

# ‘Essential Elements’ Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?\*, \*\*

*Las cláusulas de elementos esenciales  
de los acuerdos comerciales de la UE:  
¿Contribuye la política comercial de la UE  
a la protección de los Derechos Humanos?*

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**Sumario:** I. Introduction: the trade-human rights nexus in the EU. 1. The EU bilateral trade policy. 2. The human rights component in EU trade agreements.—II. The ‘essential elements’ clause. 1. A journey into creative legal drafting. 2. Critical assessment of FTA conditionality. 2.1. Exceptions to generalised conditionality. 2.2. Criticism related to drafting and scope. 2.3. Criticism of the monitoring and application of human rights clauses.—III. Conclusion: are essential elements clauses so essential to achieving the EU’s trade-human rights nexus?

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**Abstract:** This article critically examines the EU policy of including ‘essential elements’ clauses in trade agreements as the principal avenue for the realization of the trade-human rights nexus required by the EU’s treaty obligation to use its external relations for the promotion of its core values. After evaluating the anatomy of such clauses, the article sets out to analyze the criticism which they have generated regarding (i) the fact that such clauses are not contained in all EU trade agreements, (ii) their drafting and scope, and (iii) their monitoring and enforcement. The article then concludes with an assessment of the effectiveness and legitimacy of this policy, and of the way it impacts the credibility of the EU’s normative external relations agenda.

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**Keywords:** 'essential elements' clauses, trade-human rights nexus, Free Trade Agreements, conditionality.

**Resumen:** Este artículo examina de una manera crítica la política europea de incluir cláusulas de 'elementos esenciales' en acuerdos comerciales, como principal medio para la realización del nexo comercio-derechos humano exigido por la obligación de la UE de articular sus relaciones externas para la promoción de sus valores fundamentales. Después de estudiar la anatomía de dichas cláusulas, el artículo se propone analizar las críticas que estas cláusulas han generado en relación con (i) el hecho de que no todos los acuerdos comerciales de la UE contienen estas cláusulas, (ii) su redacción y alcance, y (iii) su evaluación e implementación. El artículo concluirá con una valoración de la efectividad y legitimidad de esta política y de la manera en la que influye sobre la credibilidad del programa normativo de las relaciones exteriores de UE.

**Palabras clave:** cláusula de elementos esenciales, nexo comercio-derechos humanos, Acuerdos de Libre Comercio, condicionalidad.

## I. Introduction: the trade-human rights nexus in the EU

For a number of years, the European Union (EU) has anchored its external relations into a firm normative agenda, to the point of being dubbed 'Normative Power Europe'.<sup>1</sup> Namely, the EU conducts its external relations with the stated purpose of promoting its values. This evolution has been made official in the Treaty of Lisbon, notably its article 21 (1), which states

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

In this context, economic foreign relations, and in particular trade can be a powerful lever for normative objectives and an avenue to foster

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<sup>1</sup> See MANNERS, I., 'Normative Power Europe – A Contradiction in Terms?', *Journal of Common Market Studies*, n.º 40, 2002, p. 235.

societal change in partner countries<sup>2</sup>. Therefore, Art. 21 (3) TEU explicitly encompasses trade as part of the action of the EU 'on the international scene', and trade policy must consequently 'be guided' by the range of EU values, in which human rights feature prominently. Therefore, EU bodies and institutions have designed strategies to ensure that EU trade relations and instruments could effectively realize the so-called 'trade-human rights nexus'.

In 2011, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy (HR/VP, who also serves as the vice-president of the European Commission and as the Chair of the Foreign Affairs Council) have jointly declared that human rights were the 'silver thread' in all EU external relations, and have clarified their strategy to achieve the nexus: "The EU approach to trade policy focuses on using positive incentives, making use of trade preferences to promote human rights, coupled with a process of dialogue about the conditions to maintain those preferences."<sup>3</sup>

Likewise, in 2012 the Council of the European Union established a 'Strategic Framework and Action Plan for Democracy and Human Rights', in which a number of actions are listed as a way to "make trade work in a way that helps human rights."<sup>4</sup>

In this article I will briefly survey and assess one aspect of the EU's strategy on trade and human rights: that of promoting human rights through bilateral trade relations by including dedicated clauses in the numerous trade agreements it signs with third countries.

## 1. *The EU bilateral trade policy*

The EU's Common Commercial Policy (CCP) is chiefly carried out by way of international agreements. Already in the 1957 Treaty of Rome, the then European Economic Community (EEC) had received the exclusive competence to conclude trade agreements. Since the entry into force of the Lisbon Treaty, this competence comprises virtually the full range of trade in

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<sup>2</sup> HAFNER-BURTON, E., *Forced to be Good. Why Trade Agreements Boos Human Rights*, Ithaca, Cornell University Press, 2009, pp. 3-4.

<sup>3</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach', Joint Communication to the European Parliament and the Council, 12 December 2011, COM(2011) 886 final, p. 11.

<sup>4</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, 11855/12, Action 11.

goods, services, trade-related intellectual property rights and foreign direct investment.<sup>5</sup>

EU international trade policy has been implemented through multilateral agreements, via accession to the GATT and membership in the WTO. However, partly as a result of the stalemate in which multilateral trade talks now find themselves, culminating with the 2003 Cancún debacle, and in spite of its Treaty-imposed preference for multilateralism<sup>6</sup> the EU decided in the mid-2000s to reshuffle its cards and to abandon the 'multilateralism first' doctrine which it had followed to show its commitment to the Doha round.<sup>7</sup> The EU thus placed again so-called 'free trade agreements' (FTAs, i.e. particular trade liberalisation regimes negotiated bilaterally with select partner countries) at the centre of the CCP,<sup>8</sup> while continuing to officially declare completion of the Doha round a priority.

Prior to this sea change, the EU already had a policy of concluding FTAs, though in certain contexts only, that is, on a geographical/regional basis, as part of deep and broad partnerships with Neighbourhood or ACP countries. As a result of this new orientation, the EU is now concluding or negotiating FTAs with other strategic partners based on economic considerations alone, with Brazil, Russia, India, China and South Africa (the so-called 'BRICS' countries) as the main prospective candidates for further FTAs.<sup>9</sup> For example, new FTAs have recently been concluded with South Korea (2011), Singapore (2013, yet to enter into force), while others are currently being negotiated with *e.g.* India, Canada, ASEAN Countries, Japan, Mercosur, and most importantly the US. A self-standing investment agreement is also being negotiated with China.

It is therefore not easy to make sense of the broad network of trade agreements concluded by the EU, as these potentially belong to very different contexts, from purely trade relationships to much broader partnerships of which trade is only one aspect. It must also be noted that not all agreements concluded by the EU concerning trade necessarily accord trade preferences in the sense of cheaper market access for a

<sup>5</sup> WOOLCOCK, S., *European Union economic diplomacy: the role of the EU in external economic relations*, Farnham, Ashgate, 2012.

<sup>6</sup> Art. 21 (1) para. 2 TEU.

<sup>7</sup> SILES-BRÜGGE, G., *Constructing EU Trade Policy – A Global Idea of Europe*, Basingstoke, Palgrave-Macmillan, 2014, p. 1.

<sup>8</sup> European Commission, 'Global Europe: Competing in the world', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 4 November 2006, COM(2006) 567 final., pp. 8-10.

<sup>9</sup> See WOUTERS, J., 'L'Union européenne et l'Organisation mondiale du Commerce: concurrents ou partenaires?', *Annuaire de droit européen*, 2011, published 2013, p. 121.

range of goods and services. Many of them simply provide for trade cooperation, typically an agreement between the parties to stimulate trade amongst themselves, to cooperate towards a reduction of (tariff or non-tariff) barriers to trade, etc. In this connection, moreover, one should emphasise that many instruments are called 'trade' agreements somewhat abusively, as they are, in fact, development agreements.<sup>10</sup> A very large number of agreements were indeed concluded with developing or emerging countries, and in the total of agreements concluded by the EU, a comparatively low number was signed with developed countries. Remarkably, the EU still does not have a trade agreement in place with, e.g. the US, Canada, Japan or Australia, as it is only after the change of strategy regarding trade liberalisation outlined above that the EU started to seriously negotiate trade deals also with developed countries. Moreover, in the comprehensive agreements concluded with developing or emerging countries, trade, trade liberalisation and enhanced market access are frequently presented specifically as a way to ensure the economic (and, since more recently, sustainable) development of the partner country. For example, the recent Economic Partnership Agreement between the EU and the Forum of the Caribbean Group of African, Caribbean and Pacific States ('CARIFORUM'), of which the trade pillar is being applied provisionally pending full ratification (see below, section 2.1), includes as its very first objective to "contribut[e] to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement"<sup>11</sup> and defines itself as a 'Trade Partnership for Sustainable Development'.<sup>12</sup> To that end it then sets out to establish generous trade preferences on a wide range of products.<sup>13</sup> The 2010 EU-Vietnam Framework Agreement on Comprehensive Partnership and Cooperation (yet to enter into force) states even more clearly "that trade plays a significant role in development and that trade preferential programmes help to promote the development of developing countries, including Vietnam."<sup>14</sup>

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<sup>10</sup> See European Commission, 'Trade, growth and development. Tailoring trade and investment policy for those countries most in need', Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 27 January 2012, COM(2012) 22 final.

<sup>11</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 15 October 2008, Art. 1(a).

<sup>12</sup> *Ibid.*, Title I.

<sup>13</sup> *Ibid.*, Arts. 15 ff.

<sup>14</sup> *Ibid.*, Art. 1 (5).

However, for the sake of simplicity, in this article I will refer to all agreements which have a trade dimension (whether or not alongside other dimensions) as 'trade agreements'.

## 2. *The human rights component in EU trade agreements*

Human rights have however been part and parcel of the negotiation of international agreements well before Lisbon, including agreements having a trade dimension. As early as the 1970s, the EU found itself in the situation of having close relationships and legally binding treaty obligations, notably of a financial nature, towards governments which were violating human rights.<sup>15</sup> As a matter of fact, before linking trade and human rights as a matter of principle and in pursuance of its 'normative power', the EU first sought to establish this link as a way to suspend its relations with rogue governments and thereby avoid contributing —possibly through direct financing— to human rights violations.

The solution found was to abandon the politically neutral stance so far adopted in relation to trade agreements,<sup>16</sup> and to include clauses specifically referring to human rights in these instruments. The wording, scope and effectiveness of these treaty provisions has evolved significantly over time, and below I briefly outline this evolution before moving to a comparative assessment of the human rights provisions which can be found in the EU trade agreements currently in force.

## II. The 'essential elements' clause

### 1. *A journey into creative legal drafting*

The first mention of human rights in an EU trade agreement can be found in Art. 5 of the 1989 Lomé IV Convention with ACP Countries.<sup>17</sup> This clause, already quite detailed, is however not meant to be an operative provision giving the EU a way out in cases of human rights violations by one of its ACP partners. It rather emphasises the fact that development —the main aim of the Convention, though it includes trade provisions— 'entails respect of and promotion of all human rights.'

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<sup>15</sup> HAFNER-BURTON *op. cit.* (note 2), p. 51.

<sup>16</sup> *Ibid.*, 72.

<sup>17</sup> See Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989.

As indicated, this type of clause does not provide any kind of 'stick' to the EU in case one of the other parties violated human rights, which is what the EU was trying to achieve.<sup>18</sup> All it did was more precisely define one of the 'objectives and principles of cooperation'. Therefore, the EU adapted its reference to human rights in further agreements to move towards a formulation which, in full compliance with international treaty law, would progressively give it the possibility to suspend its obligations under international agreements (for instance the granting of trade preferences) and take other 'appropriate measures', thereby flanking these agreements with hard 'human rights conditionality,' as the terminology goes.<sup>19</sup>

In short, the legal reasoning was to include in the treaties explicit language making respect for human rights (and other values such as democracy) an 'essential element' on which the reciprocal obligations of the parties were premised, so that human rights violations of a certain scale by one of them could amount to a material breach of the treaty and justify suspension or other counter-measures.<sup>20</sup> The typical 'essential element'

<sup>18</sup> FIERRO, E., *European Union's Approach to Human Rights Conditionality in Practice*, Leiden, Martinus Nijhoff, 2003, p. 211.

<sup>19</sup> However, the objective of such clauses as stated was broader than simply providing a shield to the EU. Namely, according to the Commission, such clauses would present several advantages:

- 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 [...]. 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 penalized 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 line with the Vienna Convention ; 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. 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 time if an amicable solution is being sought.

See European Commission, 'Communication on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries', Brussels 23 May 1995, COM(95)216 final, 7-8.

<sup>20</sup> See in this regard CJEU, 3 December 1996, *Portugal v. Council*, C-268/94 and Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969, Art. 60. This article reads: '1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. [...] 3. A material breach of a treaty, for the purposes of this article, consists in: [...] (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.'

clause was given quite a number of different formulations since it was first attempted in the 1990 EU-Argentina Cooperation Agreement, in which it read “[c]ooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina.”<sup>21</sup> The actual words ‘essential elements’ were only added to the clause a few years later, in the 1992 Framework Agreement for Cooperation with Brazil.<sup>22</sup>

By way of comparison, Art. 1 (1) of the new 2010 EU-Korea Framework Agreement (yet to enter into force) now complements several mentions of human rights in the preamble and reads as follows:

[t]he Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.<sup>23</sup>

Whereas Art. 1 (1) of the 2013 EU-Colombia/Peru Free Trade Agreement adopts a more direct and less detailed formulation: “[r]espect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.”<sup>24</sup>

An overview of all essential elements clauses present in the EU trade agreements currently in force<sup>25</sup> evidences clear patterns in the drafting of the essential elements clause, along two kinds of factors. First, as indicated above, the typical drafting of the clause has evolved over time, which

<sup>21</sup> See Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, Signed 2 April 1990, Art. 1 (1)

<sup>22</sup> See Framework Agreement between the European Economic Community and the Federative Republic of Brazil.

<sup>23</sup> See Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 10 May 2010.

<sup>24</sup> See Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June 2012.

<sup>25</sup> See BEKE, L., HACHEZ, N., D’HOLLANDER, D. AND PÉREZ DE LA HERAS, B., *Report on the integration of human rights in EU development and trade policies*, FRAME Deliverable No. 9.1, 2014: <http://www.fp7-frame.eu/reports/>, Annex II (last visited 27 February 2015).



makes sense from the perspective of constantly trying to improve the language of agreements, notably in regard of past practice linked to similar clauses. Second, one can also clearly group these clauses on a geographical or regional basis, evidencing the fact that the EU, in its international relations and treaty negotiation practices, works very much on the basis of regional policies addressing blocs of countries. The temporal and geographical patterns have in many cases actually developed in parallel, as many agreements with countries of the same regional bloc were negotiated and concluded around the same time. For example, most of the agreements concluded with members of the former USSR were concluded in the second half of the 1990s and many of them look very much alike (see below, section 2.1). However, it may happen that certain countries belonging to a bloc negotiate a new agreement whereas other countries of the bloc do not wish so, or are slower in the negotiations, creating parallel treaty regimes in respect of the same issue and in the same region. For example, the Andean Community is currently split between Colombia and Peru which are under a brand new 2012 FTA, and Ecuador and Bolivia, whose trade relations with the EU are still only governed by the 'old' 1993 Cooperation Agreement which applied to all members of the Cartagena Agreement and does not grant trade preferences.

As Lorand Bartels notes, though a number of standard formulations now seem to have emerged in regard of the various phrases of the essential elements clauses,<sup>26</sup> proper drafting ensuring the legal options described above was probably never achieved. The intention of the parties is however well known at this stage, and the end result is therefore undeniable, even if we have seldom seen these clauses in action (see below, section 2.3).<sup>27</sup> The aim of securing a way out for the EU is all the more attained as, alongside the essential elements clause, the EU has also progressively adopted the practice of including 'non-execution' clauses expressly delineating the consequences to be attached to a violation of the 'essential elements' of the treaties.

Non-execution clauses have historically taken two forms: the 'Baltic' clause, which was notably included in agreements with Baltic states prior to their accession, and which authorised a party to suspend the application of the agreement with immediate effect in case of a serious breach of essential provisions. Given the lack of flexibility afforded by

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<sup>26</sup> BARTELS, L., *A Model Human Rights Clause for the EU's International Trade Agreements*, German Institute for Human Rights and Misereor, 2012: [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_A\\_Model\\_Human\\_Rights\\_Clause.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf), p. 10 (last visited 27 February 2015).

<sup>27</sup> *Ibid.*, p. 13.

this formulation, the Baltic clause was progressively abandoned, and its concurrent, the 'Bulgarian' clause, became the standard, allowing either party to 'take appropriate measures' in case of breach by the other party, after proper consultation of that party and/or referral to a committee established by the treaty. Most non-execution clauses now dispense with this last condition 'in cases of special urgency,'<sup>28</sup> which are said to correspond (either in the clause itself, or in an interpretative declaration of the parties) to correspond to grave violations of the essential elements or the agreements. This means that, in cases of grave human rights violations by one party, the other is allowed to immediately take measures in response. In this regard, it is almost always specified that the measures chosen must be those which 'least disturb' the normal operation of the agreement, and sometimes as well that those measures must be 'proportional', making suspension of the whole agreement an unlikely outcome.<sup>29</sup>

So far, the so-called Cotonou Agreement between the EU and the ACP countries<sup>30</sup> can be said to have the most complex set of clauses ensuring human rights conditionality. Not only does it have the longest ever 'essential element' clause,<sup>31</sup> it also sets up a detailed process of political dialogue around the essential elements,<sup>32</sup> explicitly in order to pre-empt situations in which a party might deem it justified to activate the non-execution clause.<sup>33</sup> As discussed in more detail below, in this case, the essential elements clause and the overall conditionality mechanism goes well beyond the reactive purpose of ensuring a way out for the EU in case of human rights violations. It is a genuine tool for proactively promoting human rights and other values in partner countries, meant to be applied on an ongoing basis, outside of and before any situation of human rights violations, combining 'strong elements of both coercion and persuasion'.<sup>34</sup> In the same vein, a number of Association Agreements (notably adopted in the framework of the Eastern Neighbourhood Policy

<sup>28</sup> European Commission (note 19), p. 8.

<sup>29</sup> See in respect of Euro-Mediterranean Countries: BARTELS, L., 'A Legal Analysis of The Human Rights dimension of the Euro-Mediterranean Agreements', *GREAT Insights*, n.º 1, 2012, p. 7.

<sup>30</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group Of States of the one part, and the European Community and its Member States of the other part, signed in Cotonou, 22 June 2000.

<sup>31</sup> *Ibid.*, Art 9 (2).

<sup>32</sup> *Ibid.*, Annex VII.

<sup>33</sup> *Ibid.*, Art 96.

<sup>34</sup> HAFNER-BURTON, E., 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression', *International Organization*, n.º 59, 2005, p. 607.

and with Southern Asia countries) also take this more proactive stance towards linking trade agreements with human rights issues by having a chapter on 'Cooperation on matters relating to democracy and human rights.'

Since 1995, it is the official policy of the EU to include respect for democratic principles and human rights in agreements between the Union and third countries, and the EU has generally been true to this policy (see below, section 2.1).<sup>35</sup> In this regard, an increasingly followed method to place respect for human rights at the centre of all treaty relations between the EU and particular partners is to conclude 'Framework Agreements' which contain a comprehensive essential elements clause, a non-execution clause, and possibly a dispute settlement mechanism.<sup>36</sup> Thematic agreements are then subsequently concluded and 'hooked' onto the framework agreement, making the human rights apparatus included therein also applicable to treaty relations in the thematic fields. A recent example includes the 2010 EU-Korea Framework Agreement.<sup>37</sup> However, the most early and prominent example of this practice is the Cotonou Agreement. As a response to the planned expiry of the trade preferences granted directly to ACP countries by the Cotonou Agreement in December 2007,<sup>38</sup> Art. 35 thereof mandates the parties to conclude 'Economic Partnership Agreements' on a regional basis to regulate their trade relations. The (interim) EPAs in force so far, namely with CARIFORUM States,<sup>39</sup> with Central African countries (to date only applicable to Cameroon),<sup>40</sup> with

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<sup>35</sup> In the early nineties, a number of agreements were concluded which contained an essential elements clause, but no non-execution clause: see Argentina, Brazil, Andean Community Framework Agreement, Vietnam.

<sup>36</sup> The Council would have made this a policy preference. See BARTELS, L., *The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements*, European Parliament Directorate-General for External Policies of the Union, EXPO/B/DROI/2012-09, 2014: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN\\_ET\(2014\)433751\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf), pp. 6-7 (last visited 27 February 2015).

<sup>37</sup> See above (note 23).

<sup>38</sup> See World Trade Organization, Ministerial Conference, 'European Communities – The ACP-EC Partnership Agreement', Doha, 14 November 2001, WT/MIN(01)/15, 2, by which Art. I (1) of the GATT 1947 (MFN) clause, is waived until 31 December 2007. See also ONGUGLO, B. and ITO, T., *How to make EPAs WTO compatible? Reforming the rules on regional trade agreements*, ECDPM Discussion Paper No. 40, 2003: <http://ecdp.org/wp-content/uploads/2013/11/DP-40-Make-EPAs-WTO-Compatible-Reforming-Rules-Regional-Trade-Agreements1.pdf> (last visited 27 February 2015).

<sup>39</sup> EU-Cariforum EPA (note 11).

<sup>40</sup> Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed 15/01/2009.

Eastern and Southern African countries,<sup>41</sup> and with Pacific States (to date only applicable to Papua New Guinea and Fiji)<sup>42</sup> all specify that nothing in the Agreement shall be construed so as to prevent the adoption by the EU of any measure under, notably, Art. 96 of the Cotonou Agreement (the non-execution clause).<sup>43</sup> One (the CARIFORUM agreement) even specifies expressly that this includes trade sanctions, and two (the CARIFORUM and the Pacific States Agreement) additionally restate that the EPA is based on the same essential elements as the Cotonou Agreement by referencing its Art. 9. Outside of the Cotonou ambit, the 2001 EU-Korea Framework Agreement' essential elements and non-execution clauses are made expressly applicable to the subsequent EU-Korea Free Trade Agreement.<sup>44</sup> The new 2010 EU-Korea Framework Agreement, yet to enter into force, further reinforces that link.<sup>45</sup>

## 2. Critical assessment of FTA conditionality

This might all seem like a well-oiled and steady policy, but significant exceptions and ambiguities in respect of certain types of agreements and practices threaten the effectiveness and coherence of EU conditionality altogether. Criticism of human rights clauses has to do with their inclusion (or not) in an agreement, their drafting and scope, and their effective implementation. We address these three lines of criticism in that order below.

### 2.1. Exceptions to generalised conditionality

The most notable and far-reaching exception to the inclusion of essential elements clauses in all agreements concerns sectoral trade

<sup>41</sup> Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, signed 29/08/2009.

<sup>42</sup> Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, signed 30/07/2009.

<sup>43</sup> It would have been even clearer to include again in each EPA a clear reference to the essential elements and to the consequences of their breach, but apparently this was a contentious point, and whereas the EU was in favor of inclusion the clause was dropped in some cases. Whether or not this allows or evacuates the possibility of trade sanctions is debatable. See, in the case of the EPA with West Africa, X, *West Africa, EU Reach Trade Deal*, Bridges, Volume 18, Number 5, 13 February 2014: <http://www.ictsd.org/bridges-news/bridges/news/west-africa-eu-reach-trade-deal> (last visited 27 February 2015)

<sup>44</sup> See Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, on the other part, signed 06/10/2010, Art. 15.14.

<sup>45</sup> Above (note 23), Art. 43 (3).

agreements, which provide for trade liberalisation or cooperation only in respect of certain products or services. Hundreds of such agreements have been concluded over the years by the EU with many countries, some of which have problematic human rights records, and some of which concern sectors which are prone to human rights violations. We have identified such agreements notably in respect of the following sectors: wood, timber and forestry products; fish and fisheries products; agricultural products; industrial products; wine and spirits; steel and iron; textiles; oil seeds; and aviation. The concern is alleviated by the fact that many sectoral agreements are in the form of protocols to broader agreements which are conditional on respect for human rights. However, many others are self-standing and do not have any conditionality component. For example, the recent and innovative agreements introducing a Forest Law Enforcement, Governance and Trade (FLEGT) scheme with a number of developing countries, the so-called 'Voluntary Partnership Agreements' (VPAs), though they address sustainable development and a number of human rights (rights of indigenous peoples, right to information), do not include an 'essential elements clause'.<sup>46</sup> Likewise, fisheries Partnership Agreements, for example, have traditionally not contained an essential elements clause, though some have in their preamble a non-operational reference to an agreement in which essential elements are spelled out, such as the Cotonou Agreement.<sup>47</sup> However, in 2013 protocols to such agreements with Morocco and Côte d'Ivoire may indicate a changing course as they include a reference to the relevant clauses of, respectively, the EU-Morocco Association Agreement and the Cotonou Agreement.<sup>48</sup>

A second potentially far-reaching *caveat* to the generalised conditionality policy of the EU concerns the provisional application of the trade provisions of broader agreements. Many agreements containing 'beyond trade' issues are mixed agreements and therefore require the ratification of all Member States before entering into force, which can take time. On the contrary, trade being an exclusive competence of the EU, this allows for creating legal obligations in that field without the intervention of the Member States. Therefore, many comprehensive agreements foresee that, pending complete entry into force following

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<sup>46</sup> See for instance Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union (FLEGT), signed 27/07/2011.

<sup>47</sup> See for example, Fisheries Partnership Agreement between the European Community and the Republic of Côte d'Ivoire, signed 18/04/2008.

<sup>48</sup> BARTELS, L., *op. cit.* (note 36), p. 7.

ratification by EU Member States, the provisions pertaining to trade will be applied provisionally. This is sometimes done by way of an 'interim agreement' between the EU and the partner at hand, in which the trade provisions of the broader agreement are repeated, and in which essential elements clauses are included as well. However, sometimes the provisional application takes place without having recourse to an interim agreement and may derive from a provision of the broader agreement itself, or from a decision of the parties to that effect. The 2012 EU-Iraq Partnership and Cooperation Agreement, for example, provides that as soon as Iraq and the EU have ratified it, certain trade provisions, but also the essential elements and the non-application clause, will enter into force and be applied.<sup>49</sup> It is thus very clear that the provisional application of the agreement encompasses human rights conditionality, but this is not so in all cases of provisional application.

For example, the 2012 EU-Central America Association Agreement provides that 'Part IV of this Agreement may be applied by the European Union and each of the Republics of the CA Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. [...]'<sup>50</sup> Here, the provisional application clause only refers to 'Part IV', that is, the trade pillar of the agreement, whereas the essential elements clause is contained in Part I on General and Institutional Provisions and the non-execution clause is contained in Part V on General and Final Provisions. This creates significant uncertainty as to the applicability of human rights conditionality during the provisional application phase. One might argue that the general provisions inform operational chapters of the agreement and that therefore 'Part IV' cannot be read in isolation of Parts I and V. This interpretation might be consistent with Art. 31 (1) of the Vienna Convention on the Law of Treaties which states that treaty provisions ought to be interpreted in light of their context, meaning the preamble, the annex, but also 'other agreements relating to the treaty', which might encompass the other essential elements clause. Yet, one might argue just as validly that the text of the agreement does not require any interpretation as the meaning is clear and strictly restricts the provisions amenable to provisional application to the trade chapter.

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<sup>49</sup> Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed 11/05/2012, Art. 117.

<sup>50</sup> Agreement establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, signed 29/06/2012, Art. 353 (4).

In any event, this ambiguity risks creating significant confusion and to severely water down the dissuasive or promotional effect that the essential elements clause might have, if any.

Even despite these potentially enormous gaps, the quasi-unflinching resolve of the EU to include essential elements and non-execution clauses in almost all its international agreements must be saluted, as it has seriously complicated a number of trade negotiations with developing and developed countries alike,<sup>51</sup> notably because some of them did not see under what pretext trade issues absolutely had to be conditioned on human rights, the two issues belonging, according to them, to clearly distinct fields.<sup>52</sup> Australia, for example, declined in 1997 to sign an agreement containing the standard EU essential elements clause.<sup>53</sup> In the developing world, the negotiations between the EU and India are also clung to the issue of the inclusion of a human rights clause,<sup>54</sup> amongst other stumbling blocks.<sup>55</sup>

## 2.2. Criticism related to drafting and scope

Another line of criticism concerns the fact that there exist slight variations in the drafting of the clauses, which may alter their scope and create uncertainty and inconsistencies as to the (largely hypothetical) situations which might trigger them.

First of all, the list of what constitutes 'essential elements' varies from one agreement to the next. Whereas 'democratic principles' and (fundamental) 'human rights' are always included, in other instances (the

<sup>51</sup> TAKÁCS, T., 'Human rights in trade: the EU's experience with labour standards conditionality and its role in promoting labour standards in the WTO', in WETZEL, J. (ed.), *The EU as a 'Global Player' in the Field of Human Rights*, Abingdon, Routledge, 2012, p. 99.

<sup>52</sup> ZWAGEMAKERS, F., *The EU's Conditionality Policy: A New Strategy to Achieve Compliance*, IAI Working Paper 12/03, 2012: <http://www10.iadb.org/intal/intaledi/PE/2012/09808.pdf>, p. 14 (last visited 27 February 2015); CHAUFFOUR, J.-P. and MAUR, J.-C., 'Landscape', in CHAUFFOUR, J.-P. and MAUR, J.-C., (eds) *Preferential Trade Agreement Policies for Development: A Handbook*, Washington D.C., The World Bank, 2011, p. 15.

<sup>53</sup> HAFNER-BURTON, E., 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe', *Perspectives on Politics*, n.º 7, 2009, p. 33.

<sup>54</sup> KHANDEKAR, G., *The EU and India: A Loveless Arranged Marriage*, FRIDE Policy Brief No. 90, 2, 2011: [http://www.fride.org/download/pb\\_90\\_eu\\_and\\_india.pdf](http://www.fride.org/download/pb_90_eu_and_india.pdf) (last visited 27 February 2015).

<sup>55</sup> WOUTERS, J., GODDEERIS, I., NATENS, B., and CIORTUZ, F., *Some Critical Issues in EU-India Free Trade Agreement Negotiation*, GGS Working Paper No. 102, 2013: [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp102-wouters-goddeeris-natens.pdf/](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp102-wouters-goddeeris-natens.pdf/) (last visited 27 February 2015).

principles of) 'the rule of law', 'respect for the principles of international law' or even (the principles of) 'market economy' find their way onto the list. An analysis of these additional mentions clearly evidences that such additional mentions were included in consideration of events, situations or developments which have affected the partner country (though not necessarily always).<sup>56</sup> Principles of market economy are indeed invariably essential elements of agreements concluded with former Soviet countries. Inclusion of the rule of law is a bit more widespread, but is especially present in agreements with countries where organised crime is reportedly more prevalent, such as the Balkans or Colombia. Finally, respect for the principles of international law are associated with 'full cooperation with the ICTY' and is included in agreements with former Yugoslav States. Whereas it is certainly true that the principles of the rule of law and respect for international law may require additional efforts in certain regions, there is no reason why these principles would not be essential to the relations of the EU with *all* its partners. The inclusion of the principles of market economy as essential elements is also rather dubious as it is clearly of another nature than the other principles. The plausible argument that market economy is somehow conducive to the realisation of human rights, notably the right to property or the right to set up a business, does not evacuate the question whether this limitation of the economic orientation of a partner country does not conflict with, e.g., the principle of self-determination.<sup>57</sup> But beyond the questions surrounding the substantive merits of this reference, it must be noted that this essential element is not consistently applied across countries which have a history of planned economy. Neither the 1995 nor the 2012 cooperation agreements with Vietnam, for example, include such reference. How can it be justified that the EU would not mind entering agreements with planned economy countries (including China, with which the EU is currently negotiating an investment agreement), whereas for others it makes it a point of principle that they would uphold the principles of market economy?

<sup>56</sup> FIERRO, E., *op. cit.* (note 18), pp. 218 ff.

<sup>57</sup> See Art. 1 (1) of the International Covenant on Economic, Social and Cultural Rights, which provides: 'All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Admittedly, this reference to market economy also includes a mention of the documents of the 1990 CSCE Bonn Conference, in which the relevant countries took part (through the participation of the former USSR or Yugoslavia). However, adding to the ambiguity, this reference to CSCE documents also includes the 1975 Helsinki final act, which restates the provision of the ICESCR quoted above.



Moreover, the notion of human rights itself can be subject to variable interpretations and its plasticity can play out in various ways.<sup>58</sup> The long-lasting debate regarding the different 'generations' of rights and notably the extent to which labour rights are human rights seemed settled (at least for what concerns 'core' labour standards). The EU's consecration of a notion of 'universal, indivisible and interdependent' human rights should also leave little doubt in this respect, but the recent 'sustainable development chapters'<sup>59</sup> containing provisions on labour rights inclusion in EU trade agreements has puzzled many observers of EU practice.<sup>60</sup> Uncertainty of this sort about the exact scope of the essential elements clause is perhaps the reason why it is often proposed to expand the areas it is meant to cover. Very recently, for instance, the Commission proposed to make 'Inclusion of human trafficking in the Human Rights Clauses' a priority of the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, even though in its own assessment essential elements clauses encompass human trafficking.<sup>61</sup>

Hesitations regarding the exact scope of the essential elements clauses also stem from the considerable variation in the references to international instruments that are used to substantiate the notion of 'human rights'. Whereas some agreements do not refer to any specific instrument, most do refer to 'human rights as laid down in/proclaimed by/set out in/established by/defined in the Universal Declaration of Human Rights'. Others use geographically relevant regional instruments such as, for members of the OSCE, the Helsinki Final Act, and the Charter of Paris for a New Europe, or for members of the Council of Europe, the European Convention of Human Rights, which broadens the scope of the clause to certain rights that are not addressed in the Universal Declaration but well are in these regional instruments. Agreements outside of the ambit of the Organization for Security and Co-operation in Europe (OSCE) or the Council of Europe do not include references to specific instruments next to the UDHR, but an innovation was introduced in the 2010 EU-Korea Framework Agreement which lists as essential elements human rights 'as laid down in

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<sup>58</sup> See generally WILLIAMS, A., *EU Human Rights Policies – A Study in Irony*, Oxford, Oxford University Press, 2004.

<sup>59</sup> For a detailed analysis of 'sustainable development chapters' in EU FTA and their relationship with essential elements clauses, see BEKE, L., D'HOLLANDER, D., HACHEZ, N. and PÉREZ DE LAS HERAS, B., *op. cit.* (note 25), pp. 72-77.

<sup>60</sup> BARTELS, L., *op. cit.* (note 26), p. 33.

<sup>61</sup> European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016', Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 19 June 2012, COM(2012) 286 final, 12.

the Universal Declaration of Human Rights and *other relevant international human rights instruments*'.<sup>62</sup> This formulation may be interpreted as the admission that, in other agreements, the reference to human rights is strictly limited to those enumerated in the Universal Declaration of Human Rights (UDHR) and other specifically mentioned agreements, whereas for South Korea, the list could be expanded to include any human right potentially 'relevant' to a situation covered by the agreement. An author argues that a plausible reading however is to link the clause to the instruments binding on the parties,<sup>63</sup> though technically 'relevant' is a broader term than, for example, 'binding' or even 'applicable'. The same author also argues that a reference to relevant instruments makes the agreement 'future proof', as it also potentially includes any relevant instrument to be adopted in the future.<sup>64</sup>

The more or less erratic substantiation of standards of conditionality may additionally, as can be expected, affect the legitimacy of the Union's efforts to link human rights and trade and other issues in international agreements, as different parties may be subject to limited or expansive conditionality according to the wording of the clause.<sup>65</sup> Several arguments can however put forward to explain variations. First of all, agreements are negotiated and it is natural that depending on the negotiation dynamics and other interests of the parties, the scope of the essential elements would be an element of the negotiation. An author argues that South Korea felt (rightly or wrongly) that it did not have a particularly problematic human rights record, and therefore had no reason to take issue with the clause as currently drafted.<sup>66</sup> A second explanation could be related to the scope and ambitions of the various agreements, ranging from strictly trade issues to sweeping political and economic cooperation. It might be argued that the wider the scope of the mutual obligations, the stricter and more expansive the wording of the conditionality. However, an analysis of the different clauses present in the EU's international agreements cannot confirm this hypothesis and rather evidence similarities based on temporal or regional patterns, and not based on the agreements' material scopes.

<sup>62</sup> Above (n 23), Art. 1 (1) (emphasis added).

<sup>63</sup> KO, Y. L., 'A Common Institutional Framework for EU-Korea Relations', in HARRISON, J. (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations*, Oxford, Oxford University Press, 2013.

<sup>64</sup> BARTELS, L., *op. cit.* (note 36), p. 9.

<sup>65</sup> Already in 1995, the development of Guidelines on human rights clauses was meant to counter the fact that the use of different clauses and mechanisms can appear as discriminatory practice. See European Commission (note 19), 11.

<sup>66</sup> KO, *op. cit.* (note 63).

### 2.3. Criticism of the monitoring and application of human rights clauses

Another popular line of criticism of these clauses has to do with their implementation: the EU went through great lengths to insert a conditionality tool in all its agreements, but does it actually use it? The first critique is that the EU does not activate conditionality often enough, and regularly leaves human rights violations by partner countries unpunished. The European Parliament has made an issue of this, insisting that if 'negative' conditionality mechanisms were put in place, they would only be credible if activated.<sup>67</sup> Indeed, progress in human rights has been noted to take place when, after a suspension of benefits, the partner country saw again the prospect of regaining them under certain conditions linked to human rights.<sup>68</sup>

A second critique is that the EU would be triggering the clause selectively, and therefore unfairly.<sup>69</sup> Voices have raised to denounce double standards in this regard: the EU would be quick to activate conditionality against harmless partners, whereas it would be much more reluctant to do so in regards to more powerful countries.<sup>70</sup> And indeed, the essential elements clause has so far only been activated against ACP countries, as the table below shows.<sup>71</sup>

<sup>67</sup> See European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights (2008/2031(INI)), in which it '[c]onsiders that failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union's human rights strategy, sanctions policy and credibility', para. 21.

<sup>68</sup> BARTELS, L., *The Application of Human Rights Conditionality in the EU's Trade Agreements and Other Trade Arrangements with Third Countries* European Parliament Directorate for External Relations, 2008; [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA\\_ET%282008%29406991\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET%282008%29406991_EN.pdf), p. 18 (last visited 27 February 2015).

<sup>69</sup> FIERRO, E., *op. cit.* (note 18), p. 309.

<sup>70</sup> ZWAGEMAKERS, F., *op. cit.* (note 52), 5.

<sup>71</sup> KEUKELEIRE, S. and DELREUX, T., *The Foreign Policy of the European Union* (2<sup>nd</sup> ed.), Basingstoke, Palgrave Macmillan, 2014, p. 207; DØHLIE SALTNES, J., *The EU's Human Rights Policy – Unpacking the literature on the EU's implementation of aid conditionality*, Arena Working Paper 2/2013, 2013; <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp2-13.pdf> (last visited 27 February 2015). Sanctions in the form of a suspension of technical meetings foreseen under the EU-Uzbekistan Cooperation Agreement were taken against Uzbekistan in 2005, though the Common Position does not explicitly trigger the non-execution clause under that agreement. See Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan.

Year, Country	Coup d'état	Flawed Elections	Human Rights	Rule of Law
2011 Guinea-Bissau			X	X
2010 Niger	X			
2009 Niger		X		
2009 Madagascar	X			
2009 Guinea	X			
2008 Mauritania	X			
2007 Fiji	X			
2005 Mauritania	X			
2004 Guinea		X		
2004 Togo		X	X	
2003 Guinea-Bissau	X			
2003 Central African Republic	X			
2001 Zimbabwe		X	X	X
2001 Liberia		X	X	X
2001 Côte d'Ivoire		X		
2000 Fiji	X			
2000 Haiti		X		
2000 Côte d'Ivoire	X			
1999 Guinea-Bissau	X			
1999 Comoros	X			
1999 Niger	X			
1998 Togo		X		
1996 Niger	X			

*Source:* Consultations under the 'essential elements' clause, by country and reason for triggering, 1996-2012<sup>72</sup>

Essential elements have thus sparsely been invoked, they have not always led to sanctions proper but rather to consultations, and the sanctions when applied did not involve the lifting of trade preferences but rather 'suspension of meetings and technical co-operation programmes'.<sup>73</sup> Moreover, essential elements clauses were only triggered in situations where drastic changes had taken place in the country in question, such as a coup, flawed elections, or

<sup>72</sup> Reproduced from DØHLIE SALTNES, J., *op. cit.* (note 71), p. 7.

<sup>73</sup> European Commission and Special Representative of the European Union for Foreign Affairs and Security Policy (note 3), which contains in its Annex II a 'summary of the measures that may be taken in response to serious human rights violations or serious interruptions of democratic process', and which, surprisingly, does not list the lifting of trade preferences, but mentions 'trade embargoes'.

brutal occurrences of grave human rights violations.<sup>74</sup> Therefore, conditionality is normally not activated when human rights violations routinely take place in a country, unless the situation gravely and suddenly deteriorates.<sup>75</sup> This is difficult to reconcile with the Strategic Framework and Action's plan statement that 'when faced with violations of human rights, the EU will make use of the full range of instruments at its disposal, including sanctions or condemnation. The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries'.<sup>76</sup>

This raises the question of the monitoring of the human rights situation in countries with which the EU has an agreement containing an essential elements clause. No agreement has so far established an organ specifically dedicated to the monitoring of the human rights situation of the parties, though this has sometimes been done subsequently after the entry into force of the agreement. For the rest, human rights issues can of course be addressed as part of the political dialogue foreseen by the agreement, if any, by the general committee in charge of overseeing and managing the agreement, or by parliamentary committees which are established by a number of agreements.<sup>77</sup> Actually, when a party considers taking appropriate measures, the general committee must under the non-execution clause in most cases receive information and mediate between the parties. However, an exception to such role is normally foreseen for cases of 'special urgency', which are generally understood as including grave violations of essential elements. Civil society has traditionally had a role in monitoring human rights in all countries of the world, and in some EU agreements, it is given a formal or informal role with regard, notably, to human or labour rights. General standing organs involving civil society have also been set up by a number of Agreements.<sup>78</sup> There are finally no standard procedures to investigate alleged human rights violations in a partner country, contrary to FTAs concluded by other nations, under which a right of individual petitions may be recognised to the effect of inviting the relevant authority to investigate certain violations of human rights or other standards specified in the agreement.<sup>79</sup> The lack of a similar mechanism has been lamented by one author stating

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<sup>74</sup> European Commission, 'Using EU Trade Policy to promote fundamental human rights – Current policies and practices', Non-Paper, 2012: [http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc\\_149064.pdf](http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf), fn. 7-8-9 (last visited 27 February 2015).

<sup>75</sup> BARTELS, L., *op. cit.* (note 68), p. 11.

<sup>76</sup> Above (n 4), p. 3.

<sup>77</sup> BARTELS, L., 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', *Legal Issues of Economic Integration*, n.º 40, 2013, p. 301.

<sup>78</sup> BARTELS, L., *op. cit.* (note 36), pp. 10-11.

<sup>79</sup> See e.g. North American Agreement on Labor Cooperation (NAALC), signed 14 September 1993, Art. 16 (3).

[t]here is no reason why the EU, with its commitment to promoting human rights in the world, should not follow best practice, and introduce into its trade agreements a mechanism whereby individuals, civil society and the other EU institutions are able to require the Commission (or the EEAS) to investigate whether third countries are complying with human rights conditions to which they have committed in the context of a free trade agreement or unilateral trade preferences. Of course, this does not mean that these actors would have any role in the formal decision to suspend the agreement.<sup>80</sup>

It must be concluded that, in general the conditionality policy lacks any proper 'operational mechanism' for implementation, monitoring of human rights situations and evaluation of the effectiveness of sanctions. All this is supposed to take place through local diplomatic missions which lack time and resources to conduct such ground work.<sup>81</sup> Action 11 (a) of the 2012 Strategic Framework for Human Rights, which promises to 'Develop [a] methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements' might in this regard provide a welcome basis for regularly assessing the human rights situation of partner countries and evaluating the course that it is taking as well as the necessity or not of sanctions. Other authors are more critical and note that the overly integrative ambitions of EU FTAs, coupled with the sheer volume of the issues they address dilutes their operational nature, making their enforcement nearly impossible:

European PTAs are marred by considerable legal inflation. They ambitiously cover a wide range of topics, going much beyond the multilateral commitments entered into by the partners within the framework of the World Trade Organisation, but they are mostly unenforceable – if not entirely devoid of substance. The Union, in other words, seems to be using trade agreements to promote its views on how countries of the world should be run, and it is able to enlist its trade partners to do this, albeit in a noncommittal or semi-committal way. Trade policy therefore provides a vehicle for declaratory diplomacy.<sup>82</sup>

<sup>80</sup> BARTELS, L., *op. cit.* (note 36), p. 19.

<sup>81</sup> ZWAGEMAKERS, F., *op. cit.* (note 52), p. 5.

<sup>82</sup> HORN, H., MAVROIDIS, P. and SAPIR, A., *Beyond the WTO – An anatomy of EU and US preferential trade agreements*, Bruegel Blueprint n.º 7, 2009: [http://www.bruegel.org/download/parent/238-beyond-the-wto-an-anatomy-of-eu-and-us-preferential-trade-agreements-english/](http://www.bruegel.org/download/parent/238-beyond-the-wto-an-anatomy-of-eu-and-us-preferential-trade-agreements/file/663-beyond-the-wto-an-anatomy-of-eu-and-us-preferential-trade-agreements-english/), p. vi (last visited 27 February 2015).

Indeed, essential elements clauses seem to be considered chiefly as 'political' clauses by the Council,<sup>83</sup> and many observers have pointed out that, in comparison with the US approach, which takes a binding approach towards a small and clearly defined number of standards, the EU's essential policies clauses are 'aspirational' and aimed at fostering dialogue.<sup>84</sup> In any event, another author has warned against the temptation to activate essential elements clauses for the sole purpose of showing some muscle and/or avoiding the accusation of double standards. Indeed, apparently trade and other sanctions are only effective in certain contexts, and are completely useless in others. Therefore, risking to apply sanctions just to see them fail would harm rather than bolster the credibility of the Union's conditionality policy.<sup>85</sup> In this regard, one must be prepared to accept that the removal of trade benefits is perhaps not an argument that is convincing enough to induce change on its own. The example of the little effective GSP+ sanctions taken, for example, against Belarus or Myanmar may corroborate this hypothesis,<sup>86</sup> and may explain why a violation of essential elements have never given rise to sanctions of that sort. Moreover, as conditionality is becoming an ever more contentious issue, all the more on the part of a post-colonial power,<sup>87</sup> and as at least some partner countries are resisting it very assertively,<sup>88</sup> the EU should probably tread quite lightly at the time

<sup>83</sup> See Council of the European Union, 'Common approaches on the use of political clauses', 2 June 2009, 10491/1/09.

<sup>84</sup> See CHAUFFOUR, J.-P. and MAUR, J.-C., *op. cit.* (note 52), p. 15.

<sup>85</sup> BARTELS, L., *op. cit.* (note 68), p. 18. The ECJ (*Mugraby*, 6 September 2011, T-292/09) has indeed explicitly confirmed that they EU retained discretion in applying sanctions for human rights violations and was in no way obliged to invoke the essential elements clause. See para. 40: 'as regards the alleged failure by the Commission to act with respect to the suspension of the various Community assistance programmes in Lebanon, it must be held that, contrary to the applicant's assertions, Article 2 of the Association Agreement is not intended to permit or indeed to impose the recourse to and adoption of measures if the parties to that agreement fail to comply with the clause relating to fundamental rights contained in that article. Article 2 of the Association Agreement contains a provision on human rights, which provides that the relations between the parties and all the provisions of the agreement itself are to be based on respect of democratic principles and fundamental human rights.'

<sup>86</sup> See BEKE, L. and HACHEZ, N., 'The EU GSP: A Preference of Human Rights and Good Governance? The Case of Myanmar', forthcoming in WOUTERS, J., MARX, A., GERAETS, D., and NATENS, B. (eds.), *Global Governance though Trade*, Cheltenham, Edward Elgar, 2015.

<sup>87</sup> WETZEL, J., 'Introduction', in WETZEL, J., (ed.), *The EU as a 'Global Player' in the Field of Human Rights*, Abingdon, Routledge, 2012, p. 12.

<sup>88</sup> See for example the assertion that the relationship of the EU with ACP countries has evolved from one of cooperation to one of coercion: HURT, S., 'Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention', *Third World Quarterly*, n.º 24, 2003, p. 161.

of contemplating sanctions for fear of fuelling conflict rather than fostering social change.<sup>89</sup> The EU must finally be mindful of not doing more harm than good by activating sanctions as these could hit the local population more painfully than the government. And indeed, the EU has made it a rule that its sanctions and restrictive measures must comply with international law and fundamental rights, and must not entail an undue economic or humanitarian cost.<sup>90</sup> This is why the conduct of human rights impact assessments has been rightly suggested before deciding on sanctions.<sup>91</sup>

### III. Conclusion: are essential elements clauses so essential to achieving the EU's trade-human rights nexus?

Trade relations have been noted to be natural avenues for achieving normative objectives such as human rights. Legal instruments governing those relations are a powerful lever to achieve those aims, notably through conditionality policies.<sup>92</sup> This has clearly been the philosophy of the EU since 1995, which it reaffirmed in its Strategic Framework for Human Rights, in which the Council lays down specific actions in respect of bilateral instruments to 'make trade work in a way that helps human rights.'<sup>93</sup> In this article I have provided an overview of the principal way in which EU bilateral trade and investment agreements has included 'beyond trade' concerns in a way that leverages human rights, namely the essential elements clauses.<sup>94</sup> In this conclusion, I would like to outline a brief evaluation of whether and to what extent the EU's ambitions in this regard have succeeded. The picture is quite mixed.

From the point of view of effectiveness, the EU has not deviated from its policy to systematically link trade and human rights by including 'essential elements' clauses in all its general trade agreements since 1995.

<sup>89</sup> MEUNIER, S. and NICOLAIDIS, K., 'The European Union as a conflicted trade power', *Journal of European Public Policy*, n.º 13, 2006, p. 921.

<sup>90</sup> See Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy', 15 June 2012, 11205/12 2012, 5.

<sup>91</sup> BARTELS, L., *op. cit.* (note 26), p. 31.

<sup>92</sup> See generally HAFNER-BURTON, E., *op. cit.* (note 2).

<sup>93</sup> Council of the European Union (note 4) Action 11.

<sup>94</sup> As mentioned above, the more recent EU trade agreements now include 'sustainable development chapters' which seek to incept an ongoing dialogue with the partner country on sustainable development issues, including labour rights. The approach taken by those chapters is fundamentally different from that of the essential elements clause, and it has been argued elsewhere that such approach might not be less effective. See BEKE, L., D'HOLLANDER, D., HACHEZ, N., and PÉREZ DE LAS HERAS, B., *op. cit.* (note 25), p. 77.



The EU should be credited for this, as this single point has delayed and stiffened a number of negotiation processes. The essential elements clause potentially provides a hard mechanism through which the EU can sanction the many human rights violating countries with which it has an agreement in place. Yet, the EU very seldom activates conditionality in this way, and when it does, trade mechanisms are not at the heart of sanctions. This attitude has been analysed as a sign of weakness or pusillanimity from the EU, who would be talking the talk but would not dare walking the walk. Others have emphasised that sanctioning was not necessarily the point of conditionality: what is important would be to put human rights commitments on record, and thereby provide a basis for ongoing dialogue and progressive improvement. Partial evidence seems to show that, in terms of the correlation between trade instruments and human rights improvement over the long run, the dialogue-based approach is not necessarily negative.<sup>95</sup>

In terms of the legitimacy, the picture is also rather conflicted. Human rights conditionality is an established line of policy and has been practiced outside of Europe. Yet it is still being questioned by a number of —developed and developing— EU partners who do not favour linking human rights and trade in conditionality terms. Arguments are that insistence on improving human rights standards should not become disguised protectionism, and should not be used to put into question the comparative advantage of developing countries. Many EU Member States being former colonial powers, the imperialistic aftertaste of this normative agenda is also increasingly resented. However warranted these objections on principles might be, the way the EU has been concretely applying conditionality based on trade agreements somehow reinforces their import. The most important challenge in this regard has to do with perceived double standards. We have put in evidence the fact that deviations in the drafting of human rights clauses —however justified by historical or geographical criteria— potentially create obligations of a different scope and intensity across the group of EU trade partners. With regard to sanctions, the only times the EU ever acted on the basis of the human rights clauses were to target ACP countries – the former group of EU colonies, whereas certain events left ignored would also have warranted some reaction by the EU.

In terms of credibility, the EU has set the bar quite high for itself, by casting into constitutional stone its commitment to linking external (trade) relations and human rights, and by identifying concrete and ambitious

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<sup>95</sup> See MARX, A., SOARES, J., and VAN ACKER, W., 'The protection of the rights of freedom of association and collective bargaining. A longitudinal analysis over 30 years in 73 countries', forthcoming in MARX, A., WOUTERS, J., BEKE, L and RAYP, G. (eds.), *Global Governance and Labour Rights*, Cheltenham, Edward Elgar, 2015.

objectives, notably in the Strategic Framework for Human Rights. The effectiveness and legitimacy flaws identified above already largely affect the credibility of the EU's stance as a global normative power, and have reportedly stood in the way of many EU foreign policy objectives. All in all, it is quite difficult to evaluate whether the EU conditionality policy as implemented through bilateral trade relations is successful. The EU has clearly chosen a progressive and non-adversarial approach, and therefore changes, if any, will take place incrementally and over the long run. However, the effectiveness, legitimacy and credibility issues we have outlined above confirm that the EU is fundamentally, in the words of Meunier and Nicolaidis, a 'conflicted trade power'.<sup>96</sup> It wants to do the right thing and robustly link trade and human rights, but other considerations stand in the way. This is of course normal as policy-making by definition entails compromise. However, given the ways in which the 'essential elements' strategy falls short, the outside observer is left wondering whether, in its position and with the tools at its disposal, the EU *could* and *should* not achieve more.

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<sup>96</sup> MEUNIER, S. and NICOLAIDIS, K., *op. cit.* (note 89).