

COMMISSION COMMUNICATION COM (95)216 of 23 May 1995

**ON THE INCLUSION OF RESPECT FOR DEMOCRATIC PRINCIPLES AND
HUMAN RIGHTS IN AGREEMENTS BETWEEN THE COMMUNITY
AND THIRD COUNTRIES**

INTRODUCTION

A commitment to respect, promote and protect human rights and democratic principles is a key element of the European Community's relations with third countries.

These issues have been gradually incorporated into the Community's activities over a period of time through a series of commitments culminating in the insertion of explicit references to human rights and democratic principles in the body of the Union Treaty.

To help it meet those commitments the Community has a broad range of instruments at its disposal, including Union intervention in international forums and specific operations aimed at bolstering the rule of law and respect for human rights in the context of the Community's relations with non-member countries. Taking account of human rights in contractual relations with third countries is one of those instruments.

It is on this latter instrument that the communication focuses.

A. FOUNDATIONS AND REFERENCES

References to human rights in agreements with third countries are based on the positions the Community has taken by:

- subscribing to universal and regional instruments and assuming responsibility for promoting the principles of democracy, the rule of law and respect for human rights (paragraph 5 of the preamble to the Single European Act);
- making respect for, and promotion of, these principles one of the general objectives of Community development cooperation policy (Union Treaty, Article 130U) and one of the objectives of the common foreign and security policy (Union Treaty, Article J1 (2));
- defining the main components of a hands-on strategy through its development cooperation policy and by inserting clauses on human rights into economic and cooperation agreements with third countries (Luxembourg European Council's Declaration on Human Rights, June 1991, paragraph 11);
- jointly identifying guidelines appropriate to the different types of agreement:
 - in its relations with developing countries, by adopting guidelines, procedures and practical measures and including clauses on human rights in its cooperation agreements (paragraph 10 of the resolution on human rights, democracy and development of the Council and the Member States meeting within the Council, 28 November 1991);

- in its relations with CSCE countries, by recognizing democratic principles and human rights as an essential element of its contractual relations with those countries by incorporating the appropriate provisions into the agreements concerned; these provisions allow the Community to take action in cases of special urgency, including any failure to meet the obligations deriving from the agreement (Council Declaration of 11 May 1992).¹

These commitments as a whole are consistent with the opinions voiced by Parliament in its various human-rights-related initiatives, including its annual resolutions on the world human rights situation.

B. EVOLUTION

The Community's growing commitment to the promotion of human rights and democratic principles is reflected in the evolving nature of the references to these issues in the relevant agreements.

Initially they were mentioned either not at all or only in passing in the preamble of some agreements. The first reference in the body of a contractual document was in Article 5 of the fourth Lomé Convention, concluded in December 1989. In this way the European Community and its Member States tangibly demonstrated their commitment to human rights in their relations with third countries. In the ensuing three years, this stance was confirmed as such references gradually began to appear in cooperation agreements, defining respect for democratic principles and human rights as one of the foundations of the parties' relations.

However, Article 5 of Lomé IV and similar articles in other agreements do not provide a clear legal basis to suspend or denounce agreements in cases of serious human rights violations or interruptions of democratic process.

It is for this reason that a clause defining democratic principles and human rights as an "essential element" of the agreements with Brazil, the Andean Pact countries, the Baltic States and Albania was introduced in 1992 (see Annex 1-1).

This is a substantial innovation, in that:

- it makes human rights the subject of common interest, part of the dialogue between the parties and an instrument for the implementation of positive measures, on a par with the other key provisions;
- it enables the parties, where necessary, to take restrictive measures in proportion to the gravity of the offence (see Annex 2). In the spirit of a positive approach, it is important that such measures should not only be based on objective and fair criteria, but they should also be adapted to the variety of situations that can arise, the aim being to keep a dialogue going;
In the selection and implementation of these measures it is crucial that the population should not be penalised for the behaviour of its government;
- it allows the parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a "material breach" of the agreement in

¹ 6326/92 (Press 71G).

line with the Vienna Convention,² constituting grounds for suspending the application of the agreement in whole or in part in line with the procedural conditions laid down in Article 65.³ The main condition involves allowing a period of three months between notification and suspension proper, except in "cases of special urgency", plus an additional period of grace if an amicable solution is being sought.

In application of a General Affairs Council declaration, since May 1992 all agreements concluded with CSCE countries include an innovative provision in addition to the "essential element" clause.

This additional clause (see Annex 1-2) provides for an immediate response, diverging from the procedure laid down in Article 65 of the Vienna Convention. It takes one of two forms:

- an explicit suspension clause authorising the suspension of the application of the agreement in whole or in part "with immediate effect" in cases of serious breach of essential provisions; this, so-called "Baltic clause" was used only in the first agreements with the Baltic States, Albania and Slovenia; or
- a general non-execution clause known as the "Bulgarian clause" which provides for appropriate measures should the parties fail to meet their obligations, following a consultation procedure "except in cases of special urgency"; this clause was used in the agreements with Romania, Bulgaria, the Russian Federation, Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus.

The difference between the two formulas resides in the degree of sensitivity allowed for. The "Baltic clause" is more severe in that it provides only for extreme cases warranting immediate suspension without consultation of any kind. The "Bulgarian clause" not only provides for a conciliation procedure and a range of different options but is also designed to keep the agreement operational wherever possible. It asserts that immediate suspension should be envisaged only in cases of special urgency.

In January 1993, in response to the disparate nature of the references in the relevant agreements, the Commission, determined to adopt a non-discriminatory approach, drafted guidelines on these issues (Decision of 26 January 1993, MIN (93)1137, point XIV), stipulating that draft negotiating directives for association agreements and economic cooperation agreements should incorporate the following:

(a) in the body of the agreement:

- a clause specifying that relations between the Community and the country concerned and all provisions of the relevant agreement are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the

² Vienna Convention, Article 60(3): "A material breach of a treaty, for the purposes of this Article, consists in:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the objective or purpose of the treaty."

³ Vienna Convention, Article 60(1): "A material breach of a bilateral treaty by one of the parties entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

Community and the country concerned and which constitute essential elements of the agreement;

(b) in the preamble:

- general references to respect for human rights and democratic values;
- references to the universal and/or regional instruments common to both parties.

An explicit suspension clause or a general non-execution clause may be included in specific cases.

The main points of these guidelines featured in a letter from Mr Van den Broek to the Council, Parliament and the Member States.

C. ASSESSMENT⁴

Although the Commission guidelines have been respected, the objective of a systematic approach has not yet been achieved.

As regards the preamble, the practice of using different references depending on the regional location of the party concerned, when not supplemented by universal references, can appear to contradict the principle of universality; references to the market economy in agreements with OSCE countries create a different perspective having no direct connection with human rights, a fact that could be prejudicial to the aim of consistency.

References to human rights and/or democratic principles as an essential element, although systematically included in all recent agreements of a general nature,⁵ have been positioned differently (Article 1, Article 6, etc.) depending on whether or not the agreements in question provide for political dialogue, and also supplemented with other references.

The "Baltic" clause was last used in October 1992, since when the preferred formula has been the "Bulgarian" clause, in some cases supplemented by one of two types of interpretative declaration (see Annex 1-3):

- joint declarations (Annex 1-4.i) in which the parties agree that a "case of special urgency" means a material breach of the agreement, i.e. the breach of an essential element of the agreement or repudiation of the agreement not sanctioned by the general rules of international law;
- unilateral declarations by the Community (e.g. the agreement concluded in July 1993 with the Czech Republic, Annex 1-3.i) that subsequently became bilateral declarations (for the first time in the agreement signed with Russia in June 1994, Annex 1-3.ii); these declarations emphasise the inclusion in the agreement of the "essential element" clause and the reference to "cases of special urgency" resulting

⁴ See table in Annex 3 showing different types of references to human rights and democratic principles in the Community's agreements with third countries.

⁵ In the case of Turkey, a Decision of the Association Council of 6 March implemented the additional protocol to the association agreement of 1963, which entered into force in January 1973, and which provides for the creation of a customs union between the two parties within 22 years.

from the Council Declaration of 11 May 1992 on the Community's relations with its CSCE partners;

- in the case of the partnership and cooperation agreement with Russia, a joint declaration (Annex 1.4.ii) in which the parties agree that the "appropriate measures" referred to in the non-execution clause mean measures taken in accordance with international law, and that when one party takes measures in cases of special urgency, the other may avail itself of the dispute settlement procedure.

The use of two different formulas (the "Baltic" and "Bulgarian" clauses) in the same part of the world could be interpreted as a discriminatory practice, putting the Commission in a difficult position in its negotiations with third countries. There is also a growing tendency to regain the margin of flexibility lost in the clauses themselves through an increasingly varied range of interpretative declarations.

Nevertheless, the innovative use of specific clauses in the main body of the agreements concluded with third countries places the European Community in the vanguard of the international community's endeavours in this field and highlights the parallel importance of adopting a positive approach.

This impact of this initiative has been positive in a number of ways:

- (a) the additional clause initially intended for the OSCE countries has, at the Council's behest, gradually been applied to other geographical areas, e.g. the Lomé IV review, Morocco and Tunisia, South Korea and Nepal.
- (b) enshrining human rights as an essential element of the Community's relations with third countries enhances cooperation and improves the visibility of its initiatives, many of which are entrusted to specialist organisations, such as the reinforcement of the rule of law, the consolidation of the legal system, support for freedom of expression, the defence of vulnerable groups and support for the grassroots.
- (c) it has introduced a range of restrictive measures (see Annex 2) that is sufficiently broad to enable the parties to respond in a manner appropriate to the gravity of the case in question; to date, none of the agreements with an "essential element" clause, with or without an additional clause, has had to be suspended in any way.

D. CONCLUSIONS

The concern expressed by the European Parliament⁶ and the Council⁷ with regard to the issue of human rights and the Community's contractual relations with third countries and the experience acquired in this area would suggest that there is a need for a number of initiatives to improve the consistency, transparency and visibility of the Community approach and to make greater allowance for the sensitivity of third countries and the principle of non-discrimination.

⁶ Most recently in the Resolution of 12 April 1995 on the world human rights situation in 1993/94 and the Union's human rights policy (Rapporteur, Mr Imbeni): paragraphs 47, 62-65.

⁷ This question was discussed in two meetings of the External Relations Group (13 March and 24 April 1995), and was the only item on the agenda of the COREPER meeting of 27 April.

The following conclusions set out the basic references to human rights and democratic principles. They provide for the following mechanism:

In all new draft negotiating directives for Community agreements with third parties, the following should be included:

(a) in the preamble:

- general references to human rights and democratic values;⁸
- references to universal and regional instruments common to both parties;

(b) in the body of the agreement:

1. Insertion of an Article X, defining the essential elements, to be adapted according to circumstances (e.g. OSCE membership, market economic principles, etc.):

"Respect for the democratic principles and fundamental human rights established by [the Universal Declaration of Human Rights]/[the Helsinki Final Act and the Charter of Paris for a New Europe] inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this agreement."

The same applies to the principles of market economy as they are defined in the CSCE Bonn conference document on economic cooperation⁹.

2. Insertion of an Article Y on non-execution:

"If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties."

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."

3. Insertion of interpretative declarations on Article Y:

"(a) The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term "cases of special urgency" in Article Y means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

- (i) repudiation of the Agreement not sanctioned by the general rules of international law;*

⁸ The recitals could also mention the rule of law and good governance and the Vienna human rights conference of June 1993.

⁹ This provision applies to all OSCE participants, and to other countries at the discretion of the Council.

or

(ii) violation of essential elements of the Agreement, namely its Article X.

(b) The parties agree that the "appropriate measures" referred to in Article Y are measures taken in accordance with international law. If a party takes a measure in a case of special urgency as provided for under Article Y, the other party may avail itself of the procedure relating to settlement of disputes."

In the Commission's opinion the application of this mechanism comes within the ambit of respect for the principle of proportionality between the breach cited and the degree of reaction. Use of the concept "special urgency" opens an option without creating an obligation and it is in this context that it is for the parties to gauge what measures they should take.

This may entail building on the standard provisions on human rights and democratic principles to strengthen or clarify the nature of the commitments involved, without altering the legal scope of the text. The wording given for Article X should feature among the first articles of the "General principles" title, and it should not be altered or diluted by inclusion in a more general provision.

This Communication will be addressed to the Council and to Parliament.

ANNEX 1

Standard wording for clauses on human rights and the relevant interpretative declarations

1. Essential element clause

Article X: [General principles or General/Political Dialogue]

"Respect for the democratic principles and human rights established by [the Helsinki Final Act and the Charter of Paris for a New Europe] [as well as the principles of market economy] [as defined at the Bonn CSCE conference] inspires the domestic and external policies of the Community and of [third country] and constitute an essential element of this agreement."

2. Complementary clause

Article Y:

(a) explicit suspension or "Baltic" clause

"The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs"

(b) general non-execution or "Bulgarian" clause

"If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."

3. General interpretative declarations

i. **Unilateral declaration by the European Community (agreement with the Czech Republic, July 1993)**

"The reference to the respect for human rights as an essential element of the Agreement and to the cases of special urgency has been included in the Agreement as a result of the policy followed by the Community in the area of human rights pursuant to the Council Declaration of 11 May 1992 which foresees such reference in the Cooperation or Association Agreements between the Community and its partners in the Conference on Security and Cooperation in Europe."

ii. **Joint declaration (agreement with the Russian Federation, June 1994)**

"The Parties declare that the inclusion in the Agreement of the reference to respect for human rights constituting an essential element of the Agreement and to the cases of special urgency flows from

*** the Community's policy in the area of human rights, in conformity with the Declaration of the Council of 11 May 1992 which provides for the inclusion of this reference in cooperation or association agreements between the Community and its CSCE partners, as well as**

*** Russia's policy in this field and**

*** the attachment of both Parties to the relevant obligations, arising in particular from the Helsinki Final Act and the Charter of Paris for a New Europe."**

4. Interpretative declarations accompanying a general non-execution clause

i. **Standard joint declaration**

" The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term "cases of special urgency" in Article Y means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

(i) repudiation of the agreement not sanctioned by the general rules of international law;

or

(ii) violation of essential elements of the Agreement, namely its Article X.

ii. **Joint declaration (agreement with the Russian Federation, June 1994)**

"The parties agree that the "appropriate measures" referred to in Article Y are measures taken in accordance with international law. If a party takes a measure in a case of special urgency as provided for under Article Y, the other party may avail itself of the procedure relating to settlement of disputes."

ANNEX 2

Summary of measures that may be taken in response to serious human rights violations or serious interruptions of democratic process:

- alteration of the contents of cooperation programmes or the channels used
- reduction of cultural, scientific and technical cooperation programmes
- postponement of a Joint Committee meeting
- suspension of high-level bilateral contacts
- postponement of new projects
- refusal to follow up partner's initiatives
- trade embargoes
- suspension of arms sales, suspension of military cooperation
- suspension of cooperation

**References to human rights and democratic principles
in Community agreements with third countries**

KEY

A. Regional European framework

1. The provisions and principles of the following should be fully implemented:
 - (a) the Conference on Security and Cooperation in Europe (CSCE)
 - (b) the Helsinki Final Act, the concluding documents of the Madrid and Vienna conferences
 - (c) the closing document of the Copenhagen meeting
 - (d) the Charter of Paris for a New Europe, particularly in respect of the rule of law, democracy and human rights (November 1990)
 - (e) the Bonn CSCE conference document on economic cooperation
2. Recognising the importance of guaranteeing ethnic and national minority rights
 - (a) in line with the commitments entered into in the context of the CSCE
 - (b) and of establishing a system based on pluralism and free and democratic elections
3. Aware of the importance of strengthening their democratic institutions and supporting the economic reform process
4. Reference to the European Convention on the Protection of Human Rights and Fundamental Freedoms

B. Attachment to the principles of the United Nations Charter

1. to democratic values and respect for human rights
2. and wishing to express their mutual desire to maintain and strengthen their friendly relations on the basis of those principles

C. Attachment to the principles of equality, freedom and justice

1. and asserting their shared wish to help initiate a new phase of economic cooperation and to facilitate the development of their respective human and material resources on the basis of those principles
2. and asserting their shared wish to promote the development of their human and physical resources in a context of freedom, equality and justice
3. and emphasising their shared attachment to the promotion of international economic relations based on freedom, equality, justice and progress

D. Other references

1. welcoming the transformation of the country into a democratic and multiracial society and the importance attached to human rights
2. recognising that in the wake of recent political developments the country wishes to stabilise and consolidate democracy and promote economic and social progress
3. the importance attached by the parties to respect for the human rights, democratic principles and economic freedom that underpin this agreement
4. attachment to democratic values and respect for human rights
5. whereas the main beneficiary of cooperation is man, and these rights should therefore be promoted

