

# INTEGRATION , TRADE AND HUMAN RIGHTS

Proposal of a Democratic Clause for the  
Association Agreement between the Andean  
Community and the European Union

DEMOCRATIC CLAUSE



3<sup>rd</sup>

NOTEBOOK GLOBALIZATION WITH EQUITY

**Peruvian Network for a Globalization with Equity - Red GE**

# **INTEGRATION, TRADE AND HUMAN RIGHTS**

**For the Association Agreement between the Andean  
Community and the European Union**

## **HUMAN RIGHTS FIRST**



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# GENERAL INDEX

<b>Prologue</b>	7
<b>I. Presentation</b>	11
<b>II. PROPOSAL OF DEMOCRATIC CLÁUSE</b>	15
1. PREAMBLE	15
2. GENERAL DISPOSITIONS	16
3. PILLARS OF THE ASSOCIATION	19
A. PILLAR OF POLITICAL DIALOGUE	19
B. PILLAR OF COOPERATION	21
C. PILLAR OF COMMERCE	26
4. EXCEPTIONS	33
5. SUSPENSION AND TERMINATION OF THE AGREEMENT	34
6. ANNEX I: TREATIES TO BE RATIFIED THAT COMPLEMENT THE CONCEPT OF HUMAN RIGHTS IN THE FRAMEWORK OF THE PRESENT AGREEMENT	34
<b>III. ANNEXS</b>	37
<b>1. ANNEX N° 1: THE DEMOCRATIC CLAUSE: BASIC DEFINITIONS AND EVOLUTION OF THE CONCEPT</b>	37
A. ANTECEDENTS: THE DEMOCRATIC CLAUSE AND THE INTERNATIONAL COOPERATION.	38
B. THE USE OF THE DEMOCRATIC CLAUSE AS A POLICY OF THE EUROPEAN UNION	39
C. THE DEMOCRATIC CLAUSES IN THE ASSOCIATION AGREEMENTS OF THE EU	46
D. SOME NECESSARY CONDITIONS TO MAXIMIZE THE EFFECTIVENESS OF HUMAN RIGHTS' LAWS AND THE DEMOCRATIC CLAUSE	68
<b>2. ANNEX N° 2: CONCEPTUAL FRAMEWORK. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND FREE TRADE IN REALITY: THE ASYMMETRIES</b>	79
A. THE OBLIGATORINESS OF THE HUMAN RIGHTS DEMOCRATIC CLAUSE AS A NORM OF INTERNATIONAL LAW	82

B. THE <i>ERGA OMNES</i> NATURE OF ITS OBLIGATIONS AND THE INTERNATIONAL RESPONSIBILITY THAT GENERATES ITS BREACH	82
C. THE SPECIAL CHARACTERISTICS OF THE INTERNATIONAL OBLIGATIONS IN MATTERS OF HUMAN RIGHTS	85
D. THE SPECIAL CASE OF THE OBLIGATIONS IN MATTERS OF HUMAN RIGHTS OF THE EUROPEAN COMMUNITY AND THE EUROPEAN UNION IN THEIR INTERNATIONAL RELATIONS	86
E. CONFLICT BETWEEN NORMS THAT GATHER HUMAN RIGHTS AND THOSE THAT REGULATE FREE TRADE: PRIMACY OF THE FIRST ONES	89
F. SOME CONCLUSIONS	93
<b>3. ANNEX N° 3: THE SUSTAIN AND DEVELOPMENT OF OUR PROPOSAL</b>	95
A. PREAMBLE	95
B. GENERAL DISPOSITIONS	97
C. PILLAR OF POLITICAL DIALOGUE	100
D. PILLAR OF COOPERATION	102
E. PILLAR OF COMMERCE	107
F. CONTROL MECHANISMS	115
G. THE EXCEPTIONS	116
H. SUSPENSION AND TERMINATION OF THE AGREEMENT	117

## PROLOGUE

After the important breakthrough of the human rights internationalization through the creation of the international protection systems, the process of economical globalization constitutes a significant challenge. The new trade and economic rules that are being pushed through Free Trade Treaties, promote a development model with which significant protections for the rights of capital are procured, giving great stability to the investments at the expense of restricting the State's capacity for action.

The concern about the impact on human rights of these treaties is not new. There are already significant antecedents of the impact they have been having through the new commitments they promote in issues such as intellectual property and its implications in the access to medicines, or in cases in which the mechanisms of international arbitration rule against the National States, making them pay millions in compensations. This happens because those instances for considering dangerous to the investors' rights the legitimate measures of environment or consumers' protection taken by the governments.

Thus, while the system that guarantees the fundamental rights has as a basis the national and international justice systems, the international capital through the free trade treaties and the international arbitration systems has been promoting a parallel system of protection and guarantee of the investments. In this «two way» globalization, the fundamental human rights protected in the international rights system is somehow left unprotected in the protection system of capital and investment's rights. Consequently, we are going from the fundamental rights as a base, to a new protection system, in which the international capitals' rights are protected with the new trade rules expressed in the free trade treaties.

At an international level, plenty are the voices of alert that have called attention on the important limitations that the model of economical-commercial integration has, via the free trade treaties, to procure the best guarantee of the fundamental human rights and particularly of the economical, social and cultural rights as well as to abide the environmental standards that can offer dignified life conditions and sustainable development. In such context, several organizations have been campaigning for the general supremacy of human rights to be included as an explicit premise in the framework of commercial negotiations as opposed to the commercial rights given by the free trade treaties. Yet, even though this declaration has been included in some agreements, the mention seems to be no more than an allusion for good intentions.

In this accelerated process of economical globalization, Peru has chosen the commercial insertion of the Free Trade Treaties' model. Our country has already subscribed these agreements with the United States, Canada and Singapore and is negotiating new agreements with over six countries that include some of great economical and commercial power such as China and the European block. The negotiation with the European Union (EU) initially proposes a different context to the traditional Free Trade Treaties' negotiation. With the format of Association Agreement, the EU promotes the negotiation between blocks of countries (in our case through the Andean Nations Community) of three essential pillars: the pillar of Political Dialogue, of Cooperation and of Commerce, the last one of which properly corresponds to a Free Trade Treaty. In other words, with the EU we negotiate something more than a traditional Free Trade Treaty.

As it has done before in other negotiations, the EU proposes the inclusion of a «Democratic Clause» for the agreement. This clause conditions the validity of the Association Agreement to the fulfilment of the fundamental rights, according to the Universal Declaration of Human Rights. Including this clause constitutes a new scenario for discussing the guarantee and enjoyment of the fundamental rights in the context of the Free Trade Treaties. Even though it is true that the negotiating pattern the Europeans propose have no precedents in our country, it is

important to say that the democratic clauses approved by other countries like Mexico and Chile in their negotiations with Europe have turned out to be insufficient, in that it does not constitute a mechanism efficient enough to monitor the impact that the commercial agreement has in matters of human rights.

The opportunity of negotiating a democratic clause between the Andean countries and the EU must be seized to visualize and seek to include a real mechanism to guarantee the fundamental rights in the commercial agreements. In order to do that and with the follow up work and critical analysis being done about the negotiation process of the Association Agreement between the Andean Community and the European Union, we have developed the Democratic Clause proposal we now present, which encloses the antecedents and experiences of other negotiations and the proposals produced by diverse sectors of the civil society and the human rights movement. This document has been elaborated by Dr. Javier Mujica Petit, in collaboration with Victor Saco, of the Centre for Labour Counselling of Peru (CEDAL in Spanish), as a request from the Peruvian Network for a Globalization with Equity (REdGE in Spanish) and has the support of CEDAL for its publication. We thank 11.11.11 for making this initiative possible.

The proposal has the endorsement of Peruvian organizations such as the Association for Human Rights (APRODEH in Spanish), the Human Rights National Coordinator (CNDDHH in Spanish), and the National Centres Association (NCA), as well as the support of international networks such as the Organizations of Promotion Latin American Association (ALOP in Spanish), the Human Rights International Federation (FIDH in Spanish) and we expect it might also be picked up by other networks and platforms.

Convinced that promoting equity in the context of globalization requires a strong stake in developing an approach of promotion and guarantee of the fundamental rights, the proposal of a Democratic Clause that we share with you in this third notebook Globalization with Equity wants to be a contribution for the analysis and a proposal for the incidence action

we, the organizations, can promote in the context of the negotiation with the European Union and in new commercial negotiations.

Facing the model of commercial integration through the Free Trade Treaties we assert that Human Rights must come first, and for that, concrete mechanisms must be included in these agreements that will allow to give primacy to them, as well as mechanisms for the follow up and vigilance of these rights' guarantee. To include a broad Democratic Clause, capable of being executed, must be the expression of a real commitment with human rights from the States in the context of commercial agreements.

Alejandra Alayza  
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## I. PRESENTATION

The International Law on Human Rights is imperative in stressing its primacy over any other kind of international obligation. This primacy must be respected, especially during the negotiation and celebration of international treaties linked to international trade that stress the promotion and protection of the enterprises and investors «rights» in contrast with the human rights treaties that protect the rights of every person equally and foresee a special protection for vulnerable sectors and international mechanisms to ensure their effectiveness.

Most of these treaties and commercial agreements emphasize the interests of transnational enterprises and of the governments that represent them, in favouring not only the free circulation of merchandise but also the deregulation and limitation of the states' intervention in the economy with the purpose of submitting the economical activity to the power of those who control the markets. Thus they ignore that neither the market nor the competition can guarantee for themselves the validity of human rights, for it depends essentially on the states' capacity to guarantee and be responsible for the validity of these rights.

Even though the primacy of human rights is clearly established in the 103<sup>o</sup> article of the UN Charter according to which, in case of conflict between the obligations contracted by the Members of the United Nations in virtue of its Charter and the obligations contracted in virtue of any other international agreement, the obligations imposed by the Charter will prevail. It is also established in Declarations as the World Conference on Human Rights of 1993, in which 171 states approved the Vienna Declaration and Programme of Action, the first resolved point stating clearly that the promotion and protection of human rights is the first responsibility of the States.

The same happens in the Organization of American States (OAS), whose historic mission according to its constitutive charter is to offer men and women of America a land of freedom and a favourable space for their personality development and the realization of their warranted

aspirations as well as a regime of individual liberty and social justice, based on the respect of their essential rights and the consolidation of the democratic institution, ratifying the principles and purposes trusted to the United Nations by Humanity. This judgement was ratified when the Inter American Democratic Charter (2001) was adopted, in which the respect for Human Rights and fundamental liberties was recognized as an essential element of democracy.

If the international mercantile law has gained proportions and characteristics that threaten the validity of many of the obligations assumed by the states in matters of human rights, it is imperative to act so that the processes of integration and liberation of commerce stop ignoring the primacy of human rights. More so – regarding our region’s countries – when those of the Andean Community as well as of Central America have been negotiating Association Agreements with the European Union.

To achieve this goal it is necessary to insert in these agreements a *Democratic Clause* (DC) that essentially and predominantly ensure a framework of protection for Human Rights and respect of the Democratic State of Law in each of the contacting parties. As counterpart, all violation of Human Rights or democratic principles must generate the loss or suspension of the treaty’s benefits as is foreseen, although still insufficiently, in some of the EU agreements with other countries and regions, such as Mexico, Chile and Cotonou (Africa, Caribbean and the Pacific).

In fact, it is worth mentioning – as has done the past European Union and Latin America and the Caribbean’s IV Syndical Forum – that the approach of the negotiating mandates referred to the social and participation dimension of the agreements present notorious deficits that the Democratic Clause would help overcome:

- in matters of social cohesion it does not present references to instruments as the structural funds.

- about treating the asymmetries, it clearly presents self limitations when declaring that «all these dispositions will reduce to a minimum», and that «it will be contemplated when necessary and reducing to a minimum the differentiation of commitments between countries».
- it does not expressly mention civil society's participative structures.
- it does not introduce a socio-labour pillar, so this dimension tends to be included in the cooperation chapter, in a limited way. If the «social chapter» in the recent Association Agreement between the EU and South Africa is taken as an antecedent, only basic contents can be found.
- it does not consider the migratory issue, of indubitable current importance between the two blocks.
- it does not incorporate the climate change treatment.
- it does not foresee the need to analyze the previous and later impact of the agreement in the economical-commercial, socio-labour and environmental aspects.

In this document a proposal for a Democratic Clause is presented and its goal is that civil society and the agreement's negotiators can have an instrument for dialogue so that the negotiation is as beneficial as possible for the interests of Andean, Central American and European citizens, from a human rights perspective. The proposal will be interlaced throughout the Association Agreement when the respective contents, already forecasted in the Agreement's format currently in negotiation, are identified. In addition, a group of specific articles identified with the letters «X», «Y» and «Z» are included in the proposal.

These proposal text must be read as an exposure of the principles and contents presented to be included in the Democratic Clause, as well as a

technical document that develops in detail the additions that must be incorporated in the Association Agreement with the EU.

To contribute to achieve the mentioned goal, aside from the proposal of a Democratic Clause we refer to, three (3) annexes that facilitate its justification and disclosure are presented as well.

On Annex N° 1 some basic definitions are presented as well as a review of the evolution of the concept of Democratic Clause, from its origins as an international policy instrument to its current normative character.

It also includes a recount of the contents of democratic clauses included in the most important Association Agreements in which the EU and the European Community have participated.

With this we pretend that the normative content for the Democratic Clause is present in all negotiations that are currently taking place, that in no case it is inferior to what the European Union already has acknowledged or integrated in its previous negotiations and agreements.

On Annex N° 2 the importance of the Democratic Clause and its fulfilment is explained based on its obligatory character and the primacy of human rights in international law, emphasizing the fact that the Democratic Clause is just an express manifestation of the existent obligations in the relationship between human rights and international trade.

Finally, Annex N° 3 explains how the proposal, that the Democratic Clause represents, of a system of norms that protect human rights is reached, and we propose for it to be included in the Association Agreements between the EU and our region's countries.

## II. PROPOSAL OF A DEMOCRATIC CLAUSE

This proposal of a Democratic Clause has been formulated as a system of norms destined to protect human rights in the framework of the Association Agreement between the UE and the Andean Nations Community (ANC). It presents norms already used by the EU in its Association Agreements, so they can be understood as the basic level of protection that can be aspired in an Association Agreement as the one the EU pretends to have with the ANC.

### 1. PREAMBLE

«**ACKNOWLEDGING** that a political climate and a trade that guarantee peace, security and stability, respect for human rights, for the democratic principles, the State of Law and the proper management of public affairs are an integrating part of long term development, acknowledging that the responsibility to ensure that climate mainly concerns the countries involved;

**RECOGNIZING** that the existence of healthy and lasting economical policies are a precondition for development;

**REFERING** to the principles of the United Nations Charter, and remembering that the norms of International Law on Human Rights, presented among other instruments in the Universal Declaration of Human Rights, the conclusions of the Vienna Conference of 1993 on Human Rights, the Andean Charter on the Protection and Promotion of Human Rights, the Covenants on Civil and Political Rights and of Economical, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of International Humanitarian Law, the 1954 Convention Relating to the Status of Stateless Persons, the 1951 Geneva Convention on the Status of Refugees and the

1967 New York Protocol on the Status of Refugees, are mandatory for the parties involved;

**CONSIDERING** that the European Convention for the Protection of Human Rights and Fundamental Liberties and the American Convention on Human Rights in matters of Economical, Social and Cultural Rights «Protocol of San Salvador», as well as the decisions of the European Court and the Inter American Court of Human Rights constitute positive regional contributions for respecting human rights in the European Union and the states member of the Andean Nations Community;

**CONSIDERING** that the Millennium Development Goals that emanate from the Millennium Declaration adopted by the United Nations' General Assembly in 2000, particularly the eradication of extreme poverty and hunger, as well as the goals and principles of development agreed in the United Nations Conferences, provide a clear vision and must sustain the EU - ANC cooperation in virtue of the present Agreement;

## **2. GENERAL DISPOSITIONS**

### **Article 1. Goal of the Treaty**

The goal of the Association Agreement is to accelerate the human development of the Parties populations based on the realization of human rights and democratic principles that the parties share and that are an essential element of the present Agreement.

It is understood as human development the wellbeing of the population that can be achieved by elevating the living standards, attaining a job, a considerable and constantly increasing real income and the effective demand, by increasing production and the trade of goods and services, allowing at the same time the optimal use of the world's resources in agreement with the goal of a sustainable development and procuring to protect and preserve the environment

and increase the ways to do it, compatibly with the respective needs and interests according to the different levels of economical development.

The progress of the participants' capacity in development and the improvement of the institutional framework necessary for social cohesion, for the functioning of a democratic society and a market economy and for the surfacing of an active and organized civil society, are an integral part of this approach. The situation of women and the matters of equity among both genders, as well as the minorities and the more vulnerable sectors of society will systematically be taken into account in every political, economical or social scope.

It is understood as human rights the norms ruled by the international law of human rights, be those of a conventional, consuetudinary or principle based nature, or any other source. In the case of the conventional norms, these are included in every treaty mentioned in Annex 1, though not exclusively, as well as in the United Nations Universal Declaration of Human Rights.

## **Article 2: Principles**

1. The respect for the democratic principles and the fundamental human rights gathered in the norms of International Law on Human Rights, as they are expressed in this and other instruments, and of the principle of State of Law, inspire the internal and international policies of the Parties and constitute an essential element of the present Agreement.
2. The promotion of economical, social and environmental sustainable development and the equitable distribution of the benefits of the Association are leading principles for the application of the present Agreement.
3. The Parties reiterate their adhesion to the principle of good governance.

### **Article 3: Conciliating goals of the Association**

The Parties celebrate the present Agreement to promote and accelerate their economical, cultural, social and environmental development, to contribute to peace and security and to favour a political-economical climate that is stable, democratic and respectful of human rights.

The association will centre in the goal of reduction and, in a long term, eradication of poverty in a manner coherent with the goals of sustainable development and a progressive economical integration between the parties.

These goals as well as the Parties' international commitments will inspire the development strategies and must be taken following the integrated approach that simultaneously takes into account the political, economical, social, cultural and environmental components of development. The association must offer a coherent framework of support to the strategies for development defined by each party, considering the asymmetries that exist between them.

The continuous economical growth, the private sector's development, the increase of decent employment and the improvement of access to the productive resources will be a part of this framework. The respect of the individual's rights and the satisfaction of essential needs, the promotion of social development and the conditions for an equitable distribution of the growth's benefits which should be set in harmony with the environment, will be favoured. The progress of the participants' capacity in development and the institutional framework's improvement necessary for social cohesion, for the functioning of a democratic society and a social market economy and for the surfacing of an active and organized civil society, are an integral part of this approach. The situation of women and the matters of equity among both genders, as well as the minorities and the more vulnerable sectors of society, will systematically be taken into account in every political, economical or social scope.

Trade and the rules to liberalize it are only instruments to achieve these goals.

### **3. PILLARS OF THE ASSOCIATION**

#### **Article 4:**

To achieve the goals of the first and third articles, policies based on three pillars will be developed:

- a) Political Dialogue
- b) Cooperation
- c) Commerce

#### **Article 5:**

The measures to be developed in virtue of the three pillars will be always destined to achieve the goals of the agreement contained in articles 1 and 3.

#### **Article 6:**

To verify the fulfilment of the agreement's goals the Impacts Committee of the Commercial Association on Human Rights is created and will be in charge of informing the Association Counsel of the problems generated in this matter, in order for it to find the solutions required.

The Impacts Committee of the Commercial Association on Human Rights will receive and answer the civil society's communications in their National and Local Offices.

### **A. PILLAR OF POLITICAL DIALOGUE**

#### **Article 7: Policies of political dialogue's goals.**

1. The Parties will maintain global, balanced and deep political dialogue periodically, which will lead to mutual commitments that aim to consolidate the Association established by the present Agreement and help reach its goals.

2. The main goal of political dialogue among the Parties is the promotion, dissemination, development and common defence of democratic values such as respect for human rights, people's freedom and the principles of the State of Law as the basis of a democratic society.
3. To that end, the Parties will debate and exchange information about joint initiatives related to any matter of mutual interest and any other international matter searching to achieve the common goals, particularly the security, stability, democracy and regional development.
4. The dialogue will refer to the goals and purposes defined by the Agreement as well as all matters of common interest, general, regional or subregional. The Parties will contribute through dialogue to peace, security and stability and to promote a stable and democratic political climate. The dialogue will incorporate the cooperation strategies and the general and sector policies including the ones related to the environment, the relative aspects of gender, the migrations, the impacts of economic exchanges on human rights and the matters entailed to the cultural patrimony.
5. The dialogue will focus, among other aspects, in specific political issues that present a general or common interest in relation to the goals expressed in the Agreement, particularly in ambits such as [...] ethnical, religious or racial discrimination. It also includes a periodical evaluation of the situation related to the respect for human rights, the democratic principles, the State of Law and the proper management of public affairs. [...]

**Article 8:**

The political dialogue will be used to strengthen the fulfilment of the resolutions given by the organs of human rights of the United Nations and the European and Inter American Courts.

## **B. PILLAR OF COOPERATION**

### **Article X. Essential elements and fundamental element.**

1. The cooperation will seek to achieve sustainable development focused on the human being, lead role and main beneficiary of development, and allege the respect and defence of all human rights.

The respect of all human rights and fundamental liberties, including the respect for economical, social and cultural fundamental rights, democracy based on the State of Law and a transparent and responsible management of public affairs form an integral part of sustainable development.

2. The Parties attach to their obligations and international commitments in reference to respect for human rights. They restate their deep commitment in favour of human dignity and human rights that constitute legitimate aspirations of individuals and people. Human rights are universal, indivisible and interdependent. The Parties commit to promoting and protecting all fundamental liberties and all human rights, being those civil, political or economical, social and cultural. In this context, the Parties reaffirm equity between men and women.

The Parties reaffirm that democratization, development and the protection of fundamental liberties and human rights are interdependent and mutually reinforced. The democratic principles are universally recognized principles in which the State's organization is based to guarantee the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system and the existence of participation mechanisms. Based on universally recognized principles, each country develops its democratic culture.

The State of Law inspires the State's structure and competences of the different powers, and will imply in particular the existence of effective and accessible means of legal recourse, an independent judicial system that guarantees equal protection of the law and an executive power that fully yields to legality.

Respect for human rights, for democratic principles and for the State of Law, in which the ANC-EU association is based, will inspire the internal and international policies of the Parties and constitutes an essential element of the present Agreement.

3. Essential elements in matter of human rights, democratic principles and the State of Law and fundamental element in matter of good governance.

The proper management of public affairs, in which the ACP-EU association is based, will inspire the Parties' internal and international policies and constitutes a fundamental element of the present Agreement. The Parties agree that only in grave cases of active and passive corruption, as is defined in article 97 constitutes a violation of this element.

4. The association will actively support the defence of human rights, the democratization processes, the consolidation of the State of Law and the proper management of public affairs.

These subjects will constitute an important element of the political dialogue. In the framework of this dialogue, the Parties will grant a particular importance to the evolution of the situation and the continuous character of the completed progresses. This periodical evaluation will take into account the economic, social, cultural and historic situation of each country.

These subjects will be the object of special attention in the support of development strategies. The Community will lend their support to the political, institutional and juridical reforms, and to the

reinforcement of public, private and civil society lead roles' capabilities, in the set of the strategies decided as common agreement between the State in question and the Community.

**Article X1: General Goals**

1. The Parties will establish a stretch cooperation destined, among other aspects, to:
  - a) reinforce the institutional capacity to consolidate democracy, the State of Law and the respect of human rights and fundamental liberties;
  - b) promote social development, using the economical development that should always take into account the protection of the environment. The Parties will give special priority to the respect of fundamental social rights;

[...]

2. The Parties reaffirm the importance of economic, financial and technical cooperation as the means to contribute to the fulfilment of the goals and principles derived from the present Agreement.

**Article X2: Cooperation on human rights and democracy**

1. The Parties convene in that the cooperation in this sphere must have as goal to promote the principles referred to in articles 1 and 3.
2. Cooperation will focus mainly on the following:
  - a) the development of civil society by teaching, forming and sensitizing programs for the public opinion;

- b) measures of training and information destined to help institutions to work more effectively and strengthen the State of Law;
  - c) the promotion of human rights and democratic values.
3. The Parties will be able to execute joint projects in order to strengthen the cooperation between their respective electoral institutions and between those in charge of watching and promoting the fulfilment of human rights.

#### **Article Z: Cooperation in matters of training and education**

1. The Parties will define the means to sensibly improve the situation of the educational sector and of professional training. Special attention will be paid to the education and professional training of the social groups less favoured hoping to achieve the exercise and full enjoyment of the right to education.
  2. The Parties reinforce their cooperation in the subjects of education, including college education, of professional training and of the exchanges between universities and companies, in order to improve the level of technical knowledge of the public and private sector's responsible personnel.
- [...]
4. Cooperation between the parties could lead to the celebration by mutual consent of a sector agreement in the subject of education, including college education, professional training and the youth's education.<sup>1</sup>

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<sup>1</sup> EU-Mexico Association Agreement.

### **Article Z1: Health**

1. Cooperation in the subject of health will have as goals to strengthen the activities of research, pharmacology, preventive medicine and infectious diseases such as AIDS.
2. Cooperation will be done mainly through:
  - a) projects in matters of epidemiology, decentralization and administration of the health services,
  - b) development of professional training programs,
  - c) programs and projects to improve health conditions and social wellbeing in the urban and rural areas.<sup>2</sup>
  - d) access to medicaments for affected populations to fight epidemics.
  - e) maintain a balance between the right to patents and the right to health.

### **Article Z2: Cooperation in social matters and for overcoming poverty**

1. The Parties will maintain dialogue on all aspects of the social agenda that are of interest to any of them.

It must include issues related to vulnerable groups and regions among which are: native population and communities, afrodescendants, poor peasants, women, children and adolescents of scarce means, older people, people with disabilities, with different sexual orientation, with HIV/AIDS and other groups of the population in state of poverty.

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<sup>2</sup> EU-Mexico Association Agreement.

2. The Parties acknowledge the importance of harmonizing economic and social development preserving the fundamental rights of the groups mentioned in the previous paragraph. The bases of growth must generate employment and ensure better living standards to the less favoured population. In this respect, the policies of the pillar of commerce will take into account these situations.
3. The Parties will have a periodical consensus about actions of cooperation that involve civil society tending to provide opportunities for the creation of employment, professional training and the generation of income.<sup>3</sup>

### **C. PILLAR OF COMMERCE**

**Article Y:** Of the purposes of the Pillar of Commerce

The goal of the economic pillar is to elevate the living standards, achieve full employment and a considerable and constantly increasing real income and the effective demand, to increase production and the trade of goods and services, allowing at the same time the optimal use of the world's resources in agreement with the goal of sustainable development and attempting to protect and preserve the environment and increase the ways to do it, compatibly with the respective needs and interests according to the different levels of economical development.

The parties will devise positive efforts so that the countries in development can obtain a part of the international trade increment that corresponds to the needs of their economic development and the achievement of the full validity of human rights and democratic principles.

The parties commit themselves to avoid that the mockery of the international standards in matters of labour and union human rights

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<sup>3</sup> EU-Mexico Association Agreement.

become a disloyal form of commercial competition through social dumping. The norms ratified by the parties, the fulfilment of which they force themselves to respect and promote, must prevent that the standards of protection disposed by social and/or labour national laws are diminished, derogated or not applied with the purpose of obtaining or broadening a competitive edge. The performance of transnational companies and their contractors must be contemplated from the perspective of their social and legal responsibility.

**Sub issues:**

In the case of this pillar, 14 sub issues are being negotiated:

- 1 Access to market (general rules and non agricultural sectors)
- 2 Agriculture: access to market

Article: The implementation of measures in matters of agriculture will seek to achieve the right to food of the States Parties' populations.

- 3 Asymmetries and special and differentiated treatment
- 4 Rules of origin
- 5 Customs affairs and trade facilitation
- 6 Technical obstacles to trade
- 7 Sanitary and fitosanitary measures
- 8 Commercial defence (instruments)
- 9 Competition (policies)
- 10 Public acquisitions
- 11 Intellectual property

Article: The rights of intellectual property regulated in this agreement will be executed in harmony with the right to health in order to achieve the full validity of it.

The native people's rights and ancestral knowledge in matters of health and medicine will be protected in the process of granting patents in the State Parties.

The native people's rights and ancestral knowledge will be protected in the process of granting patents in the State Parties.

Prior to granting patents derived from the native people's rights and ancestral knowledge their approval must be acquired, as well as promote their participation during the referred process. In addition, it must be guaranteed that the right of this people to receive equitable benefits derived from its use must be respected.

- 12 Services, establishment and capitals movement
- 13 Solution of differences and controversies
- 14 Sustainable development and trade

#### **Article Y1: Cooperation in social matters**

1. The Parties recognize the importance of social development that must come with economic development. They will give priority to the creation of employment and the respect of fundamental social rights, especially promoting the corresponding agreements of the International Labour Organization about issues such as freedom of association, the right to a collective negotiation and no discrimination, the abolition of forced labour and children labour, and the equal treatment of men and women.
2. Cooperation might cover any subject of interest for the Parties.
3. The measures might be coordinated with those of the States members and the corresponding international organizations.
4. The Parties will give priority to the measures destined to:
  - a) the promotion of human development, the reduction of poverty and the battle against social exclusion, generating innovative projects that can be replicated in which the most vulnerable and margined social sectors participate; special attention will be given to families of low income and people with disabilities;

- b) the promotion of the female role in the process of economical and social development and the promotion of specific programs for the youth;
- c) the development and modernization of labour relations, of working conditions, of social assistance and labour safety;
- d) the improvement of social policies' formulation and management including the policy of social housing, improving the access to it by the beneficiaries;
- e) the development of a sanitary system that is efficient and equitable, based on principles of solidarity;
- f) the promotion of professional training and the development of human resources;
- g) the promotion of projects and programs that generate opportunities to create employment in micro, small and medium sized enterprises;
- h) the promotion of programs to arrange the territory that allow a sustainable use of the natural resources, paying special attention to the areas of higher social and environmental vulnerability;
- i) the promotion of initiatives that contribute to social dialogue and to creating consensus;
- j) the promotion of respect for human rights, democracy and citizen participation.

**Article Y2: Development of the social sector**

1. The cooperation will support the ANC State's efforts in favour of the development of general and sector policies and reforms that improve the coverage, quality and access to infrastructure and basic social services, and will take into account the local needs and specific

demands of the most vulnerable and less favoured groups, reducing at the same time the inequities of access to these services. It would be wise to especially endeavour in maintaining a sufficient level of public expense in the social sectors. With this framework, cooperation must tend to:

- a) improve education and training and reinforce the capacity and technical competences;
  - b) improve the health and nutrition systems, eliminate hunger and malnutrition, guarantee the security and provision of food;
  - c) integrate demographic matters in the development strategies in order to improve genetic health, primary sanitary assistance, family planning and prevention against women's genitalia mutilations;
  - d) promote the fight against AIDS;
  - e) ensure the provision of domestic water, improving the access to drinkable water and a sufficient hygiene;
  - f) improve the access to a habitat adequate to everyone's needs by supporting social housing building programs and improving the conditions of urban development; and
  - g) favour the promotion of participative methods of social dialogue as well as the respect of fundamental social rights.
2. The cooperation will also support the capacity development of social sectors, favouring particularly: training programs in the elaboration of social policies and in the modern management techniques for social projects and programs; policies in favour of technological innovation and research; consolidation of a local baggage of experience and technical knowledge and promotion of collaboration; organization of debates and round tables in national and regional scales.

3. The cooperation will foment and support the elaboration and application of policies and systems of social protection and security with the purpose of reinforcing social cohesion and promoting self assistance as well as the solidarity of local communities. Support will focus particularly in the development of initiatives based on economical solidarity, especially through the creation of social development funds adapted to the needs and the local participants.

#### **Article Y3: Aspects relating to the young population**

The cooperation will also support the elaboration of a coherent and global policy with the purpose of obtaining maximum advantage of the youth's potential, so that young people are better integrated in society and can demonstrate all the extent of their capabilities. In this framework, the cooperation will support policies, measures and actions destined to:

- a) protect the rights of children and youth, particularly that of girls;

[...]

#### **Article Y4: Cultural development**

In the culture subject, the cooperation will tend to:

- a) integrate the cultural dimension in the different levels of development cooperation
- b) recognize, preserve and promote the cultural values and identities to favour intercultural dialogue;
- c) help the organisms from local communities to give their children the possibility to develop their physical, psychological and socioeconomic potential;

[...], and»;

- e) foment the active participation of young people in public life, as well as student exchanges and the interaction of the ANC and EU youth's organizations.

#### **Article Y5: Regional cooperation**

1. The cooperation, in the area of regional cooperation, will comprise a wide range of functional and thematic subjects that include common problems and allow exploiting scale economies, that is to say:

[...]

- c) health, education and training;

[...]

2. The cooperation will also support projects and initiatives of interregional and intra ANC cooperation, including those in which countries in development that are not members of the ANC participate.
3. The cooperation will contribute to the promotion and development of a regional political dialogue in the subjects of prevention and solution of conflicts, human rights, democratization, exchanges, creation of networks and the promotion of mobility among the different participants in development, particularly civil society.

#### **Article Y6: Institutional and capacity development**

1. The cooperation will pay systematic attention to the institutional aspects and in this context support the efforts of the ANC and its State members to develop and reinforce the structures, the institutions and the procedures that contribute to:

- a) promote and support democracy, human dignity, social justice and pluralism, fully respecting the diversity in societies;

- b) promote and support the full and universal respect as well as the defence of all human rights and fundamental liberties;
- c) develop and reinforce the State of Law and improve the access to justice, at the same guaranteeing the professionalism and independence of the juridical systems; and
- d) guarantee a transparent and responsible management and administration in all public institutions.

#### **4. EXCEPTIONS**

##### **Article 91 – Clause of general exception**

In reserve of the following listed measures not being applied in a way that constitutes the means of arbitrary or unjustifiable discrimination between the Parties when similar conditions prevail, or a covered restriction of trade between the Parties, no disposition of the present Title will be interpreted in the sense of obstructing that one Party adopts or applies measures:

- a) necessary to protect the public morale
- b) necessary to protect the health and life of people as well as protect the biological diversity in its three levels (ecosystems, species and genes).
- c) necessary to guarantee the observance of the laws and regulations that are not incompatible with the present Agreement, such as the laws and regulations related to the application of custom measures, the protection of intellectual property rights and the prevention of deceitful practices;
- d) related to the import and export of gold and silver;

- e) imposed to protect the national treasures of artistic, historic and archaeological value;
- f) related to the conservation of natural non renewable resources, conditioned to these measures been applied together with restrictions to the national production or consumption; or
- g) related to articles fabricated in prisons.

## **5. SUSPENSION AND TERMINATION OF THE AGREEMENT**

### **Article T:**

In case of violation of human rights or the democratic principles contained in the first and third articles, the Parties can suspend or put an end to the present agreement. In order to do it, a communication to the Association Counsel is sufficient.

## **6. ANNEX I: TREATIES TO BE RATIFIED THAT COMPLEMENT THE CONCEPT OF HUMAN RIGHTS IN THE FRAMEWORK OF THE PRESENT AGREEMENT**

### **UN and ILO conventions concerning human and labour rights**

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of all Forms of Racial Discrimination
4. Convention on the Elimination of all Forms of Racial Discrimination against Women
5. Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide

8. Covenant concerning Minimum Age for Admission to Employment (N° 138)
9. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (N° 182)
10. Convention concerning the Abolition of Forced Labour (N° 105)
11. Convention concerning Forced or Compulsory Labour (N° 29)
12. Convention concerning Equal Remuneration for Male and Female for Work of Equal Value (N° 100)
13. Discrimination (Employment and Occupation) Convention (No 111)
14. Convention concerning Freedom of Association and Protection of the Right to Organize (No 87)
15. Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No 98)
16. International Convention on the Suppression and Punishment of the Crime of Apartheid
17. Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
18. Convention on the Rights of People with Disabilities (for States parties, though not yet in vigour).
19. Convention of the International Labour Organization (No. 169) concerning Indigenous and Tribal People in Independent Countries

**Conventions concerning the environment and the principles of governance**

20. Convention on International Trade of Endangered Species of Wild Fauna and Flora
21. Convention on Biological Diversity
22. Cartagena Protocol on Biotech Safety
23. Kyoto Protocol of the United Nations Framework Convention on Climate Change
24. United Nations Single Convention on Narcotic Drugs (1961)
25. United Nations Convention on Psychotropic Substances (1971)

26. United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances (1988)
27. United Nations Convention against Corruption in Mexico
28. Montreal Protocol on Substances that Deplete the Ozone Layer
29. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
30. Stockholm Convention on Persistent Organic Pollutants

## III. ANNEXS

### 1. ANNEX N° 1: THE DEMOCRATIC CLAUSE: BASIC DEFINITIONS AND CONCEPT EVOLUTION

The Democratic Clause is a norm or disposition in a free trade treaty or commercial association that seeks to ensure the protection of human rights and the respect for the Democratic State of Law between the Parties of this agreement.

In virtue of this, it is necessary to mention that, firstly, because it is an article in a treaty, as a norm this disposition is mandatory for the Parties and must be fulfilled. Secondly, even though the treaty's content is predominantly commercial, the clause grants it an extra-economical component in which the Parties commit to respect the democratic principles and human rights in their territories. Finally, the human rights gathered in the clause are in themselves norms of other treaties or of international conduct, and as such they are also mandatory independently of their inclusion in an Association Agreement.

Moreover, the Democratic Clause is not only a norm but, as will be seen ahead, the Parties give it a predominant value in the treaty, in that they consider it an essential or fundamental element of the agreement. As counterpart of this value, the disregard of human rights or the democratic principles will have as consequence the suspension or conclusion of the treaty's benefits.

Despite the name, for the present document the term democratic clause will be used as one that includes human rights clauses, as the constant practice demonstrates that the respect of both principles tends to be presented jointly.

Equally, it will be established that, currently, «democratic clause» is understood as a normative system (compilation of norms) of protection of human rights and democratic principles in a treaty's implementation.

## A. ANTECEDENTS: THE DEMOCRATIC CLAUSE AND THE INTERNATIONAL COOPERATION.

The democratic clause did not always had normative force, this characteristic is the result of an evolution that begins with conditionality policies of economical assistance framed in a world stream brought forward by international finance institutions that searched the States' «good governance<sup>4</sup>» as a mechanism to achieve development.

The clause's antecedents can be situated in the frame of the international cooperation and specifically in the field of assistance to the development of countries «in the way to development» (of the «second and «third» world), by the «countries of the North» or «developed countries». Being for their interest in the respect of democratic values and human rights or guided by geopolitical interests, the donating States began to condition their aid, mainly economic, to the fulfilment of certain standards of democracy and protection of human rights<sup>5</sup>.

The European countries that are counted among the main economical aid donors in the world were not strangers to these conditionality policies. Thus, in the European case two levels of conditionality can be identified: the one of first generation that demanded of the aid recipient the privatization of its public sector, the encouragement of free trade and fiscal reforms<sup>6</sup> and; the one of second generation that required political reforms in matters such as the protection of human rights and the market liberalization<sup>7</sup>.

<sup>4</sup> GOMEZ, Ana, «The use of the democratic clause and of human rights in the external relations of the European Union» (Abstract), Working Paper N° 39, February 2003, Barcelona: Observatory of European External Policies, Institut Universitari d'Estudis Europeus, Universitat Autònoma of Barcelona; p. 2.

<sup>5</sup> GOMEZ, Ana, *op. cit.*; p. 2.

<sup>6</sup> STOKKE, Olave, *Aid and political conditionality*, London: EADI – Frank Cass, 1994; p. 8. Cited by: PRADO, Juan Pablo. *The European Union and the promotion of human rights in Israel during the «Defensive Wall» operation*; p. 4. Available in: [http://www.joseluispaniagatebar.es/component/option,com\\_docman/Itemid,0/task,doc\\_view/gid,15/](http://www.joseluispaniagatebar.es/component/option,com_docman/Itemid,0/task,doc_view/gid,15/).

<sup>7</sup> Overseas Development Institute, «Aid and Political Reform», Brief Paper, London, 1992. Cited by ROBINSON, Mark «Governance, democracy and conditionality: NGO's and the new policy agenda» in: CLAYTON, Robinson, *Governance, Democracy and Conditionality. What a role for NGO's?* Oxford: Intrac, 1994; p. 47.

Conditioning aid was, therefore, the centre of these policies. This conditionality can be understood as:

«[...] a theoretically preventive mechanism that operates by dissuasion (negative conditionality, that is, reduction or termination of the external support) or stimulation (positive conditionality or increase of the collaboration), since it presumes the automatic possibility of punishment in case of not fulfilling the previously established requirements»<sup>8</sup>.

This quote presents two basic components of conditionality: the end that is expected and the mechanism to achieve it. As for the first, we have already said that the interest could be geopolitical, economical or the respect of the humanity and democratic values; in the second case, as the quote states, can be a stimuli or a dissuasion.

Consecutively, these policies were shaped into juridical norms or democratic clauses in the association treaties, yet the logic will be maintained. Thus, in actuality, it can be that the conditionality may not pursue geostrategic or ideological purposes, yet it cannot be denied that they still reflect economical and political interests. Nonetheless, as it becomes a norm in a treaty, it becomes, according to its phrasing, a reciprocal condition for the agreement's parties.

## **B. THE USE OF THE DEMOCRATIC CLAUSE AS A POLICY OF THE EUROPEAN UNION:**

The clause was introduced as norm in the treaties of the EU with third States after the end of the Cold War, a period in which the human rights acquired great importance for the EU at an institutional level.<sup>9</sup>

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<sup>8</sup> PRADO, Juan Pablo, *op. cit.*; p. 7.

<sup>9</sup> GOMEZ, Ana, *op. cit.*; p.2.

There were no political conditions introduced in the possible aid to countries in development before the nineties, on one hand because organs such as the European Commission considered that there was no room for fundamental rights in trade treaties, and on the other hand because for recently independent countries the conditionality was seen as a neo-colonial attitude that threatened their authority.

The need to introduce a conditionality clause was created as a response to human rights' violations, mainly in African aid beneficiary countries in virtue of the Lome Agreements and the situation generated from the impossibility of suspending the aid since a juridical criteria was not foreseen in the treaty. This was a consideration to maintain the treaty even in cases as the III Lome Agreement were human rights were mentioned, though in the Preamble, therefore not acquiring the desired imperative character.<sup>10</sup>

Thus, since 1991, the EU starts introducing these clauses in their Association Agreements with other States<sup>11</sup>. The Association Agreements are free trade treaties that apart from promoting the circulation without barriers (economical or not) of goods, services and capitals, the protection of investments, the solution of controversies, among others, they also have a cooperation for development component. In this way, the Association Agreements determine the conditions for markets access of foreign investments in the States Parties' territories and also gather dispositions to accomplish human and democracy development.

In these agreements the democratic conditionality clauses or of negative conditionality will express that the human rights and democratic principles are *essential* elements in the relationship between the parties and will allow the EU (although technically also the other parties) to suspend and even put an end to the treaty in case of breach of these principles.

<sup>10</sup> GOMEZ, Ana, *op. cit.*; p. 4.

<sup>11</sup> Resolution of the Counsel and its State Members of June 1991, Declaration on Human Rights, Annex V, European Communities Journal N°16-1991. PRADO, Juan Pablo, *op. cit.*; p. 11. In the Agreements of Lomé IV (1989) it starts to appear a reference to conditionality, though not on a clear way. GOMEZ, Ana, *op. cit.*; pp. 3-4.

According to Prado<sup>12</sup>, these clauses can be catalogued in four ways:

- «1. *Clause of democratic principles*, when it promotes in the recipient countries the respect for human rights and democracy, with no punishment whatsoever in case of infringement. It was first used in the Agreements with Argentina, Chile and Uruguay.
2. «*Essential element*» clause, when it incorporates the respect for human rights and democratic principles as an «essential element» of the Agreements signed since 1992 with Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela, Mongolia, Macao, India, South Africa, Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Sri Lanka, Nepal, Vietnam, Israel and Egypt.
3. *Baltic clause*, when it allows any of the parties involved to suspend the collaboration program immediately and without previous question to the counterpart. This clause was first included in the Agreements with the Baltic States at the end of 1992 (thus its name), Albania and Slovenia, and since 1995 with the countries of the Africa, Caribbean and Pacific Group (ACP).
4. *Bulgarian clause*, the procedures to be followed in situations where human rights and democracy violation presents itself are determined more precisely. This type of clause establishes an Association Counsel as an organ in charge of solving controversies and considers that the cooperation's immediate suspension will only be executed in cases of particular urgency. It was included for the first time in 1995 in the Agreements with Bulgaria, and since then with MERCOSUR (Argentina, Brazil, Paraguay and Uruguay), Romania, Russian Federation, Ukraine, Kyrgyzstan, Moldova, Czech Republic, Slovakia, Kazakhstan,

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<sup>12</sup> PRADO, Juan Pablo, *op. cit.*; p. 12.

Belarus, Morocco, Tunisia, South Korea, Nepal, with the Baltic countries in that year's agreements, with Mexico in the Agreements of 1997 and 2000 and with Israel in the Association Agreement of 1995.»

Nonetheless, following Gómez it is relevant to classify the previous clauses based on their functionality in the treaty. In that respect, we find two groups of clauses previously mentioned: the ones of conditionality *per se* and those that regulate the procedure of suspension and termination of the treaty<sup>13</sup>.

The conditionality clauses can be classified into two types: the *Fundament Clauses*, also called Base Clauses, in which all dispositions of the agreement are based on the respect of the democratic principles and human rights and inspire the internal and international policies of the parties; and the *Essential element Clauses*, by which the democratic principles and human rights inspire the internal and international policies of the parties, constituting this an essential element of the agreement».

The purpose of these clauses is to explicitly evidence an object and end to the treaty and the activation of norms of suspension and termination of the treaties contained in the Vienna Convention on the Law of Treaties of 1969 (from now on Vienna Convention).

The first one, used in the IV Lome Agreements<sup>14</sup> was not very effective due to the political criteria that predominated during its application, which argued that the concepts of human rights and democratic principles of the treaty did not lack true content; and also that there was no explicit juridical basis for the suspension or termination of the treaty in case of violation of these vague principles.

Therefore, since 1992 the second type of clause begins to be incorporated in the association treaties, even though the principles' content is not yet defined it does offer the possibility of activating the

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<sup>13</sup> GOMEZ, Ana, *op. cit.*

<sup>14</sup> GOMEZ, Ana, *op. cit.*; p. 5.

application of article 60.1 of the Vienna Convention that, in case of non-compliance of an element of the treaty considered essential (the democratic principles and human rights in this case), allows the (total or partial) suspension and even termination of the agreement by the other party. The specific mention of the word *essential* in the democratic clause is for that purpose.

The definition of human rights and democratic principles was completed by declarations of European institutions, which allowed interpreting the treaty in the sense of article 31 of the Vienna Convention.

As for the clauses that regulate the procedure of suspension or termination of the treaty, these seek to reduce the periods of article 65 of the Vienna Convention by regulating the procedure. These are, as previously mentioned, of two kinds:

«Clause of explicit suspension, also called *Baltic clause*, used for the first time in the agreements with the Baltic States at the end of 1992, and that allows any of the parties to immediately partially or totally suspend the agreement if the initial disposition has been infringed.

General clause of no execution, known as *Bulgarian clause* that has been used since 1993 and that appears for the first time in the agreements with Bulgaria and other Central European countries, as well as in the ones subscribed with ex Russian republics. It foresees in greater detail the procedures that must be followed in case of non-compliance of the parties, with the option of a procedure of previous consults»<sup>15</sup>.

The tendency is to use the second one, for it is more flexible allowing in certain cases a bigger margin to achieve the fulfilment of the human rights based on negotiations and political concessions, which would not be possible if the dialogue is drastically broken.

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<sup>15</sup> *Ibid., loc. cit.*

The EU is an international organization, and as such is ruled by the mandates of its constitutive treaty. It is in this instrument that the concern for human rights and democracy can be gathered, in the case of this Organization as well as in the European Community for, juridically, the basis of the clause can also be found in the second one's same Constitutive Treaty, which in its Title about Cooperation for Development, recognizes that in this field the Community's policy is to contribute to the respect of human rights and development:

- «1. The Community's policy on cooperation for development, which will be complementary to the ones executed by the States members, will favour:
  - the lasting economical and social development of the countries in development and particularly of those less favoured,
  - the harmonious and progressive insertion of the countries in development to the world economy,
  - the fight against poverty in the countries in development.
2. The Community's policy on this issue will contribute to the general goal of development and consolidation of democracy and the State of Law, as well as the goal of respect for human rights and fundamental liberties.
3. The Community and the State members will respect the commitments and will take into account the goals they have agreed in the United Nations framework and that of other competent international organizations»<sup>16</sup>.

In the same way, the European Union Treaty gathers as foreign policy and of common security the development and consolidation of democracy and the State of Law, as well as the respect for human rights:

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<sup>16</sup> Article 177.

- «1. The Union will define and perform a foreign policy and of common security that will reach every aspect of foreign policy and security and will include the following goals:
- the defence of common values, of fundamental interests and of the independence and integrity of the Union, according to the principles of the United Nations Charter,
  - the reinforcement of the Union's security in every way,
  - the preservation of peace and reinforcement of international security, according to the principles of the United Nations Charter, the principles of the Helsinki Final Act and the goals of the Charter of Paris, included the ones concerning the external frontiers,
  - the encouragement of international cooperation,
  - the development and consolidation of democracy and the State of Law as well as the respect of human rights and fundamental liberties.
2. The State members will actively and unreservedly support the foreign and security policy of the Union, with the spirit of loyalty and mutual solidarity.

The State members will work together to intensify and develop their mutual political solidarity. They will abstain of all action contrary to the interests of the Union or that can injure its efficiency as a cohesion force in international relations.

The Counsel will guard the respect of these principles»<sup>17</sup>.

It is necessary to take into account that coming 2009, with the Lisbon Treaty in force, the EU will be part of the European Convention on Human Rights which will imply that the whole of the latter will be taken into account for the interpretation of the EU policies in matter of human rights, through the labour of the European Court of Human Rights.

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<sup>17</sup> Article 11.

To conclude, even though the execution of democratic clauses has been marked by a conditionality policy, in the present time it is compulsory to notice two situations; the first one is that the Association Agreements not only involve the interest of assistance to development, but also involve the will to expand markets for national companies, among others. In second place, juridically the democratic clause, as every other norm of the treaty, is applied to both parties, and this allows for it to be a latent instrument that may help the effective application of human rights in the territory of all States Parties.

### **C. THE DEMOCRATIC CLAUSES IN THE ASSOCIATION AGREEMENTS OF THE EU.**

In the association treaties the dispositions on human rights, democracy and development are not limited to the conditionality clause and that of the process of suspension and termination previously seen. In actuality, a series of norms can be found that gather the human rights throughout the treaty.

The following is a recount, according to these norms location in the agreement.

#### **The Preamble.**

The convention's preambles are rarely taken into account by the jurists as happened, for example, with the Lome Agreements previously seen, yet these are part of the context of the treaty for the purpose of its interpretation (article 31 of the Vienna Convention).

The preamble's importance is that it gives the treaty's interpreter the subject and principles that rule its interpretation, is the general framework and can determine the primacy of a norm over the other in case of conflict<sup>18</sup>.

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<sup>18</sup> See, for example, the case of shrimp before the Dispute Settlement Body of the WTO.

The preambles of previous Association Agreements have been very descriptive about the content of human rights and the democratic principles, making reference to treaties, declarations and principles of International Law on Human Rights. Among those, the following were gathered:

- 1 **Declarations** such as the United Nations Universal Declaration on Human Rights, Millennium Declaration – Millennium Development Goals.
- 2 **Principles** such as the international law principles in reference to the relationship of friendship and cooperation between the States in conformity with the United Nations Charter, the principles of State of Law and good governance and goals and principles of development agreed in the United Nations Conventions.
- 3 **Treaties** such as the United Nations Charter, the Covenants on Civil and Political Rights and of Economical, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of International Humanitarian Law, the 1954 Convention Relating to the Status of Stateless Persons, the 1951 Geneva Convention on the Status of Refugees and the 1967 New York Protocol on the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Liberties, the African Charter on Human and People's Rights, the American Convention on Human Rights, the principles and dispositions of the European Energy Charter.
- 4 **Conferences** such as the conclusions of the 1993 Vienna Convention on Human Rights, principles and dispositions included in the Final Act of the Conference on Security and Cooperation in Europe, the final documents of Madrid and Vienna and the Charter of Paris for a new Europe.

**5 Political declarations** that prove the will and intentions of the State to fulfil the human rights' norms without having to refer to a juridical instrument to do it.

Thus, the preamble serves to fill with substance the concepts of «human rights» and «democratic principles», for they must be read, according to the Vienna Convention in concurrence with the rest of the treaty were other instruments of International Law can also be referenced.

As an example, we can review the preambles of Agreements such as the one adopted with Bulgaria (1994):

«RECOGNIZING [the parties] the fundamental character of the democratic changes of Bulgaria, that have taken place in a pacific way and with the purpose of building a new political and economical system, based on the State of Law and human rights, the political pluralism and a multiparty pluralist system with free and democratic elections and the creation of the necessary legislative and economic conditions for developing a market economy, as well as the need to continue and complete the process with the Community's aid.

CONSIDERING the firm commitment of the Community and its State members and Bulgaria with the State of Law and human rights, including those of the minorities and with full application of the other principles and dispositions included in the Final Act of the Conference on Security and Cooperation in Europe (CSCE), the final documents of Madrid and Vienna, the Charter of Paris for a new Europe and the principles and dispositions of the European Energy Charter».

In the Agreement with Mexico of 2000:

«CONSIDERING [the] total adhesion [of the parties] to the democratic principles and the fundamental human rights as they are enunciated in the Universal Declaration of Human Rights, as well as other principles of international law principles referent to the relationship of friendship and cooperation between the Status in conformity with the United Nations

Charter, the State of Law and good governance principles in terms of the Ministerial Summit of the Group of Rio-European Union adopted in São Paulo in 1994».

In the Agreement with Chile of 2002:

«CONSIDERING the traditional relation between the Parties and with special reference to:

- their full commitment of respect for the democratic principles and fundamental human rights established in the United Nations Universal Declaration of Human Rights;

- their adhesion to the principles of the State of Law and of good governance.»

The Cotonou Agreement with the African, Caribbean and Pacific countries of 2000 (modified on June 25, 2005), is, without doubt, the more extensive:

«ACKNOWLEDGING that a political climate that guarantees peace, security and stability, respect for human rights, for the democratic principles, the State of Law and the good management of public affairs is an integrating part of long term development, acknowledging that the responsibility to ensure that climate mainly concerns the countries involved;

RECOGNIZING that the existence of healthy and lasting economical policies are a precondition for development;

REFERING to the principles of the United Nations Charter, and remembering the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and of Economical, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of

Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of International Humanitarian Law, the **1954** Convention Relating to the **Status of Stateless** Persons, the 1951 Geneva Convention on the Status of Refugees and the 1967 New York Protocol on the Status of Refugees;

CONSIDERING that the European Convention for the Protection of Human Rights and Fundamental Liberties, the African Charter on Human and People's Rights and the American Convention on Human Rights constitute positive regional contributions for respecting human rights in the European Union and the ACP States;

CONSIDERING that the Millennium Development Goals that emanate from the Millennium Declaration adopted by the United Nations General Assembly in 2000, particularly the eradication of extreme poverty and hunger, as well as the goals and principles of development agreed in the United Nations Conferences, provide a clear vision and must sustain the ACP-EU cooperation in virtue of the present Agreement.»

### **The text of the Treaty and concerning certain specific aspects**

The mention of human rights and democracy as parameters to be respected can be found in the text of the Agreements, in the first articles, under the title of Principles, General Dispositions or Goals – of the Association Agreements, stipulating that they are norms that inspire the treaty or fundament it, being an essential content of it as can be appreciated in the Agreements with Bulgaria, Mexico and Chile. These are the conditionality clauses previously seen.

It is interesting to appreciate the evolution in the Agreement with the African, Caribbean and Pacific countries (ACP) in the Cotonou

Agreement were these principles are the goal and the means to achieve the Association Agreement's purposes.

Agreement with Bulgaria of 1994:

«TITLE II GENERAL PRINCIPLES

Article 6

The respect of the democratic principles and human rights established by the Final Act of Helsinki and the Charter of Paris for a new Europe inspire the internal and external policies of the Parties and constitute an essential element of the present association.»

Agreement with Mexico of 2000:

«TITLE I: NATURE AND AMBIT OF APPLICATION

Article 1: Fundament of the Agreement

The respect of the democratic principles and the fundamental human rights as are enunciated in the Universal Declaration of Human Rights inspire the internal and international policies of the Parties and constitute an essential element of the present Agreement.»

Agreement with Chile of 2002:

«PART I: GENERAL AND INSTITUTIONAL DISPOSITIONS

TITLE I: NATURE AND AMBIT OF APPLICATION OF THE AGREEMENT

Article 1: Principles

1. The respect of the democratic principles and the fundamental human rights as are enunciated in the United Nations Universal Declaration of Human Rights and the State of Law principle inspire the internal and international policies of the Parties and constitute an essential element of the present Agreement.

2. The promotion of sustainable economical and social development and the equitable distribution of the benefits of the Association are rector principles for the application of the present Agreement.

3. The Parties reiterate their adhesion to the principle of good governance.»

Cotonou Agreement (modified in 2005):

«TITLE I – GOALS, PRINCIPLES AND PARTICIPANTS

CHAPTER 1 – Goals and principles

Article 1: Goals of the Association

[...] «the Parties», celebrate the present Agreement to promote and accelerate the economical, cultural and social development of the ACP States, to contribute to peace and security and to favour a political climate that is stable and democratic.

The association will centre in the goal of reduction and, in a long term, eradication of poverty in a manner coherent with the goals of sustainable development and a progressive integration of the ACP States to the world economy.

These goals as well as the international commitments of the Parties will inspire the development strategies and

must be taken following the integrated approach that simultaneously take into account the political, economical, social, cultural and environmental components of development. The association must offer a coherent framework of support to the strategies for development defined by each ACP State.

The continuous economical growth, the private sector's development, the increase of employment and the improvement of access to the productive resources will be a part of this framework. The respect of the individual's rights and the satisfaction of essential needs, the promotion of social development and the conditions of an equitable distribution of the growth's benefits, will be favoured. [...] The progress of the participants' capacity in development and the improvement of the institutional framework necessary for social cohesion, for the functioning of a democratic society and a market economy and for the surfacing of an active and organized civil society, are an integral part of this approach. The situation of women and the matters of equity among both genders will systematically be taken into account in every political, economical or social scope. [...]

Article 9. Essential elements and fundamental element.

1. The cooperation will seek to achieve sustainable development focused on the human being, lead role and main beneficiary of development, and allege the respect and defence of all human rights.

The respect of all human rights and fundamental liberties, including the respect for fundamental social rights, democracy based on the State of Law and a transparent and responsible management of public affairs form an integral part of sustainable development.

2. The Parties attach to their obligations and international commitments in reference to respect for human rights. They restate their deep commitment in favour of human dignity and human rights that constitute legitimate aspirations of individuals and the people. Human rights are universal, indivisible and interdependent. The Parties commit to promoting and protecting all fundamental liberties and all human rights, being those civil, political or economical, social and cultural. In this context, the Parties reaffirm equity between men and women.

The Parties reaffirm that democratization, development and the protection of fundamental liberties and human rights are interdependent and mutually reinforced. The democratic principles are universally recognized principles in which the State's organization is based to guarantee the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system and the existence of participation mechanisms. Based on universally recognized principles, each country develops its democratic culture.

The State of Law inspires the State's structure and competences of the different powers, and will imply in particular the existence of effective and accessible means of legal recourse, an independent judicial system that guarantees equal protection of the law and an executive power that fully yields to legality.

Respect for human rights, for democratic principles and for the State of Law, in which the ACP-EU association is based, will inspire the internal and international policies of the Parties and constitute an essential element of the present Agreement.

3. Essential elements in matter of human rights, democratic principles and the State of Law and fundamental element in matter of good governance.

The proper management of public affairs, in which the ACP-EU association is based, will inspire the internal and international policies of the Parties and constitutes a fundamental element of the present Agreement. The Parties agree that only in grave cases of active and passive corruption, as is defined in article 97 constitutes a violation of this element.

4. The association will actively support the defence of human rights, the democratization processes, the consolidation of the State of Law and the proper management of public affairs.

These subjects will constitute an important element of the political dialogue. In the framework of this dialogue, the Parties will grant a particular importance to the situation's evolution and the continuous character of the completed progresses. This periodical evaluation will take into account the economic, social, cultural and historic situation of each country.

These subjects will be the object of special attention in the support of development strategies. The Community will lend their support to the political, institutional and juridical reforms and to the reinforcement of public, private and civil society lead roles capabilities, in the set of the strategies decided as common agreement between the State in question and the Community».

The mention of human rights is also appreciated throughout the treaty in reference to the implementation of the agreement's policies or their directive lines. Taking them as

general referents, the following dispositions can be considered:

«Article 39: Cooperation about human rights and democracy

1. The Parties convene in that the cooperation in this sphere must have as goal to promote the principles referred to in article 1.
2. Cooperation will focus mainly on the following:
  - a) the development of civil society by teaching, training and sensitizing programs for the public opinion;
  - b) measures of training and information destined to help institutions to work more effectively and strengthen the State of Law;
  - c) the promotion of human rights and democratic values.
3. The Parties will be able to execute joint projects in order to strengthen the cooperation between their respective electoral institutions and between those in charge of watching and promoting the fulfilment of human rights.»<sup>19</sup>

#### «PART II - POLITICAL DIALOGUE

##### Article 12: Goals

1. The Parties agree to strengthen their periodical dialogue on international and bilateral matters of mutual interest. They aim to intensify and deepen this political dialogue with the purpose of consolidating the Association established by the present Agreement.

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<sup>19</sup> EU-Mexico Association Agreement.

2. The main goal of political dialogue among the Parties is the promotion, dissemination, development and common defence of democratic values such as respect for human rights, people's freedom and the principles of the State of Law as the basis of a democratic society.
3. To that end, the Parties will debate and exchange information about joint initiatives related to any matter of mutual interest and any other international matter searching to achieve the common goals, particularly the security, stability, democracy and regional development.»<sup>20</sup>

#### «PART III - COOPERATION

##### Article 16: General Goals

1. The Parties will establish a close cooperation destined, among other aspects, to:
  - a) reinforce the institutional capacity to consolidate democracy, the State of Law and the respect for human rights and fundamental liberties;
  - b) promote social development, which must come with economical development and the protection of the environment. The Parties will give special priority to the respect of fundamental social rights;
- [...]
2. The Parties reaffirm the importance of economic, financial and technical cooperation as the means to contribute to the fulfilment of the goals and principles derived from the present Agreement».<sup>21</sup>

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<sup>20</sup> EU-Chile Association Agreement.

<sup>21</sup> EU-Chile Association Agreement.

Equally, human rights implicitly or their contents explicitly can present themselves in matters and specific areas of the treaty's implementation, for example in the education and health subjects, which enclose the rights that protect them:

«Article 30: Cooperation in matters of training and education

1. The Parties will define the means to sensibly improve the situation of the educational sector and professional training. Special attention will be paid to the education and professional training of the less favoured social groups.
2. The Parties reinforce their cooperation in the subjects of education, including college education, professional training and the exchanges between universities and companies, in order to improve the level of technical knowledge of the public and private sector's responsible personnel.

[...]

4. Cooperation between the parties could lead to the celebration by mutual consent of a sector agreement in the subject of education, including college education, professional training and the youth's education.»<sup>22</sup>

«Article 42: Health

1. Cooperation in the subject of health will have as goals to strengthen the activities of research, pharmacology, preventive medicine and infectious diseases such as AIDS.
2. Cooperation will be done mainly through:

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<sup>22</sup> EU-Mexico Association Agreement.

- a) projects in matters of epidemiology, decentralization and administration of the health services,
- b) development of professional training programs,
- c) programs and projects to improve health conditions and social wellbeing in the urban and rural areas.»<sup>23</sup>

They can also be treated when regulating transversal issues linked to the fulfilment of human rights by the people in general or of certain sectors, especially of more vulnerable people in matters of human rights in society, for example those who suffer poverty, native and indigenous communities, refugees, among others:

«Article 36: Cooperation in social matters and for overcoming poverty

1. The Parties will maintain dialogue on all aspects of the social agenda that are of interest to any of them.

It must include issues related to vulnerable groups and regions among which are: natives, poor peasants, women of scarce means, and other groups of the population in state of poverty.

2. The Parties acknowledge the importance of harmonizing economic and social development preserving the fundamental rights of the groups mentioned in the previous paragraph. The bases of growth must generate employment and ensure better living standards to the less favoured population.

3. The Parties will have a periodical consensus about actions of cooperation that involve civil society tending to provide opportunities for the creation of employment, professional training and the generation of income.»<sup>24</sup>

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<sup>23</sup> EU-Mexico Association Agreement.

<sup>24</sup> EU-Mexico Association Agreement.

## TITLE II – THE POLITICAL DIMENSION

### «Article 8: Political dialogue

1. The Parties will maintain, periodically, a global, balanced and deep political dialogue, that lead to mutual commitments.

[...]

3. The dialogue will refer to the goals and purposes defined by the Agreement as well as all matters of common interest, general, regional or subregional. Through dialogue the Parties will contribute to peace, security and stability and to promote a stable and democratic political climate. The dialogue will incorporate the cooperation strategies and the general and sector policies including the ones related to the environment, the relative aspects of gender, the migrations, and the matters entailed to the cultural patrimony.

4. The dialogue will focus, among other aspects, in specific political issues that present a general or common interest in relation to the goals expressed in the Agreement, particularly in subjects such as [...] ethnical, religious or racial discrimination. It also includes a periodical evaluation of the situation related to the respect of human rights, the democratic principles, the State of Law and the proper management of public affairs. [...]».<sup>25</sup>

Equally, when regulating in a combined way transversal issues related to these principles, such as development and its application on specific rights:

DEMOCRATIC CLAUSE

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<sup>25</sup> Cotonou Agreement.

«Article 44: Cooperation in social matters

1. The Parties recognize the importance of social development that must come with economic development. They will give priority to the creation of employment and the respect of fundamental social rights, especially promoting the corresponding agreements of the International Labour Organization on issues such as freedom of Association, the right to a collective negotiation and no discrimination, the abolition of forced labour and children labour, and the equal treatment of men and women.
2. Cooperation might cover any subject of interest for the Parties.
3. The measures might be coordinated with those of the State members and the corresponding international organizations.
4. The Parties will give priority to the measures destined to:
  - a) the promotion of human development, the reduction of poverty and the battle against social exclusion, generating innovative projects that can be replicated and in which the most vulnerable and margined social sectors participate; special attention will be given to families of low income and people with disabilities;
  - b) the promotion of the female role in the process of economical and social development and the promotion of specific programs for the youth;
  - c) the development and modernization of labour relations, of working conditions, of social assistance and labour safety;
  - d) the improvement of social policies' formulation and management, including the policy of social housing, improving the access to it by the beneficiaries;

- e) the development of a sanitary system that is efficient and equitable, based on principles of solidarity;
- f) the promotion of professional training and the development of human resources;
- g) the promotion of projects and programs that generate opportunities to create employment in micro, small and medium sized enterprises;
- h) the promotion of programs to arrange the territory, paying special attention to the areas of higher social and environmental vulnerability;
- i) the promotion of initiatives that contribute to social dialogue and to creating consensus;
- j) the promotion of respect for human rights, democracy and citizen participation.»<sup>26</sup>

## SECTION 2 – Human and social development

### «Article 25: Development of the social sector

1. The cooperation will support the ACP State's efforts in favour of the development of general and sector policies and reforms that improve the coverage, quality and access to infrastructure and basic social services, and will take into account the local needs and specific demands of the most vulnerable and less favoured groups, reducing at the same time the inequities of access to these services. It would be wise to especially endeavour in maintaining a sufficient level of public expense in the social sectors. With this framework, cooperation must tend to:

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<sup>26</sup> EU-Chile Association Agreement.

- a) improve education and training and reinforce the capacity and technical competences;
  - b) improve the health and nutrition systems, eliminate hunger and malnutrition, guarantee the security and provision of food;
  - c) integrate demographic matters in the development strategies in order to improve genetic health, primary sanitary assistance, family planning and prevention against women's genitalia mutilations;
  - d) promote the fight against AIDS;
  - e) ensure the provision of domestic water, improving the access to drinkable water and a sufficient hygiene;
  - f) improve the access to a habitat adequate to everyone's needs by supporting social housing building programs and improving the conditions of urban development; and
  - g) favour the promotion of participative methods of social dialogue as well as the respect of fundamental social rights.
2. The cooperation will also support the capacity development of social sectors, favouring particularly: training programs in the elaboration of social policies and in the modern management techniques for social projects and programs; policies in favour of technological innovation and research; consolidation of a local baggage of experience and technical knowledge and promotion of collaboration; organization of debates and round tables in national and regional scales.
3. The cooperation will foment and support the elaboration and application of policies and systems of social protection and security with the purpose of reinforcing social cohesion and promoting self assistance as well as the solidarity of local

communities. Support will focus particularly in the development of initiatives based on economical solidarity, especially through the creation of social development funds adapted to the needs and the local participants.»<sup>27</sup>

«Article 26: Aspects relating to the young population

The cooperation will also support the elaboration of a coherent and global policy with the purpose of obtaining maximum advantage of the youth's potential, so that young people are better integrated in society and can demonstrate all the extent of their capabilities. In this framework, the cooperation will support policies, measures and actions destined to:

- a) protect the rights of children and youth, particularly that of girls;

[...]»<sup>28</sup>

«Article 27: Cultural development

In the culture subject, the cooperation will tend to:

- a) integrate the cultural dimension in the different levels of development cooperation
- b) recognize, preserve and promote the cultural values and identities to favour intercultural dialogue;
- c) help the organisms from local communities to give their children the possibility to develop their physical, psychological and socioeconomic potential;

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<sup>27</sup> Cotonou Agreement.

<sup>28</sup> Cotonou Agreement.

[...], and,

e) foment the active participation of young people in public life, as well as student exchanges and the interaction of the ACP and EU youth's organizations.»<sup>29</sup>

«Article 30: Regional cooperation

1. The cooperation, in the area of regional cooperation, will comprise a wide range of functional and thematic subjects that include common problems and allow exploiting scale economies, that is to say:

[...]

c) health, education and training;

[...]

2. The cooperation will also support projects and initiatives of interregional and intra ACP cooperation, including those in which non ACP countries in development participate.

3. The cooperation will contribute to the promotion and development of a regional political dialogue in the subjects of prevention and conflict solution, human rights, democratization, exchanges, creation of networks and the promotion of mobility among the different participants in development, particularly civil society.»<sup>30</sup>

«Article 33: Institutional and capacity development

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<sup>29</sup> Cotonou Agreement.

<sup>30</sup> Cotonou Agreement.

1. The cooperation will pay systematic attention to the institutional aspects and in this context support the efforts of the ACP States to develop and reinforce the structures, the institutions and the procedures that contribute to:

a) promote and support democracy, human dignity, social justice and pluralism, fully respecting the diversity in societies;

b) promote and support the full and universal respect as well as the defence of all human rights and fundamental liberties;

c) develop and reinforce the State of Law and improve the access to justice, at the same time guaranteeing the professionalism and independence of the juridical systems; and

d) guarantee a transparent and responsible management and administration in all public institutions.»<sup>31</sup>

Finally, just as in the Preambles, the human rights can be gathered more specifically, through a list of treaties that should be ratified by the parties, as is the case of the System of Generalized Tariff Preferences (GSP). This list is an integral part of the treaty, by referencing in its own text the annex containing it.

In this respect, it is necessary to remember that the terms relating to human rights must be read together with the preamble, the agreement's annexes and based on the interpretation principles previously stated.

In the case of the GSP, the list of treaties is as follows:

## **UN and ILO conventions concerning human and labour rights**

### **1. International Covenant on Civil and Political Rights**

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<sup>31</sup> Cotonou Agreement.

2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of all Forms of Racial Discrimination
4. Convention on the Elimination of all Forms of Racial Discrimination against Women
5. Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. Covenant concerning Minimum Age for Admission to Employment (N° 138)
9. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (N° 182)
10. Convention concerning the Abolition of Forced Labour (N° 105)
11. Convention concerning Forced or Compulsory Labour (N° 29)
12. Convention concerning Equal Remuneration for Male and Female for Work of Equal Value (N° 100)
13. Discrimination (Employment and Occupation) Convention (No 111)
14. Convention concerning Freedom of Association and Protection of the Right to Organize (No 87)
15. Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No 98)
16. International Convention on the Suppression and Punishment of the Crime of Apartheid

**Conventions concerning the environment and the principles of governance**

17. Montreal Protocol on Substances that Deplete the Ozone Layer
18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
19. Stockholm Convention on Persistent Organic Pollutants
20. Convention on International Trade of Endangered Species of Wild Fauna and Flora
21. Convention on Biological Diversity
22. Cartagena Protocol on Biotech Safety
23. Kyoto Protocol of the United Nations Framework Convention on

Climate Change

24. United Nations Single Convention on Narcotic Drugs (1961)
25. United Nations Convention on Psychotropic Substances (1971)
26. United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances (1988)
27. United Nations Convention against Corruption in Mexico

#### **D. SOME NECESSARY CONDITIONS TO MAXIMIZE THE EFFECTIVENESS OF THE HUMAN RIGHTS' NORMS AND THE DEMOCRATIC CLAUSE**

It can be deduced from what has been exposed in the previous paragraphs that the Democratic Clause can no longer be understood as the conditionality clause studied at the beginning of this document, but, on the contrary, it is now part of a system of clauses on human rights that inspire and make an opportunity of the association agreements to steer international trade towards the achievement of development. Proof of that is the difference between the agreements of Bulgaria and Cotonou.

It can be appreciated that human rights and the democratic principles in the current association agreements are not limited to the conditionality clause but rather gather a series of norms that influence the treaty's implementation.

Yet to be able to take maximum advantage of these agreements it is doubtlessly necessary to reflect on the way to make the rights contained in these clauses effective. To this respect it must be taken into account the civil society's involvement in the implementation and monitoring of the agreement, its supervision organ and the measures to be taken in case of breach.

#### **Institutions:**

As for the institutions, most of the EU's Association Agreements maintain the same arrangement, though the name might vary. Joint Counsel supported by the Joint Committee in the case of Mexico's agreement,

Association Counsel assisted by the Association Committee in the case of Chile and Bulgaria (though in the latter there was also a Parliamentary Commission), Ministers Counsel, Ambassadors Committee and equal Parliamentary Assembly in the case of Cotonou, almost all of them have the task of supervising the treaty's fulfilment and give the parties recommendations about this process.

### **Breach of norms and of the Democratic Clause:**

Here, as seen in the first part, the EU has made frequent use of the famous Bulgarian clause, being the sanctions for any violation of any of the human rights' principles the suspension of the conceded benefits, most of the time about customs, between the parties.

Normally, in the face of a treaty's violation the steps to be taken are, first, consults and dialogue, maybe international official announcements and finally, in case of highly grave violation, the suspension or termination of the treaty.

The Bulgarian Clause and its procedure:

«Article 108

1. Each of the two Parties will be able to submit to the Association Counsel any conflict related to the application or interpretation of the present Agreement.
2. The Association Counsel can resolve the conflict with a decision.
3. Each Party is forced to take the necessary measures to be able to fulfil the decisions mentioned in paragraph 2.
4. In case it was not possible to resolve the conflict in conformity with paragraph 2 of this article, each Party can notify the other about naming an arbitration judge; the other Party

must then name a second arbitration judge in two months time. For the appliance of this procedure, the Community and the State members will be considered as only one Party in the conflict.

The Association Counsel will name a third arbitration judge.

The arbitration judges' decisions will be adopted by majority.

Each Party in the conflict will take the necessary measures to fulfil the arbitration judges' decisions.»

«Article 118

1. The Parties will adopt all the necessary general and specific measures to fulfil their obligations in virtue of the present Agreement. The Parties will guard the achievement of the goals defined in the present Agreement.
2. If one of the Parties considers that the other Party has not fulfilled any of the obligations derived from the present Agreement, it will be able to take the appropriate measures. Before that, except in cases of particular urgency, it must present to the Association Counsel all the pertinent necessary information for a detailed examination of the situation in order to find an acceptable solution for the Parties.

When selecting the measures, priority must be conceded to those that less disturbs the present Agreement's execution. These measures must be immediately notified to the Association Counsel and will be the object of consults if the other Party requests it».

## Treaty with Mexico

### «Article 58: Fulfilment of the obligations

1. The Parties will adopt all the necessary general and specific measures to fulfil their obligations in virtue of the present Agreement and will guard the achievement of the goals established in the present Agreement.

If one of the Parties considers that the other Party has not fulfilled any of the obligations established in the present Agreement, it will be able to take the appropriate measures. Previously, except in cases of particular urgency, it must present to the Joint Counsel all the useful necessary information for an in depth examination of the situation in order to find, in no more than 30 days, an acceptable solution for the Parties.

The measures chosen must, as a priority, be those that less disturbs the present Agreement's execution. These measures will be immediately notified to the Joint Counsel and will be the object of consults within the said Counsel if the other Party so requests it.

2. The Parties agree that it will be understood as «cases of particular urgency», term presented in paragraph 1 of the present article, those of substantial breach of the Agreement by one of the Parties. It will be considered as substantial breach of the Agreement:
  - a) the Agreement's accusation not sanctioned by the general norms of International Law; or
  - b) the breach of the essential elements of the Agreement contemplated in article 1.
3. The Parties agree that the «appropriate measures» mentioned in the present article will be measures adopted

in conformity with the International Law. If one of the Parties adopts a measure in case of particular urgency in appliance of the present article, the other Party can request the urgent notice of a meeting of both Parties in a period of 15 days».

In the Agreement with Chile:

«Article 176: Consults when important interests of one of the Parties are adversely affected in the other Party's territory.

1. Each Party, in conformity with its legislation, will take into consideration when necessary the important interests of the other Party in the course of their activities of law application. When the authority of competence of one Party considers that an investigation or procedure being done by the authority of competence of the other Party can adversely affect its important interests, it can send its observations on the matter to the other authority of competence or request the celebration of consults. With no injury to the continuity of any action taken in virtue of its competence laws and its full liberty to adopt a definitive decision, the authority of competence that has been requested must consider in its entirety and in a favourable manner the observations manifested by the requiring authority of competence.
2. The authority of competence of one Party that considers its interests being substantially and adversely affected by practices contrary to the competence, whatever its origin, taken by one or more companies located in the other Party can request the celebration of consults with the authority of competence of that Party. Such consults will take place without injury to the full liberty of the concerning authority of competence to adopt a definitive decision. The authority of competence thus consulted may adopt the correcting measures in virtue of its competence laws considered adequate, coherent with its own national juridical code of

laws and without damage to its total discretion in matters of the application of the law.»

«Article 200: Fulfilment of the obligations

1. The Parties will adopt all the necessary general and specific measures to fulfil the obligations they assume in virtue of the present Agreement and will guard the achievement of the goals established in it.
2. If one of the Parties considers that the other Party has not fulfilled any of the obligations established in the present Agreement, it will be able to take the appropriate measures. Before that, it must present to the Association Counsel all the pertinent necessary information, in a period of 30 days, for the Counsel to do an in depth examination of the situation in order to find an acceptable solution for the Parties.

The measures chosen must, as a priority, be those that less disturbs the present Agreement's execution. These measures will be immediately notified to the Association Committee and will be the object of consults within the said Committee if the other Party so requests it.

3. Notwithstanding what is disposed in paragraph 2, either Party can immediately adopt the appropriate measures in conformity with the International Law in the case of:
  - a) the present Agreement's accusation not sanctioned by the general norms of International Law; or
  - b) the breach by the other Party of the essential elements of the present Agreement contemplated in paragraph 1 of article 1.

The other Party can request the urgent notice of a meeting of both Parties in a period of 15 days to proceed to a detailed

examination of the situation in order to find an acceptable solution for the Parties.

4. Notwithstanding what is disposed in paragraph 2, if one of the Parties considers that the other Party has not fulfilled an obligation derived from the application of Part IV, it will only be able to appeal to the procedures of controversy solutions established in Title VIII of Part IV and must obey them».

In the Cotonou Agreement:

«Article 96: Essential elements: consult procedure and pertinent measures regarding human rights, the democratic principles and the State of Law

1. To the effect of the present article, it is understood as «Party» the Community and the States members of the European Union on one side, and each of the ACP States on the other.
  - 1a. Both Parties commit to exhaust all possible options for dialogue as presented in article 8, except in cases of particular urgency, before starting the consultations referred to in the present article, paragraph 2, letter a).
  - 2 a) If despite the political dialogue about the essential elements contemplated in article 8 and in the present article, paragraph 1a, one of the Parties considers that the other Party is not fulfilling an obligation derived from the respect of human rights, the democratic principles and the State of Law quoted in article 9, paragraph 2, it will present to the other Party and the Ministers Counsel, except in cases of particular urgency, the pertinent information elements necessary to conduct a detailed examination of the situation in order to find an acceptable solution for the Parties. To this effect, it will request the other Party to

celebrate consults centred mainly in the adopted measures or the ones that will adopt the interested Party in order to solve the situation in conformity with annex VII.

The consults will take place at the level and in the way considered more convenient to reach a solution.

The consults will begin no more than 30 days after the invitation and will continue during the period determined by common agreement, based on the nature and seriousness of the violation. In any case, the dialogue under the protection of the consult procedure will not last more than 120 days.

If the consults cannot help find an acceptable solution for both Parties, in case of consult refusal or in case of particular urgency, opportune measures may be adopted. These measures will end as soon as the reasons that justified them disappear.

- b) the expression «cases of particular urgency» will refer to exceptional and particularly serious and evident violation cases of any of the essential elements quoted in paragraph 2 of article 9, that require an immediate reaction.

The Party that makes use of the particular urgency procedure will inform the other party and the Ministers Counsel separately, except if the time will not allow it.

- c) The «pertinent measures» referred to in the present article are measures adopted in conformity with the international law and in proportion with the violation. Such measures must be chosen, as a priority, to be those that less disturbs the present Agreement's execution. It is understood that suspension would be the last resource.

If in cases of particular urgency measures are adopted, these will be immediately notified to the other Party and the Ministers Counsel.

At the request of the affected Party consults can then be summoned to examine the situation in depth and, if possible, find a solution. These consults will take place according to the formalities specified in paragraphs second and third of the letter (a)».

#### ANNEX VII - Political dialogue on human rights, the democratic principles and the State of Law

##### «Article 1: Goals

1. Except in case of particular urgency, the consults contemplated in article 96, paragraph 2, letter a), will take place after an exhaustive political dialogue, as it is contemplated in article 8 and article 9, paragraph 4 of the Agreement.
2. Both Parties will maintain such political dialogue respecting the spirit of the Agreement and keeping in mind the directing lines for the Political Dialogue ACP-EU established by the Ministers Counsel.
3. The political dialogue is a process that must serve to strengthen the relationship between the ACP and EU countries and contribute to the consequence of the Association's goals».

##### «Article 2: intensified political dialogue previous to the consults in virtue of article 96 of the Agreement

1. The political dialogue on human rights, the democratic principles and the State of Law must take place according to article 8 and article 9, paragraph 4 of the Agreement and according to the parameters of norms internationally acknowledged. In the framework of such dialogue, the

Parties can convene on joint programs of performance and priorities.

2. The Parties may elaborate and jointly agree on standards and specific goals regarding human rights, the democratic principles and the State of Law, according to the parameters of norms internationally acknowledged and taking into account the specific circumstances of the ACP State involved.

The standards are mechanisms used to achieve goals by means of establishing intermediate goals and periods for their fulfilment.

3. The political dialogue referred to in paragraphs 1 and 2 will be systematic and formal and will exhaust all possible options before the consults of article 96 of the Agreement.
4. Except in cases of particular urgency as defined in article 96, paragraph 2, letter b) of the Agreement, the consults of article 96 can take place without previous intensified political dialogue when a persistent breach of the contracted commitments arise by one of the Parties during a prior dialogue or if it is impossible to establish a dialogue in good faith.
5. The political dialogue based on article 8 of the Agreement will also be used between the Parties to help the countries subjected to the opportune measures referenced in article 96 of the Agreement to normalize their relationships».

«Article 3: Additional norms of consult in the framework of article 96 of the Agreement

1. The Parties will struggle to promote equality of the representation level during the consults based on article 96 of the Agreement.

2. The Parties commit to have a transparent interaction before, during and after the formal consults, taking into consideration the standards and specific goals referred to in article 2, paragraph 2 of the present annex.
3. The parties will use the notification period of 30 days established in article 96, paragraph 2 of the Agreement to effectively prepare as well as to maintain closer consults within the ACP Group and between the Community and its State members. During the consult procedure the Parties will decide flexible terms, although they acknowledge that the cases of particular urgency referred to in article 96, paragraph 2, letter b) of the Agreement and in article 2, paragraph 4 of the present annex might require an immediate action.
4. The Parties acknowledge the role of the ACP Group in the political dialogue in respect to the norms determined by that Group, which will be communicated to the European Community and its State members.
5. The Parties acknowledge that it is necessary to celebrate the consults in reference to article 96 of the Agreement in a structured and constant manner. The Ministers Counsel may establish additional norms to that effect».

These clauses have been used in several cases, especially with African countries, and equally, they have also been used in the case of the GSP, concluding, for example, in the suspension of the preferential regime.<sup>32</sup>

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<sup>32</sup> See the case of the Belarus Republic in the Official Paper L 405 of the European Communities of December 30, 2006.

## **2. ANNEX N° 2: CONCEPTUAL FRAMEWORK. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND FREE TRADE IN REALITY: THE ASYMMETRIES**

This Annex analyzes the existing relationship between the commitments contained in the Democratic Clause and the human rights' treaties that gather the same norms and that are also valid between the same parties. This is done with the purpose of accomplishing for the Democratic Clause to be as effective as possible, in the sense of the wider realization of the human rights.

In this globalization era, despite the opposition of different political stakeholders, the relationship between human rights and international trade is becoming more evident. The human rights are worldwide acknowledged standards and even allow free trade which is based, among others, in the liberty of association. In the same way, free trade can generate hindrances to the labourers' rights, for example if to reduce costs their working conditions are affected<sup>33</sup>.

Thus, even though theoretically the relationship between trade and human rights can be complementary or contrary, reality seems to evidence the conflictive situation, perhaps due to the fact that both come from policies with different goals. The contrary interests do not appear only between these two areas, it is not new to the international law as the same happens regarding free trade and the environment.<sup>34</sup>

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<sup>33</sup> BAL, Salman, «International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT», in: Minnesota Journal of Global Trade, vol. 10, issue 1, winter of 2001; pp. 65-68. As to the relationship between labour laws and free trade, it is interesting to review the WTO and ILO joint study, where it is attempted to prove that this relationship is not so clear: JANSEN, Marion and LEE, Hedi, *Trade and Employment, Challenges for policy research*, Geneva: WTO, 2007.

<sup>34</sup> «Trade law and environmental law [...] emerge from different types of policy and that fact may have an effect on how the relevant rules are interpreted or applied». Study Group of the International Law Commission. Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682 of April 13, 2006; p. 19.

«[...] liberalisation of trade and protection of the environment are on a 'collision course'. Indeed, the first goal directed to abolishing any form of State protectionism so as to ensure the free flow of international trade. By contrast, the other goal may require strong State intervention: for instance, it may prove necessary for State authorities to stop the importation of goods injurious to health or noxious to the environment; or it may appear necessary to intervene in the area of goods processing or manufacturing by limiting those forms that prove excessively harmful to the environment».<sup>35</sup>

This in the juridical aspect, for inequities are also present in the real sphere and it will not matter if the treaty is «neutral» and is applied to both parties equally, the real situation of inequity of the parties can allow for it to be more benefits for one of the States and, even worse, it is possible that the damages for the weaker party and its inhabitants are greater than the benefits of the more powerful party.

Therefore, it is essential to acknowledge the asymmetric relationships between the parties in a treaty. For example, in the case of the last free trade agreements concluded between the United States and El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic, the results show more advantages for the first than for the Central American countries.<sup>36</sup>

In short, during the first year of implementation, the agreements even though in certain cases have generated an increase in the exports of two Central American countries (El Salvador with over 3.7% and Honduras with 5.7%, in the other two cases, the opposite happened, Nicaragua with -0.1% and the Dominican Republic with -12.70%), which is nothing compared to the increase of these States' imports, which generates a deficit in their Trade Balance and a benefit in the American.

<sup>35</sup> CASSESE, Antonio, *International Law* (2ed), Oxford: OUP, 2005; p. 392.

<sup>36</sup> Regional Network for Monitoring the impacts of Free Trade Treaties between Central America, Dominican Republic and the United States, Preliminary Report of Monitoring of Free Trade Treaties a year from its being in force, September of 2007; pp. 34-37.

Another important aspect is that the Central American countries have seen their Direct Foreign Investment reduced in their territories, in that commercially this would no longer be beneficial (it becomes cheaper to transfer the products than to fabricate them in the country). Equally, less collection has been produced as the tariffs have been reduced; the impact on Central American countries is proportional to the amount of tax liberated headings.

These numbers have also been translated to a social impact level and a benefit to the small agricultural producers has not existed, rather the most benefited have been the entrepreneurs, part of the oligopolies, situation that has also affected the prices of basic grains that have been in rising. The hindrances on social and economical rights (health and labour) have equally declined.

These asymmetries have also been manifested in the Association Agreement with Mexico, which proves that despite the democratic clause and the Bulgarian clause, the human rights, especially those of strong economical, social and/or cultural components are affected, especially because of the actions of European companies.<sup>37</sup>

International law, as the Law in general, can be beneficial for the weaker party (it is best to have a written right than non at all), yet it is also true that a norm of contractual inspiration such as the free trade treaties can generate great inefficiencies and injustices, therefore it is necessary for the weaker party in the negotiation to also be able to regulate the market to be created to avoid more damage.

As we mentioned earlier, the international law can also favour the «weaker» party, as it happens in certain cases in the relationship between State and human being. In matters of human rights, the International

<sup>37</sup> CALDERON, Jorge. Evaluation of the Agreement of Economical Association, Political Concurrence and Cooperation between Mexico and the European Union; p.5. The author is a head professor of the UNAM's Department of Economy. Also, when the Agreement's negotiation started, he was a Senator and voted in favour of beginning the negotiations; in his article he shows disappointment over the fact that more effective mechanisms for the protection of human rights were not adopted.

Juridical Order prevents the prevalence of certain norms, among them those that protect the individual.

#### **A. THE OBLIGATORINESS OF THE HUMAN RIGHTS DEMOCRATIC CLAUSE AS A NORM OF INTERNATIONAL LAW.**

The Democratic Clause, as any other disposition of the treaty that contains it, is obligatory for the parties in the frame of the treaty, in that these are bound to fulfil it in good faith (article 26° of the Vienna Convention on the Law of Treaties)<sup>38</sup>. And this is so because the treaties dispositions constitute *norms* directed to being implemented arranged to one of the cardinal principles of international law, which is the principle of *Pacta Sunt Servanda*, in which the convened dispositions in a treaty are obligatory to the parties and its breach generates international responsibility.

Also, it is worth mentioning that the Democratic Clause understood as a system of norms that protect human rights gathers or makes reference to norms of International Law on Human Rights (ILHR) and that these norms have special characteristics.

#### **B. THE ERGA OMNES NATURE OF ITS OBLIGATIONS AND THE INTERNATIONAL RESPONSIBILITY GENERATED BY ITS BREACH**

As for the characteristics of the rights' norms, one is, without a doubt its international character. It is true that internal obligations are derived from these norms which must be implemented at that level, as the object and standards of the human rights' treaties must be incorporated in the internal law by the treaties' State party or forced by customs. But that does not mean that respect for those internal obligations only concerns the State's public authorities regarding their nationals, by being

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<sup>38</sup> Adopted in Vienna, on May 23, 1969.

obligatory at an international level its fulfilment compromises all subjects of international law related to the norm.

Secondly, concerning the above, these obligations gather the interest for protecting common and collective values, aside from regulating more than one subject of international law. That is why they have been elevated to an interstate level as international norms that protect common interests, since cooperation between many countries is required to achieve its goals.<sup>39</sup>

Finally, from protecting collective interests and universal values of the international community another characteristic of these norms is derived: the «integral» or «collective» nature of its obligations. This implies that its violation, for attempting against an international interest of an essentially collective character, affects all States equally, one State will not be more affected than another.

For the collective and not bilateral nature of the interests they protect<sup>40</sup>, the obligations of the human rights' norms have been denominated by the International Court of Justice as *erga omnes*. This kind of obligations have the particularity of forcing a State in front of the whole international community, because of the importance of the rights protected, all States have a juridical interest about it.

The International Court of Justice put as an example of these norms those that prohibit acts of aggression and genocide, aside from the norms that protected the human being's fundamental rights, among them the prohibition of slavery and of discriminating.<sup>41</sup>

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<sup>39</sup> DONNELLY, Jack, *Universal Human Rights. In theory & Practice* (2nd. Ed), Ithaca: Cornell University Press, 2003; p. 34.

<sup>40</sup> PAUWELYN, Joost. Conflict of norms... *Ibid., loc cit.*

<sup>41</sup> International Court of Justice. Case of the *Barcelona Traction, Light and Power Company, Limited*. Sentence of February 5 of 1970, against the new demand of 1962; paragraphs 33 and 34.

Unlike the *erga omnes* obligations, the bilateral or inter-parties obligations are those that a State contracts with another, these would contain only interests for the other party and vice versa<sup>42</sup>. Therefore only the parties could reclaim its breach. Norms that regulate free trade normally contain that kind of obligation.

The basis of the «integrality» of these norms is found in what DUPUY has denominated the «objective character» of human rights, the author's reasoning is as follows: the individual has the rights for being a human being and not because a juridical instrument gives him irrevocably a particular statute<sup>43</sup>. Therefore, to enjoy the rights would be indifferent to the attitude that adopts the State faced with the juridical instrument that gathers the rights, that is to say, it does not matter if these are fulfilled or not.

It is just because of this objective character (one has rights because is human), that the rights' enjoyment will not depend on the fulfilment by the other parties of the obligations contained in the treaty (non bilateral character), since from these norms no bilateral obligations but rather integral ones are born.

The importance of the integrality – *erga omnes* character – of the obligations in the practical plane is that any State related – directly – or not to the human rights violation can reclaim its fulfilment at an international level, by means of the figure of international responsibility requesting the end of the violation and even requesting a compensation or any other way of reparation.

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<sup>42</sup> International Court of Justice. *Case of the Barcelona Traction, Light and Power Company, Limited, op. cit.*; paragraph 33.

<sup>43</sup> DUPUY, P-M, *Droit International Public*, 7 ed., Paris: Dalloz, 2004 ; p. 208.

### C. THE SPECIAL CHARACTERISTICS OF INTERNATIONAL OBLIGATIONS IN MATTER OF HUMAN RIGHTS

It is currently widely acknowledged that human rights are *universal, indivisible, interdependent and interrelated*<sup>44</sup> and that, thus, all these rights contain obligations of «equal» nature and their integral implementation will require immediate measures as well as the implementation of measures defined as of programmatic reach. This was reaffirmed by the 171 government representatives present at the last World Conference on Human Rights (Vienna, 1993), as well as by the treaties from the Convention on the Rights of the Child, which in one document acknowledges both kinds of rights<sup>45</sup>.

The current doctrine adds two more to these characteristics, for the human rights would also have a *progressive* and *irreversible* nature. With the first characteristic it makes reference to the fact that these rights have an evolutionary character in the history of humanity, and so the human beings based on their needs will generate new rights. The *irreversibility* is the consequence and complement of that progression because when a right is recognized as inherent, it obtains a category that is never lost, that of human right. The principle of progression implies a prohibition of retreating.<sup>46</sup>

It is required to remember that the interdependence of rights presents itself in reality with respect to the values they protect. For example, there is a very strong bond between children's malnutrition and their right to life, in the same way that it would be inconceivable the right to

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<sup>44</sup> The World Conference on Human Rights: The Vienna Declaration and Programme of Action. UN doc. A/CONF.157/23, part I, para. 5. See also article 7 of the Inter American Democratic Charter, approved by the OAS General Assembly in the first plenary session, on September 11, 2001.

<sup>45</sup> EIDE, Asbjorn, *op. cit.*; p. 24.

<sup>46</sup> Doctrine gathered in VERGARAY, Ynes; PAREDES, Lisbeth y MUJICA, Javier, *Manual for activists in Human Rights: Introduction to the Economical, Social and Cultural Rights*, Lima: CEDAL, 2006; pp. 14 and 22.

access justice without the legal aid for those who do not have the necessary resources<sup>47</sup> or deny the relationship between the right to property and the right to health.<sup>48</sup>

Thus, when we acknowledge that the obligations that emanate from human rights have the character *erga omnes*,<sup>49</sup> for protecting values common to the international society and that compose the «constitutional dimension» of international law; we refer to those coming from the denominated «civil and political» as well as the «economical, social and cultural» ones. In consequence, the violation of a right of this nature concerns the whole international community.<sup>50</sup>

#### **D. THE SPECIAL CASE OF THE OBLIGATIONS IN MATTERS OF HUMAN RIGHTS OF THE EUROPEAN COMMUNITY AND THE EUROPEAN UNION IN THEIR INTERNATIONAL RELATIONS**

The EU is an international organization, and as such is ruled by the mandates of its constitutive treaty. It is in this instrument that the concern

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<sup>47</sup> Human Rights Committee, General Observation N° 6 on the right to life. A/37/40. Also, PETERSMANN considers that there is a functional interrelation between both «kinds» of rights («Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration»; in *The European Journal of International Law (EJIL)*, vol. 13, N° 3 (2002); pp. 626-628. Other interesting examples of the relationship between liberties and social rights have been developed by SEN, Amartya, *Un nouvel modèle économique. Développement, justice, liberté*, Paris: Odile Jacob, 2000. Among others, the relationship between employment and freedom, pp.35-37.

<sup>48</sup> IHR Court, case of indigenous community Yakye Axa against Paraguay, sentence of June 17, 2005. Series C N° 125; paragraph 168.

<sup>49</sup> «L'obligation pour les Etats d'en assurer le respect [of human rights] incombe tout Etat vis-à-vis de la communauté internationale dans son ensemble, et tout Etat a un intérêt juridique à la protection des droits de l'homme» (Article one of the Resolution of the International Law Institute about «La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats» of its session in San Santiago of Compostela in 1989).

<sup>50</sup> Another subject is the specific content of the right and the proof of its violation, but once the right is violated this will affect all States.

for Human Rights and Democracy can be evidenced, in the case of this Organization as well as in the European Community (EC)

Thus, the Constitutive Treaty of the EC says in its Title dedicated to the Cooperation for Development that in this field the Community's policy is to contribute to the respect of human rights and development:

- «1. The Community's policy on cooperation for development, which will be complementary to the ones executed by the State members, will favour:
  - the lasting economical and social development of the countries in development and particularly of those less favoured,
  - the harmonious and progressive insertion of the countries in development to the world economy,
  - the fight against poverty in the countries in development.
- 2 The Community's policy on this issue will contribute to the general goal of development and consolidation of democracy and the State of Law, as well as the goal of respect of human rights and fundamental liberties.
- 3 The Community and the State members will respect the commitments and will take into account the goals they have agreed in the United Nations framework and that of other competent international organizations».<sup>51</sup>

In the same way, the European Union Treaty gathers as the core of its foreign policy and of common security the development and consolidation of democracy and the State of Law, as well as the respect for human rights:

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<sup>51</sup> Article 177.

- «1. The Union will define and perform a foreign policy and of common security that will reach every aspect of foreign policy and security and it will include the following goals:
- the defence of common values, of fundamental interests and of the independence and integrity of the Union, according to the principles of the United Nations Charter,
  - the reinforcement of the Union's security in every way,
  - the preservation of peace and reinforcement of international security, according to the principles of the United Nations Charter, the principles of the Helsinki Final Act and the goals of the Charter of Paris, included the ones concerning the external frontiers,
  - the encouragement of international cooperation,
  - the development and consolidation of democracy and the State of Law as well as the respect for human rights and fundamental liberties.
2. The State members will actively and unreservedly support the foreign and security policy of the Union, with the spirit of loyalty and mutual solidarity.

The State members will work together to intensify and develop their mutual political solidarity. They will abstain of all action contrary to the interests of the Union or that may injure its efficiency as a cohesion force in international relations.

The Counsel will guard the respect of these principles»<sup>52</sup>.

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<sup>52</sup> Article 11.

It is necessary to take into account that coming 2009, with the Lisbon Treaty in force, the EU will be part of the European Convention on Human Rights which will imply that the whole of the latter will be taken into account for the interpretation of the EU policies in matter of human rights, through the labour of the European Court of Human Rights.

These norms, which are also the juridical basis of the democratic clauses that the EU negotiates in the Association Agreements, also show the EU's commitment to the compliance of human rights and the demand for these in their relations with the world, being these regulated by the Association Agreement or not.

#### **E. CONFLICT BETWEEN NORMS THAT GATHER HUMAN RIGHTS AND THOSE THAT REGULATE FREE TRADE: PRIMACY OF THE FIRST ONES.**

To settle this conflict it has to be taken into account the position that occupy the norms that contain human rights obligations in the International Juridical Order. About that it can be indicated that these norms constitute «one of the constitutional dimensions of the contemporary international law»,<sup>53</sup> and this derives from its presence in the United Nations Charter dispositions,<sup>54</sup> which, for the United Nations State members have primacy over any other norm that contradicts them, as we will see later on.

In the public international law there is no hierarchy between the norms because of their source (that is, if they emanate from a treaty, a custom or other source of international law). Nonetheless, the supposition of predominance of some norms over others does exist, for example, the

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<sup>53</sup> CARRILLO SALCEDO, Juan Antonio, *The States and Human Rights sovereignty in contemporary International Law*, Madrid: Tecnos, 1995; p.19.

<sup>54</sup> DUPUY enumerates the following dispositions that evidence the presence of human rights in the Charter: Preamble, articles 1.3 and 55 c), complemented by the articles 13, 62 and 68.

*jus cogens*<sup>55</sup> that have primacy over any other. In this case the norms have primacy because of their contents and the importance of the matters they regulate and not because of their source.

Due to that, though the Democratic Clauses have the same value that any other norm of international law, since they gather principles and norms on human rights, some of these having the *jus cogens* status, they should have primacy over any others that do not contain these principles.

Other kind of hierarchy to be considered in this aspect is that determined by the own treaties<sup>56</sup> contents, for example, when the States commit to the posterior norms on the same subject to have primacy over the previous ones. In the same way, it is possible to pact that a treaty's dispositions will have primacy over those of any other treaty that can contradict them. In the case we are interested in, for example, when a conflict arises as the one prevented in the article 103 of the United Nations Charter.

The article 103 of the United Nations Charter seems to be an almost absolute exception to the contractual liberty of the States, for it has primacy over any treaty, no matter its date of approval<sup>57</sup> or the subject it pertains. Thus, this article indicates:

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<sup>55</sup> SHELTON, *op. cit.*; pp. 153 –157. Normally, the rights known as civil and political have received more acknowledgement as *jus cogens* norms; for example, the right to no discrimination (IHR Court, Juridical Condition and Rights of the undocumented migrants, Consulting Opinion OC-17/02 of August 28, 2002, paragraph 101); or the prohibition of torture (Penal Tribunal for Ex Yugoslavia, Case *Prosecutor v. Anto Furundzja* (TI-95-17/1-T), Sentence of the Trial Chamber of December 10, 1998; paragraph 144). Yet it is necessary to acknowledge the interdependence of human rights.

<sup>56</sup> For more abundance see article 30 of the Convention of Vienna.

<sup>57</sup> THOUVENIN Jean-Marie, Article 103, in: COT, Jean-Pierre y PELLET, Alain, *La Charte des Nations Unies. Commentaire article par article* (3 ed.), Paris: Economica, 2005; Tome II, p. 2134.

«In case of conflict between the obligations contracted by the Members of the United Nations in virtue of the present Charter and their obligations contracted in virtue of any other international convention, the obligations imposed by the present Charter will prevail».

It is true that this disposition, because it was adopted in the frame of an international organization as part of its constitutive treaty, is just to be applied to the legal system and those of the State members. Nonetheless, it is important to take into account that all State members of the EU and the ANC are also part of the UNO<sup>58</sup>.

Thus, the members of the EU and the ANC are forced to make the obligations of the Charter prevail over those derived from the Association Agreement, in case these were to contradict themselves. Naturally, the same can be said of other dispositions of the UNO Charter that contains specific obligations related to human rights.

Therefore, for example, the Charter's 55<sup>o</sup> article signals that the UNO will promote «the universal respect for human rights and the fundamental liberties of everyone» without discrimination and «the effectiveness of such rights and liberties» (paragraph c). To achieve these «purposes», the State members committed themselves to take individual and joint measures in cooperation with the UNO (article 56). These dispositions reflect the *erga omnes* character of the human rights, and even for some authors it is its basis<sup>59</sup>.

As a consequence of the above, the UNO's States Parties are forced to promote the human rights effectiveness, adopting individual and/or

<sup>58</sup> According to its web pages, the 150 members of the WTO, which are part of the ANC and EU as well, also are part of the 192 members of the UNO (based on [www.wto.org](http://www.wto.org), [www.europa.int](http://www.europa.int) and [www.comunidadandina.org](http://www.comunidadandina.org); visited on March 6 of 2007.

<sup>59</sup> MERON, Theodore, «On a Hierarchy of International Human Rights», in: AJIL, vol. 80, N° 1 (January of 1986); p 11.

collective measures, obligation that has primacy over any other contained in a different treaty. Besides, the respect of this obligation is in the interest of all the organization's members.

On the other hand, it is worth mentioning that, even though it has been considered that the obligation in the 56° article of the UNO Charter is too general and undetermined, it still means that the minimum required from the States is to abstain of all action, obstruction or contradiction of the purpose of that disposition. *Contrario sensu*, which means they are forced to act in good faith to achieve the «purposes» of the aforementioned article 55, among which can be found, precisely, the obligation to make [all] human rights effective.

These norms must be read in concurrence with other treaties. For example, with the IPESCR Preamble that gathers the enunciation of the Charter's 55° article and allows harmonizing this mandate with the rights contained in the IPESCR. Taking as an example the right to health (12° article of the IPESCR), we would have the following formulation:

«Considering that the United Nations Charter imposes on the States the obligation to promote the universal and effective respect of human rights and liberties, [... the State Parties of the IPESCR] convene in [... recognizing] the right of all people to enjoy the highest possible level of physical and mental health».

According to the above, if in the Association Agreement's implementation a contradiction was found between one norm's mandate and other on human rights, the latter should have primacy. With the same criteria, if a norm in matters of the cooperation pillar of the Association Agreement affected during its implementation another norm of the same agreement about human rights, all the necessary measures must be taken to cease the hindrances, remembering the primacy of the second norm.

Besides having juridical primacy, it must be taken into account that the Democratic Clause not only constitutes a norm fully demandable by

the States, but that in the international law all violation of a norm must be repaired. The reparation will consist, firstly, of the cease of the violation and, secondly, in the damages being repaired, attempting to return to the prior situation, before the violation of the infringed norm.

An additional matter linked to the breach of these norms consists of the possibility that the party that feels affected by the breach consider the treaty terminated or suspends its fulfilment. Antecedents and sustain for that can be found in the 1969 Vienna Convention on the Law of Treaties (for treaties between States), and in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations<sup>60</sup>. This regulation leaves to the parties the option of normalizing the subjects and procedures<sup>61</sup>. As not all State members of the EU and ANC are a part of the previous treaties, it will be necessary to regulate those procedures.

## F. SOME CONCLUSIONS

Recapitulating, we can state that most norms on human rights, no matter their conventional or consuetudinary nature have the characteristic of forcing the whole international community (*erga omnes*). And even many of them have the nature of being norms of *jus cogens* (that is that one cannot pact in contravention of its content). In addition, human rights norms, because they are juridical obligations, are in themselves mandatory and must be obeyed.

For the case of all States that are part of the UNO (and all States member of the EU and the ANC are part of the UNO), if two norms included in the treaties they adopt become conflicted (for example one that promotes free trade and other on human rights), their obligations in matters of human rights force them to prefer those on human rights over those of

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<sup>60</sup> Adopted on March 21 of 1986.

<sup>61</sup> In the case of the EU's Association Agreements, it is mentioned the evolution of the clauses of «democratic principles », «essential element», «Baltic» and «Bulgarian», according to the regulation of the treaty's suspension.

a commercial nature. This primacy will be repeated in the Association Agreement about its norms.

Now, with this primacy or predominance of the norms that protect human rights in international law already assumed, it remains to inquire about the pertinence of including norms already mandatory in the Association Agreements. In other words, ask ourselves what benefit can signify their inclusion in the Agreement if it is already clear that they must be respected and have primacy over any other obligation in case of conflict.

The answer is linked to relative aspects of its implementation and realization. International trade, if it is fair, can lead to development and the full validity of rights and democracy. Therefore, to include these clauses in the Association Agreement constitutes a way of promoting that fair trade. It is also useful to take advantage of the economic interest some trade stakeholders have in celebrating this Agreement, directing it in a way that it respects human rights, particularly those with an economical or social component which are the most affected by free trade. It all depends on how the treaty is negotiated.

A context that clearly expresses the contracting parties' commitment with human rights will contribute to more control of the EU institutions over its companies; moreover if it is already being forced to adequate its policies to the obligations emanating from the European Convention on Human Rights.

### 3. ANNEX N° 3: SUSTAIN AND DEVELOPMENT OF OUR PROPOSAL

Next we will develop the outlines of a Democratic Clause proposal understood, as has already been mentioned, as a system of norms destined to protect human rights in the framework of an Association Agreement between the EU and the ANC. As will be perceived now, the proposal is based on the dispositions of the previously analyzed treaties but modifies and reinforces them, taking into account the deficiencies previously verified.

The modifications can be found in italics.

#### A. PREAMBLE.

We start with the Cotonou Agreement's preamble modified in 2005 for it is the most extensive and explicit. The main idea that must be documented is that the purpose of this treaty is to achieve development, understood as more amount of human rights. Thus, the text must be read the following way:

«ACKNOWLEDGING that a political climate *and a trade* that guarantee peace, security and stability, respect for human rights, for the democratic principles, the State of Law and the proper management of public affairs are an integrating part of long term development, acknowledging that the responsibility to ensure that climate mainly concerns the countries involved;

RECOGNIZING that the existence of healthy and lasting economical policies are a precondition for development;

REFERING to the principles of the United Nations Charter, and remembering that *the norms of International Law on Human Rights, presented among other instruments in the Universal*

Declaration of Human Rights, the conclusions of the Vienna Conference of 1993 on Human Rights, the Covenants on Civil and Political Rights and of Economical, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of International Humanitarian Law, the 1954 Convention Relating to the Status of Stateless Persons, the 1951 Geneva Convention on the Status of Refugees and the 1967 New York Protocol on the Status of Refugees;

CONSIDERING that the European Convention for the Protection of Human Rights and Fundamental Liberties and the American Convention on Human Rights, *the American Convention on Human Rights and its Facultative protocol in matters of Economical, Social and Cultural Rights, the Andean Charter for the Promotion and Protection of Human Rights, as well as the decisions of the European Court and the Inter American Court of Human Rights* constitute positive regional contributions for respecting human rights in the European Union and the states member of the *Andean Nations Community*;

CONSIDERING that the Millennium Development Goals that emanate from the Millennium Declaration adopted by the General Assembly of the United Nations in 2000, particularly the eradication of extreme poverty and hunger, as well as the goals and principles of development agreed in the United Nations Conferences, provide a clear vision and must sustain the EU-ANC cooperation in virtue of the present Agreement;

## B. GENERAL DISPOSITIONS

Based on the first articles of the Chile and Cotonou Agreements combined and the reinforced Preamble of the Marrakech Agreement, the central idea to highlight is that the agreement and therefore international trade have as goal to achieve development and the full validity of human rights and not the other way around.

«Part I: General Dispositions.

Article 1.

*The objective of the Association Agreement is to accelerate the human development of the Parties' populations based on the realization of the human rights and the democratic principles that the parties share and that are an essential element of the present Agreement.*

*It is understood as human development the wellbeing of the population that can be achieved by elevating the living standards, attaining a job, a considerable and constantly increasing real income and the effective demand, by increasing production and the trade of goods and services, allowing at the same time the optimal use of the world's resources in agreement with the goal of a sustainable development and procuring to protect and preserve the environment and increase the ways to do it, compatibly with the respective needs and interests according to the different levels of economical development.*

*The progress of the participants' capacity in development and the improvement of the institutional framework necessary for social cohesion, for the functioning of a democratic society and a market economy and for the surfacing of an active and organized civil society, are an integral part of this approach. The situation of women and the matters of equity among both genders, as well as the minorities and the more vulnerable sectors*

*of society, will systematically be taken into account in every political, economical or social scope.*

*It is understood as human rights the norms ruled by the international law of human rights, be those of a conventional, consuetudinary or principle based nature, or any other source. In the case of the conventional norms, these are included in every treaty mentioned in Annex 1, though not exclusively, as well as in the United Nations Universal Declaration of Human Rights.»*

«Article 2: Principles

1. The respect of the democratic principles and the fundamental human rights *gathered in the norms of International Law on Human Rights*, as they are expressed in this and other instruments, and of the principle of the State of Law inspire the internal and international policies of the Parties and constitute an essential element of the present Agreement.
2. The promotion of economical and social sustainable development and the equitable distribution of the benefits of the Association are leading principles for the application of the present Agreement.
3. The Parties reiterate their adhesion to the principle of good governance.»

«Article 3: Conciliating goals of the Association

*The Parties* celebrate the present Agreement to promote and accelerate *their* economical, cultural and social development, to contribute to peace and security and to favour a political-economical climate that is stable, democratic *and respectful of human rights*.

The association will centre in the goal of reduction and, in a long term, eradication of poverty in a manner coherent

with the goals of sustainable development and a progressive economical integration *between the parties*.

These goals as well as the international commitments of the Parties will inspire the development strategies and must be taken following the integrated approach that simultaneously take into account the political, economical, social, cultural and environmental components of development. The association must offer a coherent framework of support to the strategies for development defined by *each party, considering the asymmetries that exist between them*.

The continuous economical growth, the private sector's development, the increase of employment and the improvement of the access to the productive resources will be a part of this framework. The respect of the individual's rights and the satisfaction of essential needs, the promotion of social development and the conditions of an equitable distribution of the growth's benefits, will be favoured. The progress of the participants' capacity in development and the improvement of the institutional framework necessary for social cohesion, for the functioning of a democratic society and a market economy and for the surfacing of an active and organized civil society, are an integral part of this approach. The situation of women and the matters of equity among both genders, *as well as the minorities and the more vulnerable sectors of society*, will systematically be taken into account in every political, economical or social scope.

*Trade and the rules to liberalize it are only instruments to achieve these goals. »*

The EU-ANC Association Agreement will be negotiated based on three pillars: the one of political dialogue, the one of cooperation and the one

of commerce. These three pillars must aim to achieve the aforementioned goals.

«Article 4:

To achieve the goals of the first and third articles, policies based on three pillars will be developed:

- a) Political Dialogue
- b) Cooperation
- c) Commerce»

«Article 5:

The measures to be developed in virtue of the three pillars will be always destined to achieve the goals of the agreement contained in the articles 1 and 3.»

«Article 6:

To verify the fulfilment of the agreement's goals the **Impacts Committee of the Commercial Association on Human Rights** is created which will be in charge of informing the Association Counsel of the problems generated in this matter, in order for it to find the solutions required.

The Impacts Committee of the Commercial Association on Human Rights will receive and answer the civil society's communications in their National and Local Offices».

### C. PILLAR OF POLITICAL DIALOGUE.

To this respect, we believe that a document that contains no less than the combination of articles 12 of the Chile Agreement and 8 of the Cotonou Agreement must be adopted. With this norm it must be set

clear that the goal of these policies is not only to encourage trade, but also the purposes of the Association Agreement.

«Article 7: Goals of political dialogue's policies.

1. The Parties will maintain global, balanced and deep political dialogue periodically, which will lead to mutual commitments that aim to consolidate the Association established by the present *Agreement and help reach its goals.*
2. The main goal of political dialogue among the Parties is the promotion, dissemination, development and common defence of democratic values such as respect for human rights, people's freedom and the principles of the State of Law as the basis of a democratic society.
3. To that end, the Parties will debate and exchange information about joint initiatives related to any matter of mutual interest and any other international matter searching to achieve the common goals, particularly the security, stability, democracy and regional development.
4. The dialogue will refer to the goals and purposes defined by the Agreement as well as all matters of common interest, general, regional or subregional. Through dialogue the Parties will contribute to peace, security and stability and to promote a stable and democratic political climate. The dialogue will incorporate the cooperation strategies and the general and sector policies *including the ones related to the environment, the relative aspects of gender, the migrations, the impacts of economic exchanges in human rights* and the matters entailed to the cultural patrimony.
5. The dialogue will focus, among other aspects, in specific political issues that present a general or common interest in relation to the goals expressed in the Agreement, particularly in subjects such as [...] ethnical, religious or racial discrimination. It also includes a periodical evaluation of the situation related to the

respect of human rights, the democratic principles, the State of Law and the proper management of public affairs. [...]»

In the same way, an article that gathers that the political dialogue will be used to strengthen the fulfilment of the resolutions given by the organs of human rights of the United Nations and the European and Inter American Courts must be incorporated.

#### **D. PILLAR OF COOPERATION**

The combination of articles 9 of the Cotonou Agreement, 16 of the Chile Agreement and 39 of the Mexico Agreement will also allow us to achieve the agreement's goals and frame this kind of policies in their consecution.

«Article X. Essential elements and fundamental element.

1. The cooperation will seek to achieve sustainable development focused on the human being, lead role and main beneficiary of development, and allege the respect and defence of all human rights.

The respect of all human rights and the fundamental liberties, including the respect for *economical, social and cultural* fundamental rights, democracy based on the State of Law and a transparent and responsible management of public affairs form an integral part of sustainable development.

2. The Parties attach to their obligations and international commitments in reference to respect for human rights. They restate their deep commitment in favour of human dignity and human rights that constitute legitimate aspirations of individuals and people. Human rights are universal, indivisible and interdependent. The Parties

commit to promoting and protecting all fundamental liberties and all human rights, being those civil, political or economical, social and cultural. In this context, the Parties reaffirm equity between men and women.

The Parties reaffirm that democratization, development and the protection of fundamental liberties and human rights are interdependent and mutually reinforced. The democratic principles are universally recognized principles in which the State's organization is based to guarantee the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system and the existence of participation mechanisms. Based on universally recognized principles, each country develops its democratic culture.

The State of Law inspires the State's structure and competences of the different powers, and will implicate in particular the existence of effective and accessible means of legal recourse, an independent judicial system that guarantees equal protection of the law and an executive power that fully yields to legality.

Respect for human rights, for democratic principles and for the State of Law, in which the ANC-EU association is based, will inspire the internal and international policies of the Parties and constitutes an essential element of the present Agreement.

3. Essential elements in matter of human rights, democratic principles and the State of Law and fundamental element in matter of good governance.

The proper management of public affairs, in which the ACP-EU association is based, will inspire the internal and international policies of the Parties and constitutes a fundamental element of the present Agreement. The

Parties agree that only in grave cases of active and passive corruption, as is defined in article 97 constitute a violation of this element.

4. The association will actively support the defence of human rights, the democratization processes, the consolidation of the State of Law and the proper management of public affairs.

These subjects will constitute an important element of the political dialogue. In the framework of this dialogue, the Parties will grant a particular importance to the situation's evolution and the continuous character of the completed progresses. This periodical evaluation will take into account the economic, social, cultural and historic situation of each country.

These subjects will be the object of special attention in the support of development strategies. The Community will lend their support to the political, institutional and juridical reforms, and to the reinforcement of public, private and civil society lead roles' capabilities, in the set of the strategies decided as common agreement between the State in question and the Community.»

#### «Article X1: General Goals

1. The Parties will establish a closer cooperation destined, among other aspects, to:
  - a) reinforce the institutional capacity to consolidate democracy, the State of Law and the respect for human rights and fundamental liberties;
  - b) promote social development, *using the economical development that always should take into account the protection of the environment*. The Parties will give special priority to the respect of fundamental social rights;

[...]

2. The Parties reaffirm the importance of economic, financial and technical cooperation as the means to contribute to the fulfilment of the goals and principles derived from the present Agreement».

Aside from the mention of human rights as the goal of cooperation in general, it must also exist in the Association Agreement a disposition of «human rights and democracy cooperation».

«Article X2: Cooperation about human rights and democracy

1. The Parties convene in that the cooperation in this sphere must have as goal to promote the principles referred to *in articles 1 and 3*.
2. Cooperation will focus mainly on the following:
  - a) the development of civil society by teaching, forming and sensitizing programs for the public opinion;
  - b) measures of training and information destined to help institutions to work more effectively and strengthen the State of Law;
  - c) the promotion of human rights and democratic values.
3. The Parties will be able to execute joint projects in order to strengthen the cooperation between their respective electoral institutions and between those in charge of watching and promoting the fulfilment of human rights.»

The dispositions on specific human rights are equally indispensable, especially in topics more sensitive to the asymmetries impacts such as labour rights, the right to food and the right to health, among others:

«Article Z: Cooperation in matters of training and education

1. The Parties will define the means to sensibly improve the situation of the educational sector and of professional training. Special attention will be paid to the education and professional training of the social groups less favoured *hoping to achieve the exercise and full enjoyment of the right to education.*
2. The Parties reinforce their cooperation in the subjects of education, including college education, professional training and the exchanges between universities and companies, in order to improve the level of technical knowledge of the public and private sector's responsible personnel.

[...]

4. Cooperation between the parties could lead to the celebration by mutual consent of a sector agreement in the subject of education, including college education, professional training and the youth's education. (EU-Mexico Association Agreement).»

«Article Z1: Health

1. Cooperation in the subject of health will have as goals to strengthen the activities of research, pharmacology, preventive medicine and infectious diseases such as AIDS.
2. Cooperation will be done mainly through:
  - a) projects in matters of epidemiology, decentralization and administration of the health services,
  - b) development of professional training programs,

- c) programs and projects to improve health conditions and social wellbeing in the urban and rural areas. (Mexico)
- d) *access to medicaments for affected populations to fight epidemics.*
- e) *maintain a balance between the right to patents and the right to health»*

«Article Z2: Cooperation in social matters and for overcoming poverty

1. The Parties will maintain dialogue about all aspects of the social agenda that are of interest to any of them.

It must include issues related to vulnerable groups and regions among which are: native population and communities, poor peasants, women of scarce means and other groups of the population in state of poverty.

2. The Parties acknowledge the importance of harmonizing economic and social development preserving the fundamental rights of the groups mentioned in the previous paragraph. The basis of growth must generate employment and ensure better living standards to the less favoured population. *In this respect, the policies of the pillar of commerce will take into account these situations.*
3. The Parties will have a periodical consensus about actions of cooperation that involve civil society tending to provide opportunities for the creation of employment, professional training and the generation of income».

**E. PILLAR OF COMMERCE.**

In the case of this pillar, 14 sub issues are being negotiated:

- 1 Access to market (general rules and non agricultural sectors)
- 2 Agriculture: access to market
- 3 Asymmetries and special and differentiated treatment
- 4 Rules of origin
- 5 Customs affairs and facilitation of trade
- 6 Technical obstacles to trade
- 7 Sanitary and fitosanitary measures
- 8 Commercial defence (instruments)
- 9 Competition (policies)
- 10 Public acquisitions
- 11 Intellectual property
- 12 Services, establishment and capitals movement
- 13 Sustainable development and trade
- 14 Solution of differences and controversies

It is important that in each subject the impacts on the more sensitive human rights are regulated, for example, the subject of health in the case of intellectual property, the right to food in the case of the agriculture measure, among others. Here, express remissions to the pillar of cooperation approached before, is necessary.

Article 5 must be remembered as it reveals that the goal of trade is to achieve development, the population's wellbeing and the acknowledgment of human rights among other subjects, or to opt in a more specific way for the following text:

«Article Y:

*The goal of the economic pillar is to elevate the living standards, achieve full employment and a considerable and constantly increasing real income and the effective demand, to increase production and the trade of goods and services, allowing at the same time the optimal use of the world's resources in agreement with the goal of sustainable development and attempting to protect and preserve the environment and*

increase the ways to do it, compatibly with the respective needs and interests according to the different levels of economical development.

*The parties will devise positive efforts so that the countries in development can obtain a part of the international trade increment that corresponds to the needs of their economic development and the achievement of the full validity of human rights and democratic principles.»*

About the sub issues, aside from the already mentioned in the case of Sustainable Development and Trade, it must include as minimum the following articles of the Chile and Cotonou Agreements:

«Article Y1: Cooperation in social matters

1. The Parties recognize the importance of social development that must come with economic development. They will give priority to the creation of employment and the respect of fundamental social rights, especially promoting the corresponding agreements of the International Labour Organization about issues such as freedom of association, the right to a collective negotiation and no discrimination, the abolition of forced labour and children labour, and the equal treatment of men and women.
2. Cooperation might cover any subject of interest for the Parties.
3. The measures might be coordinated with those of the State members and the corresponding international organizations.
4. The Parties will give priority to the measures destined to:
  - a) the promotion of human development, the reduction of poverty and the battle against social exclusion, generating

innovative projects that can be replicated in which the most vulnerable and margined social sectors participate; special attention will be given to families of low income and people with disabilities;

- b) the promotion of the female role in the process of economical and social development and the promotion of specific programs for the youth;
- c) the development and modernization of labour relations, of working conditions, of social assistance and labour safety;
- d) the improvement of social policies' formulation and management, including the policy of social housing improving the access to it by the beneficiaries;
- e) the development of a sanitary system that is efficient and equitable, based on principles of solidarity;
- f) the promotion of professional training and the development of human resources;
- g) the promotion of projects and programs that generate opportunities to create employment in micro, small and medium sized enterprises;
- h) the promotion of programs to arrange the territory that allow a sustainable use of the natural resources, paying special attention to the areas of higher social and environmental vulnerability;
- i) the promotion of initiatives that contribute to social dialogue and to creating consensus;

- j) the promotion of respect for human rights, democracy and citizen participation.»

«Article Y2: Development of the social sector

1. The cooperation will support the ACP State's efforts in favour of the development of general and sector policies and reforms that improve the coverage, quality and access to infrastructure and basic social services, and will take into account the local needs and specific demands of the most vulnerable and less favoured groups, reducing at the same time the inequities of access to these services. It would be wise to especially endeavour in maintaining a sufficient level of public expense in the social sectors. With this framework, cooperation must tend to:
  - a) improve education and training and reinforce the capacity and technical competences;
  - b) improve the health and nutrition systems, eliminate hunger and malnutrition, guarantee the security and provision of food;
  - c) integrate demographic matters in the development strategies in order to improve genetic health, primary sanitary assistance, family planning and prevention against women's genitalia mutilations;
  - d) promote the fight against AIDS;
  - e) ensure the provision of domestic water, improving the access to drinkable water and a sufficient hygiene;
  - f) improve the access to a habitat adequate to everyone's needs by supporting social housing building programs and improving the conditions of urban development; and

- g) favour the promotion of participative methods of social dialogue as well as the respect of fundamental social rights.
2. The cooperation will also support the capacity development of social sectors, favouring particularly: training programs in the elaboration of social policies and in the modern management techniques for social projects and programs; policies in favour of technological innovation and research; consolidation of a local baggage of experience and technical knowledge and promotion of collaboration; organization of debates and round tables in national and regional scales.
  3. The cooperation will foment and support the elaboration and application of policies and systems of social protection and security with the purpose of reinforcing social cohesion and promoting self assistance as well as the solidarity of local communities. Support will focus particularly in the development of initiatives based on economical solidarity, especially through the creation of social development funds adapted to the needs and the local participants<sup>62</sup>. »

«Article Y3: Aspects relating to the young population

The cooperation will also support the elaboration of a coherent and global policy with the purpose of obtaining maximum advantage of the youth's potential, so that young people are better integrated in society and can demonstrate all the extent of their capabilities. In this framework, the cooperation will support policies, measures and actions destined to:

- a) protect the rights of children and youth, particularly that of girls;

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<sup>62</sup> Cotonou Agreement.

[...]»

«Article Y4: Cultural development

In the culture subject, the cooperation will tend to:

- a) integrate the cultural dimension in the different levels of development cooperation
- b) recognize, preserve and promote the cultural values and identities to favour intercultural dialogue;
- c) help the organisms from local communities to give their children the possibility to develop their physical, psychological and socioeconomic potential;

[...], and»;

- e) foment the active participation of young people in public life, as well as student exchanges and the interaction of the ANC and EU youth's organizations.»

«Article Y5: Regional cooperation

1. The cooperation, in the area of regional cooperation, will comprise a wide range of functional and thematic subjects that include common problems and allow exploiting scale economies, that is to say:

[...]

- c) health, education and training;

[...]

2. The cooperation will also support projects and initiatives of interregional and intra *ANC* cooperation, including those in which countries in development *that are not members of the ANC* participate.
3. The cooperation will contribute to the promotion and development of a regional political dialogue in the subjects of prevention and solution of conflicts, human rights, democratization, exchanges, creation of networks and the promotion of mobility among the different participants in development, particularly civil society.»

«Article Y6: Institutional and capacity development

1. The cooperation will pay systematic attention to the institutional aspects and in this context support the efforts *of the ANC and its State members* to develop and reinforce the structures, the institutions and the procedures that contribute to:
  - a) promote and support democracy, human dignity, social justice and pluralism, fully respecting the diversity in societies;
  - b) promote and support the full and universal respect as well as the defence of all human rights and fundamental liberties;
  - c) develop and reinforce the State of Law and improve the access to justice, at the same guaranteeing the professionalism and independence of the juridical systems; and
  - d) guarantee a transparent and responsible management and administration in all public institutions.»

## **F. CONTROL MECHANISMS:**

It is important to remember that coming 2009, the EU will be part of the European Convention on Human Rights which will allow an interpretation more congruent with its actions and even allow European citizens to reclaim to the EU institutions the honouring of human rights related to the Association Agreement.

In the ANC we have the Andean Charter for the Promotion and Protection of Human Rights, and to this respect it is required to take into account that in its project it was proposed to create a Specialized Commission on Human Rights in the Andean Justice Court, a proposal that was discarded.

The debate about a protection mechanism is focused on the side that considers it is essential to have a new effective institution to guard human rights, specialized in the impact free trade has on them, while on the other side some consider that this institution can actually disperse the rights' protection jeopardizing the reduced power the already existing institutions have, all of this in disfavour of the human being. Better to strengthen the Inter American system, regarding decisions and sentences, or the already existent systems.

Despite the aforementioned, it is important that civil society participates in the treaty's monitoring to activate the mechanisms tending to the suspension or termination of the treaty in order to make the denouncing process more democratic (see article 6 above). After the Association Agreement it will be necessary to regulate the procedure of access for citizens and non governmental organizations to the proposed committee.

## **G. THE EXCEPTIONS:**

The exceptions are cause of suspension of the treaty for motives not attributed to the parties but in view of objective situations that may

endanger essential interests of the State. In this case, a norm as the one contained in the Association Agreement with Chile, that incorporates the article XX of the GATT, must be used:

#### «EXCEPTIONS

##### Article 91 – Clause of general exception

In reserve of the following listed measures not being applied in a way that constitutes the means of arbitrary or unjustifiable discrimination between the Parties when similar conditions prevail, or a covered restriction of trade between the Parties, no disposition of the present Title will be interpreted in the sense of obstructing that one Party adopts or applies measures:

- a) necessary to protect the public morale;
- b) necessary to protect the health and life of people and animals or to preserve vegetables;
- c) necessary to guarantee the observance of the laws and regulations that are not incompatible with the present Agreement, such as the laws and regulations related to the application of custom measures, the protection of intellectual property rights and the prevention of deceitful practices;
- d) related to the import and export of gold and silver;
- e) imposed to protect the national treasures of artistic, historic and archaeological value;
- f) related to the conservation of natural non renewable resources, conditioned to these measures been applied

together with restrictions to the national production or consumption; or

g) related to articles fabricated in prisons».

Especially all paragraph b) is a very important tool for the consecution of the effective application of human rights.

#### **H. SUSPENSION AND TERMINATION OF THE AGREEMENT:**

As for the breach of the obligations, we propose to use the Baltic clause as first alternative of negotiation:

«Article T:

In case of violation of human rights or the democratic principles contained in the first and third articles, the Parties can suspend or put an end to the present agreement. In order to do it, a communication to the Association Counsel is sufficient».



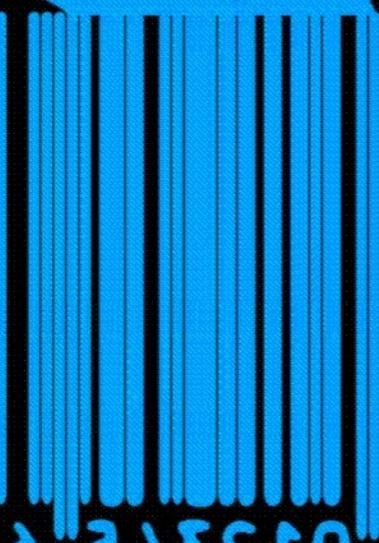
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