the political component of good governance given their roles in democratization, administrative and legal accountability and human rights protection.

19. As mentioned before, the role of the ombudsman is rather important in the countries with new democracies than in established ones since the ombudsman can contribute to the development of democratic conditions, the strengthening of the rule of law and the modernization of state institutions. In particular, the ombudsman can have an important influence on the state's transformation and modernization by drawing attention to the need for legislative change through improving human rights protection, elimination of problems in the application of new laws to individual cases and ensuring the harmonization of laws with the constitutional and international human rights obligations. It also helps in reforming government institutions and structures and modifying the practice of public authorities, particularly concerning their attitude towards members of the public.
20. The ombudsman institutions in the BSEC member states deal mostly with human rights issues covering the entire spectrum of political, civil, economic, social and cultural rights. Economic and social rights cases comprise major source of complaints. Yet, in many cases, ombudsmen are unable to operate effectively because of a lack of resources, insufficient access to necessary information or inadequate procedures for ensuring a positive response from the administration.
21. As determined in the 2003 Report on the Institution of Ombudsman by the PACE Committee on Legal Affairs and Human Rights the effectiveness of an ombudsman institution derives primarily from *guaranteed independence* whether overseeing administrative probity or protecting human rights. It is essential that the ombudsman has to be independent of government and of the general administrative bureaucracy. The ombudsman's political independence and impartiality should be reinforced by prohibiting the incumbent from any personal involvement in political activities. *Transparent appointment* by parliaments is another important element for effective functioning of impartial ombudsman institutions. Whilst the ombudsman must be independent of the executive, as guardian of a general public interest, it is important for the maintenance of public confidence that ombudsman is appointed by a democratic body like parliament in a transparent manner. *Guaranteed access to necessary information* is also extremely important for proper and reliable investigation. For the ombudsman to play a useful role, especially as an agent of human rights protection, his findings must be more than abstract repetitions of principle or descriptions of best practice: they must be acted on promptly and effectively, with reports being submitted to him afterwards. *Public accessibility* of complaint submission procedures is also very important. It must be easy, simple and free for individuals to bring cases to the ombudsman's attention. All these elements combine to establish the fundamental character of the office. The Ombudsman must be held in trust and esteem by the public, whilst at the same time maintaining the confidence and good-will of the administrative

authorities under investigation. Every party must anticipate justice and fairness from the ombudsman, so that the public is prepared to submit complaints to the ombudsman and the administration is prepared to cooperate with investigations and comply with decisions.

Ombudsman at the international level

22. The idea of ombudsmanship has been spreading beyond national boundaries applying more frequently at the regional and international level. Today ombudsman institutions exist at the national, regional and local levels and keep on spreading.
23. The European Ombudsman was established by the European Union's Maastricht Treaty to oversee the conduct of European Community institutions and bodies excluding the courts. The office of the European Ombudsman is located in Strasbourg. The European Ombudsman can be categorized generally as one of the external accountability mechanisms of the supranational EU. The European Ombudsman addresses instances of Community maladministration. The European Ombudsman is appointed by the European Parliament after each parliamentary election for the duration of its term and reports annually to the European Parliament. The mandate of the European Ombudsman is to scrutinize the administrative activities of the Community in order to improve fairness, efficiency and accountability in its administration. The European Ombudsman does not have jurisdiction over complaints against the national or sub-national governments of EU member states, whether these relate to purely domestic matters or the application of Community law by the member state. Also, the European Ombudsman does not have the jurisdiction to take complaints made against international organizations or associations, whether based in Europe or beyond. The European Ombudsman is somewhat different from a national ombudsman model in the extent of its jurisdiction over bodies with a legislative role. The typical national or sub-national ombudsman does not have the authority to investigate poor administration in the legislative branch of government. In contrast, the European Ombudsman can investigate maladministration complaints against all the Community institutions which participate in the legislative process - the Commission, the Council and the European Parliament. By promoting good administration, the Ombudsman helps enhancing relations between the European Union and its citizens. The Code of Good Administrative Behaviour which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public and which was adopted by the European Parliament in 2001. It tells citizens what they have the right to expect from the administration and civil servants what principles to observe in their activities.
24. The Council of Europe Commissioner for Human rights has a number of human rights protection functions including facilitating the work of national ombudsmen or similar human rights institutions. The Office of the Commissioner for Human Rights was established in 1999 as an independent institution within the Council of Europe. In accordance with his mandate, and without excluding the possibility of complementary actions, the Commissioner focuses his activity on four main areas. These are the promotion of the education in and awareness of human rights, the encouragement for the establishment of national human rights structures where they do not exist and

facilitate their activities where they do exist, the identification of short-comings in the law and practice with regards to human rights and, lastly, the promotion of their effective respect and full enjoyment in all the member states of the Council of Europe.

25. The European Ombudsman Institute strives to spread and promote the idea of ombudsmanship in Europe, support research in this field, and assist in the exchange of expertise at the national, European and international level. Membership of the Institute is made up of the majority of national ombudsman in Europe.
26. The International Ombudsman Institute unites national institutions of more than 50 countries worldwide and promotes ombudsmanship through studies, education programs, publication and exchange of information, as well as regional and international conferences.

III. CONCLUSION

27. Respect to the fundamental rights and observing equity constitutes the core for just and fair society maintained through effective political democracy and the rule of law. Protection of human rights and freedoms has always been a subject for concern of a global community. Universal standards to this regard have been set within the framework of the United Nations and the Council of Europe declarations with a view to secure that every individual keeps the basic principles constantly in mind and strives to ensure their recognition and observance among all peoples and nations without distinction of any kind.
28. Among the other mechanisms protecting the essential rights and providing effective remedy for acts violating the fundamental rights granted by the constitution or by law, the institution of ombudsman have emerged. In democratic societies it became an important and sometimes necessary mechanism for reinforcing the system of human rights protection and providing administrative fairness through monitoring and control procedures of public administrative structures activity. It should be also noted that the full functioning of the ombudsman institution is one of the requirements for membership of the Council of Europe or that of the European Union.
29. Ombudsman institution mandate varies from country to country depending upon domestic political environment, the form of democracy, the domestic democratic culture, etc. However, some regional similarities and trends are evident.
30. Ombudsman institutions in the BSEC member states serve as a valuable supplementary component of the inspection of the legality and fairness of public administration. Most of the ombudsman institutions in the BSEC member states concentrate on improving government administration, building good governance and protecting human rights.
31. As a pragmatic and workable concept, ombudsman's most effective role as mediator between the citizen and the administration is best achieved from a position of respected neutrality. The factors making these institutions effective and efficient include independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency, and accountability. Altogether, democratic governance in the

state; the independence of the institution from government; the jurisdiction of the institution; the extent and adequacy of the powers given to the institution; the accessibility of the office to members of the public; the level of cooperation of the institution with other bodies; operational efficiency; the accountability and transparency of the institution; the personal character and expertise of the persons appointed to head the institution; and the credibility of the office in the eyes of the populace should be addressed.

32. As an accountability mechanism, it extremely difficult for ombudsman institution to function within any system other than a democracy governed by the rule of law. In a state without a democratic system with controls on the exercise of power and where there is no real independence from the ruling power it is inconceivable for an ombudsman to exist. Any ombudsman in a non-democratic state may be used by the state as a facade to veil the human rights and administrative fairness problems. It is obvious that full functioning of the ombudsman institution presupposes a political and administrative system that is a democracy governed by the rule of law with all the appropriate mechanisms of accountability.
33. The ombudsman institutions in new democracies also have the function to contribute, through its activities, to the growth of an environment that positively supports the transition to democracy and generates greater respect for law and human rights. It has to be noted that when an ombudsman institution is been established by a new government in a consolidating democracy, the ombudsman should attempt to obtain strong legal protection and widespread support from the public. As democratic governance in a state matures, an ombudsman institution should also experience a more conducive environment for operational effectiveness.
34. It is also important that the jurisdiction of the ombudsman be defined precisely in order to avoid jurisdictional conflicts with other state institutions. Some ombudsmen do have broad jurisdiction over different areas such as the police, prisons, senior elected and appointed public officials, etc. The jurisdiction of ombudsman is sometimes extended over the judiciary to different degrees, such as the ombudsmen in Albania. A number of human rights ombudsmen do address economic, social and cultural rights such as those in Azerbaijan, Georgia, Romania and Ukraine. In addition some ombudsmen have express mandates to protect children's rights and needs either generally or in discrete areas, such as the ombudsmen in Greece.
35. The ombudsman institutions are given powers of investigation, which actually have to be as strong as possible. The institution should be given such powers in its legal framework to cover the investigatory process and the implementation stage. Investigatory powers should include those to obtain documents, compel the attendance and testimony of witnesses, and inspect government premises. The ombudsman must also ensure that the procedures are procedurally fair for complainants and for the administrative authorities under scrutiny. However, ombudsman effectiveness does not always follow automatically from having stronger enforcement powers.
36. The effectiveness of the ombudsman should be enhanced if it has an accountability system and an optimum level of transparency, usually implemented through the

reporting requirements imposed on ombudsmen in the form of annual and special public reports to the legislature or the executive.

37. The ombudsman should also be accountable to the members of the public who it is mandated to protect. Accountability to the public and transparency can be enhanced through actions such as making sure annual and special reports are distributed widely in the public sphere and ensuring that there is a regular flow of communication between the institution and the complainant during an investigation. Public dissemination of an annual report should not be contingent on the legislature or executive examining it first. Developing a relationship with the media also results in the provision of public information and transparency of operations. Many ombudsmen use press releases to inform the public about important cases and developments.
38. It is extremely important to appoint as ombudsman an individual who has expertise and competence in the subject matter. The ombudsman must have credibility, both in the eyes of the government and the populace. The populace served by ombudsman must perceive that though the right to complain about poor administration or human rights breaches they can obtain an impartial investigation. Yet, if the public develops a negative perception about the institution, this attitude may not be easily altered and members of the public may be disinclined to use the institution in the future. A strong, competent and credible ombudsman can be the determining factor in the effectiveness of the institution.
39. Political and governmental support must be given to the ombudsman institution, its work and recommendations. If the work and recommendations of the institution are ignored or unreasonably criticized by the executive branch and public administration, the effectiveness of the institution will suffer. Government responsiveness is also connected to a factor such as the character and credibility of the ombudsman and the public reputation of the institution.
40. Along with the national ombudsman institutions the idea of ombudsmanship is being spread to regional and international levels. The international cooperation among the ombudsman institutions gain full gear as the European and international ombudsman institutions become fully effective.
41. Every individual, as a member of society, is granted the right to social security and is entitled to realization of the economic, social and cultural rights. In this respect, it would be no exaggeration to say that the ombudsman institution is not only a desirable, but also an necessary mechanism for the states that follow the path of building democratic institutions and the rule of law adhering to the criteria based on the recognition of universal human rights and freedoms.