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The realisation of human rights and the EU-Mexico Agreement: challenges, implications and recommendations¹

**World Organisation Against Torture (OMCT) contribution to the
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¹ The content of this document reflects the personal opinion of the author and not that of the European Commission

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PART ONE: HUMAN RIGHTS AND THE EU-MEXICO AGREEMENT

1. Human rights as an essential element of the EU-Mexico agreement that "underpins the domestic and external policies of both Parties"

Article 1 of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Union and Mexico (hereafter the EU-Mexico agreement) underlines that human rights constitute an essential element of the said agreement and that they shall underpin the domestic and external policies of both parties. Indeed, article 1 reads as follow:

'Respect for democratic principles and fundamental human rights, proclaimed by the Universal Declaration of Human Rights, underpins the domestic and external policies of both Parties and constitutes an essential element of this Agreement'.

As an essential element, human rights shall represent, therefore, an overall objective for both parties -in term of their effective enjoyment- , a framework for implementation of the said agreement -regarding the modalities and the impact- a criteria shaping other actions not directly related to the agreement, as well as a fundamental guarantee that the policies undertaken by both parties –as part of the agreement or not- do not lead to human rights violations.

Moreover, article 1 specifies that human rights and democratic principles are, indeed, the basis of the EU-Mexico agreement. As such, the nature, scope and object of the agreement, - which entails the strengthening of commercial, economic and financial relations by means of liberalisation of trade and investment flows- shall be rooted, developed and guided in the respect for human rights and shall contribute to their effective realisation.²

On this basis, human rights also constitute the framework and basis for implementation of all other articles of the EU-Mexico agreement, notably with respect to those included in Title III (trade), in Title IV (capital movement) and in Title VI (cooperation).

PART TWO: THE NEGATIVE DIMENSION OF THE HUMAN RIGHTS CLAUSE

1. Human rights as an essential element of the EU-Mexico agreement: implications for the Political Dialogue

Article 3 of the EU-Mexico Agreement specifies that article 1 of the agreement, in other words the human rights clause, shall orientate and structure the political dialogue between the parties. Practically, the placement of human rights at the centre of the political dialogue requires the establishment of concrete mechanisms and procedures, which should go well beyond the simple mention of human rights during the Joint Council or Joint Committees meetings.

Indeed, specific mechanisms, procedures and indicators allowing to structure the political dialogue and to operationalise the human rights clause entailed in article 1 of the EU-Mexico agreement shall be put in place.

² Articles 1 and 2 of the agreement

As a first step, human rights shall be systematically placed on the agenda of the Joint Council and Joint Committees meetings. In addition, special procedures shall be established, allowing for a thorough assessment of the human rights situation prevailing in the territory and under the jurisdiction of the different parties. Consequently, this approach should include, among others: (1) the monitoring the freedom of human rights defenders to act and speak freely in their defence of all human rights; (2) the monitoring the implementation of the recommendation made by relevant international and regional human rights mechanisms, including UN treaty bodies, UN Special Rapporteurs, the International Labour Organisation and the Inter-American Human Rights Commission and Court; (3) the monitoring the ratification and reservations made to human rights covenants and conventions; (4) the monitoring individual cases of human rights violations; (5) the formulation of specific recommendations; (5) the implementation of adequate measures within the framework of the EU-Mexico agreement to stop and prevent abuses, as well as to implement the recommendations and decisions made by regional and international human rights mechanisms.

In order to deepen the political dialogue and concretise its human rights focus, the creation of a particular body dealing specifically with human rights and composed of experts in this field, might well allow to support, nourish and reinforce the political dialogue conducted at the level of the Joint Council and Committee. In this respect, OMCT would recommend that such a possibility be seriously examined under article 49 of the EU-Mexico agreement which empowers the Joint Council to create any other body to assist in the performance of its duties.

The human rights clause in article 1 does not only entail a negative dimension -allowing the implementation of sanctions to those governments responsible for grave and persistent violations of human rights- but also a positive one. The following part, describing the intrinsic challenges and potential tensions that can arise from the implementation of the EU-Mexico agreement, highlights the need to reflect upon and develop this positive dimension.

PART THREE: THE POSITIVE DIMENSION OF THE HUMAN RIGHTS CLAUSE

1. Human rights, the creation of a free trade area in services and the liberalisation of investment flows

One of the objective of the EU-Mexico agreement, if not the main one, entails the liberalisation of trade in goods, services, as well as of investment flows. In this respect, further decisions clarify the agenda and scope of liberalisation in these matters.

The EU-Mexico Joint Council provided in its Decision 2/2000 for a complete liberalisation of trade in goods by 2010, while its Decision 2/2001 underlines that liberalisation of trade in services, including health, water and education should be completed by 2014 at the latest.³ Liberalisation of investment flows is also provided for in Decision 2/2001 that sets as a target the complete implementation of existing undertaking under the OECD and bilateral investment agreements and proposes to explore further possibilities of liberalisation.⁴

³ Article 7 of Decision 2/2001

⁴ Articles 34 and 35 of Decision 2/2001

As mentioned, another principle and objective that underpins the EU-Mexico agreement is the promotion and protection of human rights. This commitment entails the promotion and protection of economic, social and cultural rights, including the right to education, the right to adequate housing, the right to health, the right to food, the right to work, the right to form and join trade unions, the right to strike and the right to social security. In this respect, Mexico and the European Union restated, at their first summit under the EU-Mexico agreement, the indivisible and interdependent nature of all human rights.⁵

Consequently, within the EU-Mexico agreement, EU member States and Mexico hold the concurrent responsibilities to promote and protect human rights and to implement trade and investment rules. In this respect, while the placement of human rights as an essential element and the basis of the agreement implies the necessity to implement all other provisions of the agreement accordingly, problems can emerge in practice.

International human rights mechanism – the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Sub-Commission on the Promotion and Protection of Human Rights, the Office of the High Commissioner for Human Rights, the United Nations non-conventional mechanisms established by the United Nations Commission on Human Rights and the International Labour Organisation (ILO)- are increasingly looking at the link between international trade rules, investment and human rights. In this respect, concerns have been raised about the human rights implications of trade policies and investment flows, recalling the primacy of human rights obligations and asking governments and economic policy forums to take international human rights obligations and principles fully into account in economic policy formulation.⁶ In her report on *'Liberalisation of trade in services and human rights'* the High Commissioner for Human Rights noted that while liberalisation of trade in services offers opportunities for increased economic growth and development, it can also threaten universal access for the poor to essential services.⁷ Moreover, the Sub-Commission on the Promotion and Protection of Human Rights considered, in its 2002 resolution on *Human Rights, Trade and Investment* that when not carefully regulated foreign direct investment - as a key element of the globalisation process, one of the main modes of delivering trade in services and a central activity of transnational corporations - can have a detrimental effect with regard to the enjoyment of human rights.⁸

While it is difficult to identify the real and potential human rights impact of liberalisation of trade in services and of investment flows between the EU and Mexico, their design and implementation might well affect the enjoyment of human rights and in particular the right to food, the right to education, the right to health, the right to work, the right to social security, as well as the rights of particular groups such as women, children, minorities, farmers, etc. In this respect, it is interesting to note that decision-making and implementation of liberalisation of trade in services and investment flows follow a specific agenda entailing precise deadlines and targets, while the human rights dimension of the EU-Mexico agreement has not followed a similar path. This imbalance might well highlight that between two concurrent obligations, priority is given to commercial and financial issues, at the detriment of human rights.

⁵ First Mexico-European Union Summit under the Economic Partnership, Political Coordination and Cooperation Agreement, Press Release, Madrid, 18 May 2002

⁶ U.N. Doc. E/CN.4/Sub.2/RES/2001/7; U.N. Doc. E/CN.4/Sub.2/RES/2001/4; U.N. Doc. E/CN.4/Sub.2/RES/2001/5; U.N. Doc E/CN.4/Sub.2/RES/2002/11

⁷ Report of the High Commissioner, *Liberalisation of Trade in Services and Human Rights*, UN Doc. E/CN.4/Sub.2/2002/9, para 68

⁸ *Supra* note 6

2. The normative content of economic, social and cultural rights, the concept of affirmative action and the liberalisation of trade in services

a. *The normative content of economic, social and cultural rights and the implicit recognition of affirmative action policies*

The Committee on Economic, Social and Cultural Rights, through its clarification and interpretation of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), stressed that economic and physical accessibility represent fundamental features of the normative content of the right to health, the right to food, the right to education and the right to adequate housing.⁹

These two normative elements entail general and specific legal obligations that include, among others, the obligation to remove *de facto* discrimination and to give special attention to those individuals and groups who have traditionally faced difficulties in exercising these rights. In this respect, the Committee on Economic, Social and Cultural Rights, in its first General Comment, stated that an initial step towards the realisation of economic, social and cultural rights is to identify and give special attention to the vulnerable or disadvantaged regions areas, groups and subgroups.¹⁰ Moreover, in its General Comment No. 13, the Committee stressed that “the adoption of temporary special measures intended to bring out *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to the right to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided that they are not continued after the objectives for which they were taken have been achieved”.¹¹

OMCT believes that the removal of *de facto* discrimination, along with the necessity to give special attention to individuals and groups traditionally facing difficulties in exercising the right to health, to food, to education and to adequate housing implicitly recognises the concept of affirmative action policies or special measures.

Indeed, the overall aim of affirmative action policies is to bring out *de facto* and effective equality in the enjoyment of all human rights. In its General Comment on article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is a general non-discrimination provision, the Human Rights Committee stressed that “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination (...)”.¹²

The UNESCO Declaration on Race and Racial Prejudice of 1978, adopted by unanimity and considered to have become part of international human rights law,¹³ stresses in its article 9 that particular attention should be paid to racial or ethnic groups which are socially or

⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 4, para 7; General Comment No. 12, para 12; General Comment No. 13, para 6; General Comment No. 14, para 12, in UN Doc. HRI/GEN/1/Rev.4, 7 February 2000

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 1, para 3, in UN Doc. HRI/GEN/1/Rev.4, 7 February 2000

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 13, para 32, *Supra* note 9

¹² Human Rights Committee, General Comment No. 18, para 10, in UN Doc. HRI/GEN/1/Rev.4, 7 February 2000

¹³ U.N. Doc. E/CN.4/Sub.2/2000/11, June 2000

economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination the advantages of social measures in force, in particular with regard to housing, employment, health and education.¹⁴

As such, the concept of affirmative action is understood as “a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality”.¹⁵ Policies of affirmative action can be carried out by actors belonging to the public sector or to the private one and have targeted women, blacks, immigrants, poor people, disabled persons, veterans, indigenous people, other racial groups, specific minorities, etc.¹⁶ Programmes for disadvantaged areas, in order to balance internal inequalities of economic and political power, have also been implemented as affirmative actions measures.¹⁷

b. The human rights to health, education and water and health, education and water as trading services

Affirmative action policies can cover a whole ranges of measures from the establishment of quotas, the granting of subsidies, the implementation of training programmes for specific groups, etc. The limits put on affirmative action measures by international human rights law are that these measures shall not lead to discrimination and that they must be temporary in nature.¹⁸

While these limits are clearly defined, the non-discrimination principle, as it is understood under international trade law, might well put additional constraints on State parties' ability to implement affirmative action policies aimed at guaranteeing *de facto* and effective equality in the enjoyment of the right to water.

Indeed, while health, education, and water are part of the ICESCR as human rights belonging to all individuals they are, at the same time, considered as a trading goods under the EU-Mexico agreement and the subsequent Decision 2/2001 of the Joint Council.¹⁹ This concurrent approach imposes different requirement upon States, where their non-discrimination obligations under international human rights law might well clash with their non-discrimination commitments under the EU-Mexico agreement and Decision 2/2001 of the Joint Council.

The realisation of the non-discrimination principle under international human rights law might require, in certain instances, to give preferential treatment to certain groups or regions in order to guarantee a *de facto* and equal enjoyment of economic, social and cultural rights, including the right to education, the right to health or the right to water . As the provision of basic services is crucial for the enjoyment of economic, social and cultural rights, this preferential treatment to certain groups or regions might well have some repercussion on the treatment given to service suppliers and corporations operating in the water, health or education sector, notably in term of regulatory measures and subsidies.

¹⁴ *Ibid.*

¹⁵ U.N. Doc. E/CN.4/Sub.2/2001/15, June 2001, para 7

¹⁶ *Ibid.*, paras 8, 12

¹⁷ *Ibid.*, para 35

¹⁸ *Ibid.*, para 41

¹⁹ Article 2 of the agreement

In this respect, the High Commissioner for Human Rights encourages, in her report on the *'Liberalisation of Trade in Services and Human Rights'*, that States take action to ensure universal supply of essential services, including water, notably through the use of affirmative action to guarantee provision of essential services to the poor, isolated and marginalized.²⁰

In fact, in certain circumstances, State parties to the ICESCR might well consider that the implementation of affirmative action policies represent the sole way to guarantee *de facto* and effective enjoyment of the right to water, health or education for certain regions or communities. One can therefore imagine that in order to guarantee that the population of a given rural area enjoy the right to water, health or education on an equal basis with the rest of the country, a State party to the ICESCR will have to subsidise a given water, health or education supplier.

Whereas such treatment does not raise any concern under international human rights law (if it does not lead to discrimination and is temporary in nature), it might well constitute a problem under the EU-Mexico agreement and Decision 2/2001 of the Joint Council. In other words, the implementation of affirmative action policies within the framework of the realisation of the right to water, health and education might well imply that differential treatment –in term of regulatory measures or subsidies- is given to corporations or service suppliers operating in these sectors.

In the light of these concurrent requirements of non-discrimination, the question arises as to the real margin of manoeuvre left by the EU-Mexico agreement and the subsequent related decision providing for the liberalisation of trade in services with respect to the implementation of special measures aiming at guaranteeing the effective and equal enjoyment of the right to water, health and education.

c. The EU-Mexico agreement and the realisation of the right to water, education and health

The EU-Mexico agreement and Decision 2/2001 provide a legal framework for the progressive liberalisation of trade in services. As the General Agreement on Trade in Services (GATS), the EU-Mexico agreement entails different requirements, including the *'most favoured nation'* and the *'national treatment'* principles.²¹ The concurrent application of both principles requires equality of treatment between foreign service and national service suppliers, as well as non-discrimination between national and non-national services and service suppliers. Under the EU-Mexico agreement, non-compliance with these requirements renders the different parties subjected to an enforceable dispute settlement system.²²

In this respect, concerns arise regarding the margin of manoeuvre left to State parties for implementing adequate policies that are aimed at guaranteeing that all the sectors of their population -including those groups or regions who have traditionally faced difficulties in

²⁰ *Supra* note 7, para 69

²¹ Article 5 and 6 of Decision 2/2001

²² See article 37 of Decision 2/2001

exercising economic, social and cultural rights- effectively enjoy the rights to water, health or education.²³

In her report on the '*Liberalisation of Trade in Services and Human Rights*', the High Commissioner for Human Rights noted that while the principles of non-discrimination exists both under human rights law and trade law, their meaning remains different and the implementation of this principle under trade law might well prevent that the same principle is being realised under human rights law.²⁴ Indeed, as mentioned in the High Commissioner report, non-discrimination in trade law envisages equal treatment for all service providers.

Under the EU-Mexico agreement, and assuming that a government made a commitment in the water, health or educational sectors,²⁵ the principle of non-discrimination (*national treatment* and *most favoured nation*) might well prevent this government from subsidising a given service provider –public or private- in order to guarantee the equal enjoyment of the right to water, health or education for vulnerable groups, communities and regions or to remove *de facto* discrimination thereof.

Indeed, article 8 of the 2/2001 Decision underlines that each party can regulate the supply of services in its territory in so far as the regulations do not discriminate against services and services suppliers of the other Party. In this respect, if the parties have completely open their water, education and health sectors, they might well find themselves in a position where they will have to choose between fulfilling their human rights obligations or facing trade sanctions under the enforceable dispute settlement system.

3. The obligation of due diligence and the liberalisation of investment flows

The EU-Mexico agreement and Decision 2/2001 provide for the progressive elimination of restrictions on payments related to investment between the parties. In this respect, the Decision 2/2001 stresses that the different parties shall aim to promote an attractive and stable environment for reciprocal investment, as well as to develop a legal framework favourable to investment.

As mentioned, the Sub-Commission for the Promotion and Protection of Human Rights has expressed its concern about the fact that when not carefully regulated foreign direct investment (FDI) - as a key element of the globalisation process, one of the main modes of delivering trade in services and a central activity of transnational corporations - can have a detrimental effect with regard to the enjoyment of human rights.²⁶ Moreover, in her report on '*Liberalisation of trade in services and human rights*' the High Commissioner for Human Rights notes that while FDI can upgrade national infrastructure, introduce new technology and provide employment opportunities, it can also have undesired effects where there is insufficient regulation to protect human rights.²⁷ In this respect, the High Commissioner lists, among other effects, the followings: (1) the establishment of a two-tiered service supply with a

²³ See in this regard the 2001 and 2001 resolutions of the UN Sub-Commission for the Promotion and Protection of Human Rights, *Supra* note 6

²⁴ *Supra* note 7, paras 59-62

²⁵ Article 7 of Decision 2/2001 stipulates that the Joint Council shall adopt a decision providing for the elimination of substantially all remaining discrimination between the parties and that this decision shall contain a list of commitments establishing the level of liberalisation which the Parties agree to grant to each other

²⁶ *Supra* note 6

²⁷ *Supra* note 7, Executive Summary

corporate segment focused on the healthy and wealthy and an under financed public sector focusing on the poor and sick; and (2) an overemphasis on commercial objectives at the expense of social objectives with respect to the provision of quality health, water and education services.²⁸

While these effects are related to the provision of basic services and are therefore linked to the precedent chapter covering the liberalisation of trade in services, FDI also raises other concerns related to the activities of transnational corporations (TNCs) and other business entities.

Companies' involvement in human rights violations and their failure to respect human rights in countries where they carry out their operations is, today, often matched by their unwillingness to bear any responsibility with regard to the enjoyment of all human rights. In parallel, while under international human rights law and the principle of due diligence States are responsible for guaranteeing that private entities, including companies, do not deprive individuals of their human rights, they are often unable or unwilling to do so. As a result, companies are, to date, often operating in a climate of impunity. For instance, in its 2001 concluding observations on Indonesia, the United Nations Committee against Torture (CAT) expressed concern about allegations that human rights abuses related to the Convention against torture are sometimes committed by military personnel employed by businesses in Indonesia to protect their premises and to avoid labour disputes.²⁹

In this respect, it is important to underline the work carried out by the Working Group on the Working Methods and Activities of Transnational Corporations, a subsidiary body of the UN Sub-Commission on the Promotion and Protection of Human Rights. Asked to contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights (U.N. Doc. E/CN.4/Sub.2/RES/2001/3), the Working-Group is currently developing the "Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights". This documents underlines companies obligations and responsibilities in the realm of human rights, notably with respect to equal opportunity and non-discriminatory treatment, the security of the person, workers' rights and environmental protection.

In addition the OECD Guidelines for Multinational Enterprises also underline, among others, that enterprises should contribute to social and environmental progress; respect the human rights of those affected by their activities; respect the right of their employees to be represented by trade unions; contribute to the effective abolition of child labour and the elimination of all forced and compulsory labour; and not discriminate among their employees on such grounds as sex, colour, race, religion, political opinion, national extraction or social origin.

In this respect, it is crucial that the elaboration of a framework for the liberalisation of investment flows between Mexico and the EU member States entails careful and precise regulations guaranteeing the effective enjoyment of human rights.

²⁸ *Ibid.*

²⁹ U.N. Doc. CAT/C/XXVII/Concl.3, para 7(e)

4. A social observatory of the EU-Mexico agreement

As highlighted in the precedent parts, several challenges arise as part of the implementation of the EU-Mexico agreement and subsequent Decisions. There is therefore a crucial need to guarantee that developments towards the liberalisation trade in services and investment flows between Mexico and the EU do not lead to a zero sum game where human rights are being marginalized in the process. The EU-Mexico agreement, which in this respect differs from the international framework regulating trade, investment and human rights law, offers the interesting setting of having trade, investment and human rights incorporated in a single instrument. Consequently, special procedures and mechanisms must be put in place in order to give adequate human rights considerations in trade and investment rules and to guarantee that the trade and investment objectives will not be realised at the expense of human rights. In this task, human rights shall not be viewed as disguised protectionism or additional conditionalities but rather as essential safeguards guaranteeing social justice and sustainable development.

These challenges underline that the agreement's human rights clause (article 1) does not only entail a negative dimension, allowing the implementation of sanctions to those governments responsible for grave and persistent violations of civil and political rights, but also a positive one.

Indeed, the positive dimension of this human rights clause entails the necessity to take effective measures in order to contribute to the enjoyment of human rights in the territory and under the jurisdiction of the respective parties. While article 39 of the EU-Mexico agreement recognises a positive dimension to the human rights clause, it is limited to the development of civil society, support to the rule of law and institutions, as well as to the promotion of democratic principles and human rights.

In this respect, it remains urgent and essential to expand the scope of this positive dimension in order to encompass the following elements: 1) an ongoing assessment and monitoring of the effects that liberalisation of trade in services and of investment flows have on the enjoyment of all human rights; 2) the adoption and implementation of a human rights approach to liberalisation of trade in services and of investment flows

This expansion of the positive dimension is related to the placement of human rights as the basis of the EU-Mexico agreement and as one of its fundamental element. In this respect, it is also interesting to recall that the United Nations Committee on Economic, Social and Cultural Rights asked to both Nepal and Algeria to take into account their obligations under the ICESCR in all aspects of their negotiations with the WTO in order to ensure that economic, social and cultural rights are duly protected.³⁰

Consequently, OMCT would recommend the creation of a Social Observatory through the Mixed Consultative Committee (MCC), whose mandate will imply, among others: (1) the assessment and monitoring of the impact of the EU-Mexico agreement and subsequent Decisions on the enjoyment of economic, social and cultural rights with a particular focus on the liberalisation of trade in services, the liberalisation of investment flow and the activities of transnational corporations and other business entities; (2) the formulation of concrete proposition on the basis of this monitoring and assessment; (3) the establishment of adequate

³⁰ U.N. Doc. E/C.12/1/Add.66, para 38, September 2001; U.N.Doc. E/C.12/1/Add. 71, para 43, November 2001

safeguards, regulations and proposals allowing for the adoption and implementation of a human rights approach to liberalisation of trade in services and of investment flows.