

# Human rights in EU trade agreements

## The human rights clause and its application

### SUMMARY

The practice of linking human rights with trade liberalisation has gained ground among many trade partners. Not only the EU, but also other important trade powers, such as the US and Canada, embed human and labour-rights provisions in their new trade agreements. For the EU, this ensues inevitably from the normative vision underlying all of its external policies, as enshrined in the Treaties. Accordingly, the EU has committed to respecting and promoting human rights and democracy through its external action.

The main mechanism for incorporating human rights into the EU's bilateral agreements consists of an 'essential elements' human rights clause that enables one party to take appropriate measures in case of serious breaches by the other party. The clause, which also covers democratic principles and often the rule of law, is more than just a legal mechanism enabling the unilateral suspension of trade commitments in times of crisis. It enshrines the parties' commitments to human rights and thus puts EU relations with third countries on a solid regulatory base, opening the path to dialogue and cooperation on human rights issues. So far, the EU has clearly preferred a constructive engagement to more restrictive measures, and has not activated the clause to suspend trade preferences under any of its trade agreements. Civil society and the European Parliament have, on the other hand, encouraged the European Commission to use the clause in a more robust way in order to respond to serious breaches of human rights and democratic principles.

*This briefing focuses exclusively on the EU's bilateral and regional free trade agreements. EU unilateral human and labour rights provisions in trade arrangements are addressed in a [separate briefing](#). A forthcoming EPRS paper will provide more information about labour rights (many of which also form part of the human rights enshrined in international conventions) in EU bilateral agreements.*



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## Background: Origins of the human rights clause

The effect of trade liberalisation on human rights remains a matter of controversy. On the one hand, trade liberalisation has often been criticised by [civil society](#) and other stakeholders for undermining human rights as well as the capacity of states to promote and enforce these rights, by being instrumental in placing economic considerations and the rights of investors and companies above the former. On the other hand, this liberalisation is credited with contributing to some degree to progress with regard to human and labour rights, primarily by increasing welfare and lifting people out of poverty, and also by creating jobs (including for women) and providing better labour conditions (also thanks to global consumers' concerns).

All of the EU's external action, trade policy included, should reflect its fundamental values – such as democracy, human rights, and the rule of law – which are clearly enshrined in the Treaties. In line with this, the EU has taken steps to ensure that bilaterally agreed human rights provisions also apply to its trade agreements, and thus to use its leverage as the world's biggest trade bloc in order to promote respect for these rights together with its trade partners. Today, human rights feature prominently in most of the EU's agreements, commercial and non-commercial ones, with third countries. This is in line with EU's official policy on the matter as outlined in the '[Common Approach on the use of political clauses](#)', agreed by Coreper in 2009, providing that political clauses should be systematically included in agreements with third countries with the aim of promoting EU's values and political principles and its security interests. According to EU practice,

- human rights are to be included in EU political framework agreements under 'essential elements' clauses;
- EU FTAs are to be linked to these political framework agreements; if no political framework agreement exists, essential elements clauses are to be included in FTAs; and
- serious breaches of the essential elements clauses may trigger the suspension in whole or part of the overall framework agreement and all the linked agreements, including the trade agreement (non-execution clause).

In the framework agreements, the clause is usually complemented by provisions on cooperation and dialogue between the parties on human rights. References to human rights norms and the commitments of parties to these also feature in the preamble of most EU agreements. *Core labour rights* on the other hand (which form part of human rights in a broader sense) are specifically covered in the more recent Trade and Sustainable Development Chapters of EU free trade agreements.

The approach of linking human rights to trade agreements has both supporters and critics. The former emphasise the supremacy of human rights norms against economic considerations and point to the need to subsume trade to such normative considerations. The latter dismiss it as empty rhetoric or legal inflation, and point out that trade should be kept independent of other considerations. Developing countries are reluctant to accept such provisions, seeing them as a form of potential interference in their internal affairs and fearing that higher human rights standards (particularly labour rights) are not only difficult to implement but also risk undermining their competitiveness in international trade. This approach is therefore considered a form of protectionism practised by developing countries. Moreover, the impact of human rights provisions is [hard to assess](#).

At the same time, there are growing pressures in favour of subordinating international trade and investment to human rights norms. Since many trade agreements have a development component, the inclusion of human rights and democratic principles in them is in line with this overarching development objective. Human rights are an important prerequisite for sustainable development; this [stance is embedded](#) in the UN sustainable development goals.

The human rights clause (HRC) was initially intended as a mechanism allowing the EU to suspend its obligations under international agreements in situations of egregious violations of human rights. In the 1970s, the EU wanted to suspend its development aid payments to Uganda in response to atrocities committed by a bloody dictatorship, but lacked a legal mechanism to do so. The first reference to human rights in an EU agreement was in Article 5 of the fourth Lomé Convention, concluded in December 1989 (covering African, Caribbean and Pacific countries), which provides for the parties' commitment to human rights and the importance of these rights for achieving the objectives of development. However, this article did not provide a clear legal basis that would allow to suspend or denounce an agreement in case of serious violations of human rights or democratic principles. The first EU agreements containing an explicit clause in this respect were signed in the 1990s with a number of Latin American and central and eastern European countries that were going through political transition (namely the 1992 agreements with Brazil, the Andean Pact countries, the Baltic States and Albania<sup>1</sup>). In 1995, the European Community established a policy of systematically including such clauses in all of its new trade agreements.<sup>2</sup> Today, the EU has dozens of bilateral or regional free trade agreements, fully or partly implemented, covering roughly a third of the world's countries. With a few exceptions, they are all subject to human rights conditionality.

The clause was an important innovation that had no match in the international agreements of other parties. It made human rights subject to the mechanisms of political dialogue and cooperation, and created the legal possibility to adopt restrictive measures proportionate to the gravity of the violations. From the beginning of its application, the clause was intended as part of all of the EU's international agreements, including on trade, cooperation and development aid. Trade embargoes, both past and present, are among the measures applied in response to violations of human rights and democratic principles. Hence, the idea of withdrawing trade preferences granted through bilateral agreements in response to such violations is not new.

#### Human rights clauses outside the EU

Many trade agreements concluded around the world in recent years include some reference to human rights. The US and Canada are among the strongest supporters of this linkage. However, unlike the EU, which focuses on universal human rights, the US and Canada focus more narrowly on specific rights in their bilateral trade agreements. The US has traditionally been considered a [leader](#) in promoting labour rights, transparency, due process and anti-corruption in trade agreements. Canada has been perceived in similar terms. Both countries have strong enforcement procedures with respect to such rights. Chile is yet another country that pays particular attention to human rights in its trade relations.

## Human rights clause: Legal aspects and relevance

The human rights clause built into EU bilateral agreements (also called the 'democracy clause', as it refers to democracy as well) is phrased as an essential elements clause, which allows parties to partially or fully suspend an agreement unilaterally in case it is breached.

The HRC is based on the 1969 [Vienna Convention on the law of treaties](#), more specifically its Article 60, entitled 'Termination or suspension of the operation of a treaty as a consequence of its breach', which states that:

'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'.

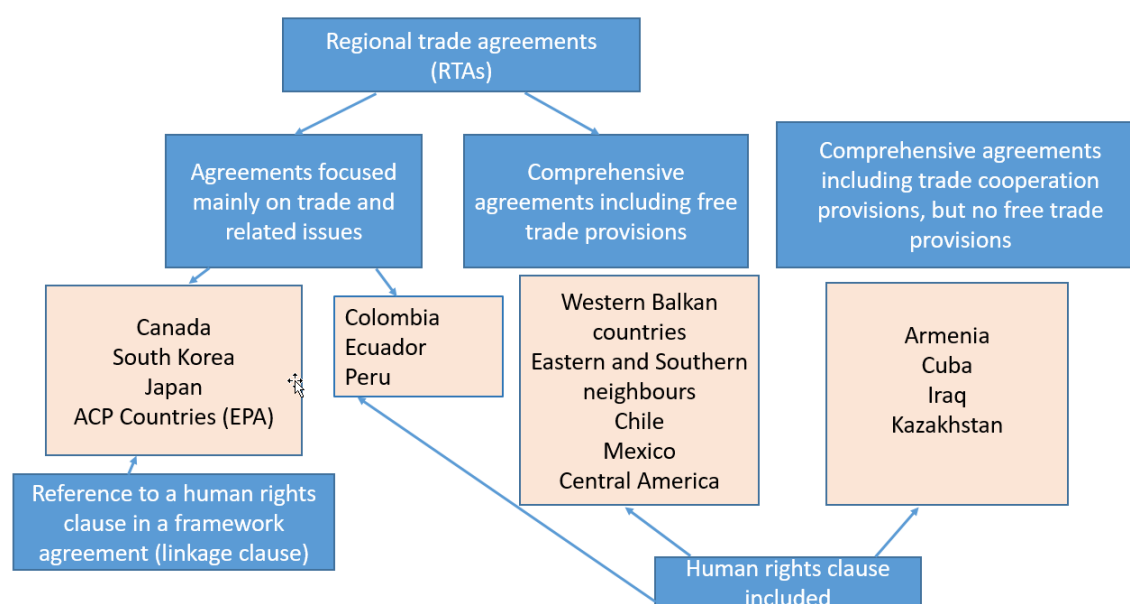
The clause is phrased in a relatively similar way across the numerous EU agreements that include it. While the EU aspired to a uniform clause across all agreements, the differing views of its partners brought variation to the clause. The main element of variation is the reference to the international human rights norms that are binding on the parties and to the [Universal Human Rights Declaration](#), which may or may not be present. A reference to the rule of law is not present in all clauses.

Table 1 – Standard formulations of the 'essential elements' human rights clause (HRC) in international EU agreements

A clause with no reference to international norms	A clause with reference to international norms	A clause with reference to international and European norms
<p>Respect for human rights, democratic principles and the rule of law, which underpin the ACP–EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.</p> <p><a href="#">(Cotonou Agreement with ACP countries, Article 9(2))</a></p>	<p>The 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.</p> <p><a href="#">(Framework Agreement with Korea, Article 1(1))</a></p>	<p>Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the United Nations Universal Declaration of Human Rights of 1948 and as defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990 shall form the basis of the domestic and external policies of the Parties and constitutes an essential element of this agreement.</p> <p><a href="#">(Association Agreement with Georgia, Article 2(1))</a></p>

The EU's policy is to include the clause in political framework agreements, to which free trade agreements should be linked. When there is no such framework agreement, the clause forms part of the agreement containing the free trade provisions. The latter agreement may be either a free trade agreement or a more comprehensive one including free trade provisions alongside provisions on cooperation in various areas (such as association agreements). The clause is also present in some agreements which deal with trade aspects (such as trade cooperation), but do not include tariff liberalisation (and therefore are not free trade agreements). Some earlier free trade agreements – such as the [Association Agreement with Turkey](#) (1963), [the Agreement on a Customs Union with Andorra](#) (1990), and the [Agreement on the European Economic Area](#) (EEA) with Iceland, Lichtenstein and Norway (1993) – do not contain an HRC, since the clause was gradually introduced in the 1990s. The EEA agreement does, however, refer to human rights in its first recital.

Figure 1 – Types of trade agreements and the human rights clause



Data source: EPRS.

When the clause is present in a framework agreement, a linkage clause in the trade agreement has the legal effect of making the HRC applicable to this as well.<sup>3</sup> A typical linkage clause is the one found in the trade agreement with South Korea:

'Article 2. The present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. It constitutes a specific Agreement giving effect to the trade provisions within the meaning of the Framework Agreement'.

The linkage clause can also refer explicitly to the essential elements clause, for example in the [Economic Partnership Agreement \(EPA\) with the Cariforum States](#) (2008):

'Article 2. This Agreement is based on the Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement'.

Other EPAs ('interim EPAs', but also the [Economic Partnership Agreement with the East African Community](#) (EU-EAC EPA)) do not explicitly refer to the HRC in the Cotonou Agreement. However they endorse the non-execution clause in this agreement (its Article 96), which can be construed as implicit recognition of the HRC.

The aim of the HRC is not to set new human rights and democratic standards, but to reaffirm the commitment of the parties to their already existing obligations under international law. For the EU, the clause reinforces its existing obligations (under the Treaties and the EU Charter of Fundamental Rights) to ensure that its external policies are not applied in violation of human rights, without adding new legal obligations.

## The role of the clause in the negotiation phase

The clause does not serve as a stringent benchmark for selecting potential EU trade partners.<sup>4</sup> Practice shows that not all EU partners are found to be compliant with human rights and democratic norms when negotiating trade agreements with the EU. However, human rights concerns may constitute legitimate grounds for the EU to postpone the adoption of a free trade agreement after the conclusion of negotiations. Recent such cases include Burundi and Vietnam. The EU instituted sanctions in 2015 and 2016 against Burundi ([targeted sanctions](#) against individuals and suspension of budget aid, respectively) on account of the grave human rights violations in the country. Nevertheless, the EU proposed to Burundi to become a party to the [EPA with the East African Community](#). Actually, this agreement was negotiated before the crisis in Burundi started, when the country was still making progress on democratic and human rights standards. For the time being, Burundi refuses to sign and ratify the EPA on account of the EU sanctions, but even if it does so, human rights will remain a central concern on the EU side in the process of the agreement's adoption.

Vietnam is another potential EU trade partner with a problematic human rights and democratic record. While the EU has recently finalised an FTA with Vietnam, numerous concerns have been expressed with regard to the human rights and political situation in this country (including by the European Parliament<sup>5</sup>). The FTA contains an HRC (albeit indirectly, via a reference to the clause in the [political cooperation agreement](#)) and a relatively elusive enforcement mechanism that provides for 'measures taken in accordance with international law which are proportionate to the failure to implement obligations under this Agreement', but not for suspension (Article 57(4)). During the negotiations, the Commission, together with civil society, addressed the human rights concerns in relation to Vietnam.<sup>6</sup> It pointed to the dialogue on human rights already in place with the country, and to existing cooperation in the field. In the meantime the EU institutions [continue to raise](#) human rights issues with the Vietnamese authorities at various levels and occasions. This is indicative of the fact that human rights concerns are a clear [factor](#) in the discussions about the approval of the agreement by the Parliament and the Council.<sup>7</sup>



The Commission's approach to the trade and human rights nexus is based on the premise that, once adopted, the FTA will open up effective channels for dialogue on democracy and human rights as well as increased commercial and economic contacts, which would encourage further progress. Some would argue that the EU has the strongest leverage during the negotiation phase when it can still withdraw the conclusion of the agreement unless the other party improves its commitment to human and labour rights. It would therefore make sense to exert pressure on other parties to improve their compliance with human and labour rights norms before an agreement is concluded.

Trade agreements have also a specific impact on human rights through the economic liberalisation they foster. The Commission weighs the overall (positive and negative) impacts of trade agreements, including with respect to human rights, in the ex ante impact assessments it draws up before opening negotiations on such agreements. With the help of its [guidelines on the analysis of human rights impacts in impact assessments](#), the Commission evaluates the likely impact of trade liberalisation either on the human rights of individuals in the countries or territories concerned, or on the ability of the EU and partner countries to fulfil or progressively realise their human rights obligations. [Sustainability impact assessments](#) are further carried out during negotiations, including a detailed qualitative analysis on the potential impact on human rights.

## The application of the clause

An analysis of EU trade partner countries, whose systems of governance range from authoritarian regimes to liberal democracies, shows a great diversity among them with respect to human rights and democracy indicators. These indicators have a relatively balanced distribution in the different categories (Figures 2 and 3 below give visual information on the indicators as provided by the EU-based [Varieties of Democracy \(V-Dem\) Institute](#) and the US-based [Freedom House](#)).

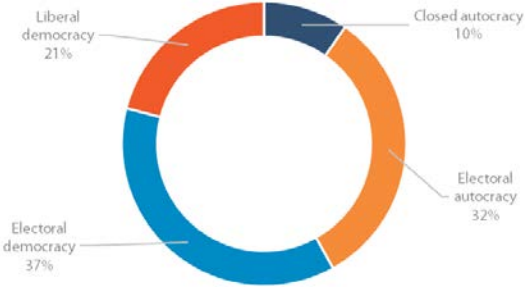

<p>Figure 2 – Distribution of EU trade agreement partners according to the type of political system in 2017<sup>8</sup></p>	<p>Figure 3 – Distribution of EU trade agreement partners according to their freedom score in 2018</p>																		
 <table border="1"> <caption>Data for Figure 2: Distribution of EU trade agreement partners by political system in 2017</caption> <thead> <tr> <th>Political System</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Liberal democracy</td> <td>21%</td> </tr> <tr> <td>Closed autocracy</td> <td>10%</td> </tr> <tr> <td>Electoral democracy</td> <td>37%</td> </tr> <tr> <td>Electoral autocracy</td> <td>32%</td> </tr> </tbody> </table>	Political System	Percentage	Liberal democracy	21%	Closed autocracy	10%	Electoral democracy	37%	Electoral autocracy	32%	 <table border="1"> <caption>Data for Figure 3: Distribution of EU trade agreement partners by freedom score in 2018</caption> <thead> <tr> <th>Freedom Score</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Partly Free</td> <td>37%</td> </tr> <tr> <td>Free</td> <td>49%</td> </tr> <tr> <td>Not Free</td> <td>14%</td> </tr> </tbody> </table>	Freedom Score	Percentage	Partly Free	37%	Free	49%	Not Free	14%
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Table 2: Worst performers in terms of human rights and democracy among the parties to EU trade agreements, 2018

Country	Freedom House classification (2018)	Variety of Democracy classification (2018)	Type of trade agreement	Human rights clause
Algeria	Not free	Electoral autocracy	FTA	HRC present
Cameroon	Not free	Electoral autocracy	FTA	No HRC, but reference to the non-execution clause in the Cotonou Agreement (Article 96)
Cuba	Not free	Closed autocracy	Trade cooperation	HRC present, but provision recognising the right of the parties to determine their political system
Egypt	Not free	Electoral autocracy	FTA	HRC present
Eswatini	Not free	Closed autocracy	FTA	HRC present
Iraq	Not free	Electoral autocracy	Only trade cooperation	HRC present
Kazakhstan	Not free	Electoral autocracy	Only trade cooperation	HRC present
Syria	Not free	Closed autocracy	FTA under sanctions	No HRC (association agreement concluded before HRC was introduced)
Turkey	Not free	Electoral autocracy	Customs union	No HRC (association agreement concluded in 1963, long ago before the introduction of the HRC)
Palestinian Authority	Not free	Closed autocracy	FTA	HRC present
Zimbabwe	Not free	Electoral autocracy	FTA	No HRC, but reference to the Cotonou <i>acquis</i> and the non-execution clause in the Cotonou Agreement (Article 96)

Source: DG Trade, V-DEM, Freedom House.

To date, the EU has never suspended trade preferences under a bilateral trade agreement containing an HRC or a linkage clause to an HRC. The presence of so many countries with a problematic human rights and democracy record among the parties to the EU's trade agreements may of course raise questions. However, a common misconception is that the primary objective of the clause is to enable the EU to place sanctions on its partners by blocking their enhanced access

to its market as granted by the agreement. In fact, the clause gives the EU a legal basis to address human rights issues with its partners in various other, more constructive ways. By affirming the parties' commitment to human rights, the clause opens the way to political dialogue, consultations and a range of cooperation measures in the field of human rights and democracy (e.g. on the implementation of international human rights instruments). The aim is therefore to create incentives for improving respect for and protection of human rights, and this has been the EU's preferred approach.

In practice, the EU conducts regular political and human rights dialogue with many of its partners, including with those to which it is bound through a political cooperation agreement and / or trade agreement (such as the ACP countries). Where there is an agreement with an HRC, this confers more legitimacy to dialogue. Such dialogue is part of the Union's broader foreign policy and is coordinated by its External Action Service. Human rights can also be addressed in the joint oversight bodies established by bilateral agreements. Even if none of these agreements provides for a permanent committee to specifically monitor the implementation of the essential elements clause, such bodies can be established subsequently on an ad-hoc basis.<sup>9</sup> Such ad-hoc human rights committees have been established, for instance, with certain Mediterranean countries. Labour rights are addressed in the Trade and Sustainable Development Committees. Some agreements – such as the association agreements and the Cariforum EPA – also provide for parliamentary committees and for consultations with civil society. These are both fora in which human rights and labour rights can be adequately addressed.

The Commission also monitors the impact on human rights in its [ex post impact assessments](#). Only a few have been drawn up in relation to trade agreements already in force (Mexico, South Korea).

EPRS has [analysed](#) the impact of the HRC on the human rights situation with regard to the trade agreements with Chile and Mexico, concluding that it is very difficult to accurately assess the impact of such conditionality. Whenever progress on human rights reforms is established, it could be attributed to other internal and external drivers as well, including domestic politics or cooperation with other major non-EU trade partners on issues such as labour rights.

## The non-execution clause

In case dialogue and consultation do not work, different legal provisions (also known as the 'non-execution clause') enable the parties to take 'appropriate measures'. The non-execution clause is usually included in the final dispositions of the agreement containing the HRC and enables the adoption of 'appropriate measures' in the case of violation of an essential element. Standard 'appropriate measures' to be taken in case of non-fulfilment of obligations, should be in line with international law and proportionate to the gravity of the violation. The suspension of an agreement should be a measure of last resort. Priority must be given to measures that least disrupt the application of an agreement. When appropriate measures are envisaged by one party, consultations should take place, except in cases of urgency, usually in the joint oversight body, such as the Association Council. In some agreements, the measures can be subjected to an arbitration procedure (as in the case of the agreement with Korea in 2010), or to the regular dispute settlement mechanism (as in the case of the agreements with Georgia and Moldova from 2013). The Cotonou Agreement, which serves as the framework agreement for EPAs, has the most extensive provisions in the non-execution clause, emphasising the role of political dialogue and providing for an elaborate schedule in case 'appropriate measures' are considered.

On the EU side, the decision to suspend the application of an agreement belongs to the Council. According to Article 218(9) of the [Treaty on the Functioning of the European Union](#) 'The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement ...'. For example, in [2010](#) the Council suspended development aid to Zimbabwe based on Article 96 of the Cotonou Agreement. The Parliament has to be kept informed at all stages of this procedure.



The legal text of the agreements (until the strategic partnership agreement with Canada - see below) provides no clear indications on the circumstances that would warrant the activation of the clause. Practice shows that 'appropriate measures' have been taken only under the Cotonou Agreement in response to very serious breaches of democracy and human rights, such as coups d'état, internal conflicts, etc., and only with regard to EU development aid and cooperation. In 2005, the EU Council also [decided](#) to suspend technical meetings under the Partnership and Cooperation Agreement with Uzbekistan in response to the brutal government crackdown on a local uprising.

### The HRC under the Cotonou Agreement

To date, the EU has taken 'appropriate measures' in response to breaches of the HRC only under the Cotonou Agreement (in some 24 cases). These have consisted of the suspension of development aid and cooperation by the EU. Trade preferences have not been suspended, even when this was possible – when the agreement still featured a trade pillar. This signals a certain reluctance on the part of the EU to apply the clause in relation to trade. According to research on the topic,<sup>10</sup> the most frequent reasons for applying the clause have been coups d'état followed by flawed elections – reasons therefore related to democratic principles. Violations of human rights and the rule of law have been a less frequent reason for activating the clause; whenever this happened, it was usually in conjunction with the first two causes. Because of this, the clause has been described as a political one, in line with the Council's 2009 policy document on the use of political clauses. Moreover, the clause has been invoked only in response to a serious deterioration of the political situation in a country: 'Therefore, conditionality is normally not activated when human rights violations take place as a rule in a country, unless the situation gravely and suddenly deteriorates.'<sup>11</sup>

Civil society organisations have often criticised the EU for being too reluctant to apply sanctions based on the HRC. Some academic studies have also argued that the EU has been inconsequential<sup>12</sup> in its sanctions policy, and has tended to be more assertive towards smaller partners, which happen to be more dependent on EU aid and trade. When deciding on HRC-related sanctions, the EU has to assess the extent to which they would be effective and deliver on the policy objectives pursued. It also needs to bear in mind that once sanctions are effectively introduced, political leverage over the partner country may diminish. In such situations, the EU needs also to take steps to avoid the risk of undermining the legal certainty trade agreements are expected to create and protect. Moreover, it has to take into account the negative impact that sanctions would have on jobs that depend on export opportunities. Last but not least, the EU also needs to consider the changing landscape of economic power in the world. The EU's diminishing role as a trade partner in comparison with emerging economies, such as China or India, which put less emphasis on values promotion through trade, has led to more [bargaining leverage](#) for third countries and, consequently, less efficacy in values promotion through instruments such as the HRC.

Some EU partners, with which the EU has a trade agreement subject to the HRC, have experienced a coup d'état or similar political upheavals, without the HRC being activated. Two such trade partners – Egypt and Zimbabwe – underwent an unconstitutional change of regime, in 2013 and 2017 respectively. These changes were arguably directed against regimes lacking in democratic legitimacy and not favorable to human rights. In the case of Syria, with which the EU has had a cooperation agreement since 1977 (the first such agreement with a country from the Southern Neighborhood), including trade provisions but not an HRC, the EU has imposed sanctions that are still in place. These [include](#) an oil embargo, export restrictions on arms, weapons and equipment that might be used for internal repression, as well as restrictions on equipment and technology for the monitoring or interception of communications. The sanctions have been in place since 1 December 2011 and are reviewed on an annual basis.

### A novel approach: The clause in the agreements with Canada

The political agreement with Canada is the first EU agreement fully clarifying the specific circumstances under which the HRC could be applied. It builds on the precedent established with Singapore. In the annexes to the EU's partnership and cooperation agreement (PCA) with this country, specific provisions limit the application of the clause to serious and as yet unforeseen violations.<sup>13</sup> In the case of Canada, its [strategic partnership agreement \(SPA\) with the EU](#) specifies that 'for a situation to constitute a "particularly serious and substantial violation" of Article 2(1), its

gravity and nature would have to be of an exceptional sort such as a coup d'État or grave crimes that threaten the peace, security and well-being of the international community' (Article 28.3). According to [scholars](#), such explicit human rights language is surprising, given that Canada has a recognised fundamental rights record and was firmly opposed to linking its trade relations with the EU to political objectives. The inclusion of the clause in agreements with countries such as Japan and Canada serves mainly the purpose of consistency. The absence of such a clause would have created a [risky precedent](#) for future EU agreements with more challenging countries such as China or India.

Another novel element is the way the non-execution clause in the SPA is linked to the [EU-Canada Comprehensive Economic and Trade Agreement](#) (CETA): 'a particularly serious and substantial violation of human rights or non-proliferation, as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)'. For the first time, not the suspension of the agreement, but the termination is envisaged, which makes the clause a truly 'nuclear option'.

## Enforcing compliance with human rights norms – an obligation for the EU?

Is the EU obliged to apply the HRC as a counter-measure if the other party does not comply with its human rights obligations? The clause is not intended to lead to measures every time there are violations of human rights and democratic principles of a certain gravity. As the European Court of Justice clarified in its judgment on the *Mugraby* case (Case T-292/09; appeal: C-581/11 P),<sup>14</sup> the EU has **a right** to adopt 'appropriate measures', but **not an obligation** to do so.

The [judgment](#) of the Court, on appeal, explicitly states:

'70 By using the words "may take" [appropriate measures], the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, and not an obligation, to take such appropriate measures.

71 That non-binding nature, expressly envisaged in that provision, cannot be called into question in the light of Article 86(1) of the Association Agreement, which concerns the measures that the parties must take to fulfil their obligations, and not the suspension of those obligations'.

Moreover, EU trade agreements concluded after 2008 contain explicit provisions excluding any direct legal effect<sup>15</sup> (i.e. an agreement cannot be construed as conferring rights or imposing obligations that can be directly invoked before EU or Member State courts and tribunals). This preclusion is legally codified in different ways, via a combination of several provisions in the text of the agreement and/or in the Council decisions on signing it, and on the provisional application of the agreement (as in the case of FTAs with Korea, Colombia and Peru).<sup>16</sup> Therefore, individuals and organisations cannot invoke the HRC before the courts of the EU or Member State courts over failure of their trade partners to adopt appropriate measures in response to human rights breaches.

## Stakeholder recommendations for improving the HRC

Both civil society<sup>17</sup> and academics<sup>18</sup> have made recommendations about how to improve the HRC:

- include an explicit reference to international human rights norms in all clauses;
- carry out regular assessments of the human rights impact of trade agreements (this can also be done by improving the consideration of human rights in the ex post impact assessments of EU trade agreements);
- amend agreements in light of the conclusions of the human rights impact assessments;
- set up a human rights roadmap with clear benchmarks for the party that is in breach of its human rights obligations;
- set up a human rights committee under each agreement and allow civil society to play a greater role in the monitoring of the agreement;

- improve the role of the European Parliament in the application of the clause (in monitoring human rights, in carrying out consultations on human rights, and in the decision on the suspension of preferences);
- set up a complaint mechanism for human rights violations, managed by civil society;
- establish trade safeguards related to human rights;
- better link the HRC with the sustainable development provisions.

## European Parliament position

The Parliament has repeatedly **supported the inclusion of the HRC in all new trade agreements** negotiated by the EU, e.g. in its [recommendation of 14 September 2017](#) on the negotiations of the modernisation of the trade pillar of the EU-Chile Association Agreement, and in its [resolution of 25 February 2016](#) on the opening of negotiations for an EU-Tunisia Free Trade Agreement.

The Parliament has **deplored the absence of a strong and enforceable HRC**, for example, in the interim economic partnership agreement (EPA) concluded with four eastern and southern African (ESA) states (in the EP [resolution of 21 May 2015](#) on Zimbabwe – the case of human rights defender Itai Dzamara).

The Parliament has also insisted on **the need to consider measures under the HRC in response to serious breaches of human rights in different countries**. For example, in its [resolution of 31 May 2018](#) on the situation in Nicaragua, it pointed out that, 'in the light of the Association Agreement between the European Union and the countries of Central America, Nicaragua must be reminded of the need to respect the principles of the rule of law, democracy and human rights, as set out in the agreement's human rights clause'. It urged the EU to monitor the situation and, if necessary, to assess the potential measures to be taken.

Furthermore, the Parliament has repeatedly stressed **the need to reinforce the application of the HRC** in its resolutions on the EU's annual report on human rights and democracy in the world. In its [resolution of 12 December 2018](#) on the subject, it highlighted that the advancement of human rights and democratic principles, including the implementation of human rights conditionality clauses in international agreements, needs to be supported through all EU policies with an external dimension, including trade policy. In a similar [resolution of 13 December 2017](#), it called on the Commission to monitor the implementation of such clauses effectively and systematically, and to provide the Parliament with regular reports on how partner countries respect human rights. It called on the Commission to adopt a more structured and strategic approach to human rights dialogues within the framework of future agreements. In its [resolution of 14 December 2016](#), the Parliament pointed out the need to establish 'ex ante monitoring mechanisms before any framework agreement is concluded, and on which such conclusion is made conditional as a fundamental part of the agreement, and for ex post monitoring mechanisms that enable tangible action to be taken in response to infringements of these clauses, such as appropriate sanctions as stipulated in the human rights clauses of the agreement'.

## MAIN REFERENCES

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[Negotiations and agreements](#), Directorate-General for Trade, European Commission, 15 February, 2019.

Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries ([COM\(1995\) 216](#)), European Commission, October 1996.

[Reflection paper on political clauses in agreements with third countries](#) (Doc 7008/09), partly classified document, EU Council, February 2009.

## ENDNOTES

- <sup>1</sup> [Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries](#) (COM(1995) 216), European Commission.
- <sup>2</sup> See Lorand Bartels' study, [The European Parliament's role in relation to human rights in trade and investment agreements](#), for information on the history of the clause.
- <sup>3</sup> According to [legal experts](#), however, this strategy runs certain legal risks, namely that the 'trade agreement is not properly covered by a human rights clause in the other agreement'.
- <sup>4</sup> See [EPRS briefing](#) for more details on human rights conditionality under EU unilateral trade preferences.
- <sup>5</sup> EP [resolution](#) of 17 December 2015 expresses serious concerns about the human rights situation in Vietnam. A September 2018 [letter](#) sent by a cross-party group of 32 MEPs to EU trade Commissioner Cecilia Malmström and EU High Representative Federica Mogherini urges them to insist on improvements to the human rights situation in Vietnam.
- <sup>6</sup> See [European Commission's staff working document on Vietnam](#).
- <sup>7</sup> See [Legislative Train Schedule on the FTA with Vietnam](#), European Parliament, 2019.
- <sup>8</sup> The V-Dem classification does not include many island states (e.g. Caribbean and Pacific ones) that have an FTA with the EU.
- <sup>9</sup> See L. Bartels, *ibid.*
- <sup>10</sup> See Johanne Døhlie Saltnes, [The EU's Human Rights Policy – Unpacking the literature on the EU's implementation of aid conditionality](#), working paper No 2, Centre for European Studies, March 2013.
- <sup>11</sup> Lorand Bartels, *ibid.*, p. 12.
- <sup>12</sup> 'This attitude has been analysed as a sign of weakness or pusillanimity on the part of the EU, which would talk the talk but not dare walk the walk. Others have emphasised that sanctioning is 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.' Frame Project, [The integration of human rights in EU development and trade policies](#), August 2016.
- <sup>13</sup> In the case of the EU-Singapore PCA, a 'joint declaration' and a 'side letter' were annexed to the agreement (see [text](#)).
- <sup>14</sup> Muhamad Mugarby, a Lebanese citizen, [claimed damages from the EU](#) for the injuries he suffered from the Lebanese state. He argued that these injuries were caused by the fact that the Council and the Commission did not adopt 'appropriate measures' under the human rights clause in the EU-Lebanon Association Agreement.
- <sup>15</sup> See Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *The European Journal of International Law*, Vol. 25 no. 4, 2014.
- <sup>16</sup> See Alik Semertzi, 'The preclusion of direct effect in the recently concluded EU free trade agreements', *Common Market Law Review* 51, pp. 1125–1158, 2014.
- <sup>17</sup> See European Commission staff working document, on the [EU-Vietnam Free Trade Agreement](#), *ibid.*, January 2016.
- <sup>18</sup> Some of these recommendations originate from Lorand Bartels' study, [A Model Human Rights model human rights clause for the EU's International Trade Agreements](#), German Institute for Human Rights/Miserecor, February 2014.

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