



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**THE EUROPEAN
PARLIAMENT'S ROLE
IN RELATION TO
HUMAN RIGHTS
IN TRADE AND
INVESTMENT
AGREEMENTS**

DROI, INTA





DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

**THE EUROPEAN PARLIAMENT'S ROLE IN RELATION TO
HUMAN RIGHTS
IN TRADE AND INVESTMENT AGREEMENTS**

Abstract

The EU has included human rights clauses in its international trade and cooperation agreements since the early 1990s. These clauses permit a party to a trade agreement to adopt 'appropriate measures' in the event that the other party violates human rights or democratic principles. This study reviews the design and operation of these clauses in light of the EU's new competences and the European Parliament's new powers under the Lisbon Treaty. It considers in particular the application of human rights clauses to investment protection obligations, and it suggests new corporate social responsibility obligations. The study also looks at several means to improve the monitoring and enforcement of these clauses, including the possibility of a right of petition for an investigation into alleged human rights abuses. The study concludes with 11 recommendations for future human rights clauses, and discusses legal and practical issues relating to their implementation.

This study was requested jointly by the European Parliament's Subcommittee on Human Rights and by the Committee on International Trade.

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EXECUTIVE SUMMARY

This study considers several ways to improve the functioning of human rights clauses in the EU's international agreements and the European Parliament's role in effecting these improvements, particularly in light of the EU's new competence on investment and the European Parliament's enhanced power of consent in relation to trade and investment agreements.

Part I of the study discusses the EU's current policy and practice in relation to human rights clauses. This includes an analysis of the wording of existing clauses, focusing on the basic human rights obligations contained in these clauses and the means by which these obligations are monitored and enforced. This part of the study also considers the practical application of these clauses over the past twenty years, which does not reflect their potential, alongside the Council's treatment of human rights clauses as 'political' clauses.

Part II of the study focuses on the ways in which future human rights clauses might be improved, particularly in light of changes to the EU's competences and the Parliament's powers following the Lisbon Treaty, and taking into account the practice of other countries. This part considers the legal implications of the EU's 2009 policy of linking trade agreements to human rights clauses in framework cooperation agreements. Next, this part looks at the standards of human rights protection in human rights clauses, and in particular the ways in which corporate social responsibility can be given a greater role in these agreements. It focuses then on the pragmatics of monitoring and enforcing human rights clauses, considering in particular ways to enhance the role of civil society and the European Parliament in this process. This part concludes with proposals for new clauses to ensure that the implementation of trade agreements does not violate human rights obligations.

Part III of the study looks in detail at the means by which the Parliament can use its powers of consent to effect the recommendations made in the study, and considers certain practical and legal issues relating to the use of such powers. It also discusses the Parliament's ability to achieve meaningful human rights reforms in third countries prior to giving consent to agreements with these countries.

Part IV contains 11 recommendations drawing on the analysis contained in the study.

Part V contains an annex on the European Parliament's recent legislative record on human rights conditionality, and an annex comparing different forms of human rights clauses in recent trade agreements.

INTRODUCTION

1. For around twenty years, the EU's trade agreements have included human rights clauses requiring the parties to these agreements to respect human rights and democratic principles. This study considers the operation of these clauses in light of recent developments, and the role of the European Parliament in ensuring that these clauses are given their full effect.

2. Part I of the study discusses the EU's existing policy and practice on human rights clauses. Section 1 gives an account of the EU's policy on the inclusion of human rights clauses in international agreements. Section 2 analyses the text of existing human rights clauses, pointing out several variations, particularly in relation to monitoring. Section 3 briefly describes the EU's practice in enforcing these obligations to date.

3. Against this background, Part II of the study focuses on the ways in which human rights clauses can be improved. Following a brief outline, Section 5 addresses the need to ensure that future trade and investment agreements are fully covered by human rights clauses. Special attention is given to the legal implications of the 2009 Council policy of not including human rights clauses in new trade agreements,

but rather linking them to human rights clauses contained in framework cooperation agreements. Section 6 looks at the human rights obligations established by human rights clauses, and considers in particular the ways in which trade and investment obligations can be connected to corporate social responsibility principles. Section 7 discusses ways to strengthen the monitoring of the human rights obligations in trade and investment agreements. Section 8 focuses on enforcement, and, drawing on the practice of other countries' free trade agreements, proposes a mechanism that would permit non-state actors and the European Parliament to request an investigation into potential violations of the human rights clause. In line with a recommendation made in the UN Guiding Principles on Business and Human Rights, Section 9 proposes new clauses for trade and investment agreements to ensure that these agreements do not impede the ability of the parties to comply with their own human rights obligations.

4. In Part III of the study, Section 10 addresses the role of the European Parliament in achieving these reforms. This section discusses in particular the Parliament's powers of consent to new agreements and its powers to legislate on human rights issues.

5. Part IV of the study contains a set of 11 recommendations, cross-referenced to the body of the study.

6. Part V contains two Annexes. Annex 1 sets out the principal legislative activity of the Parliament on human rights conditionality (2009-2013). Annex 2 is a table comparing the different wording of human rights clauses in significant and recent agreements.

1. HUMAN RIGHTS CLAUSES: STATE OF PLAY

1.1 EU policy on human rights clauses in trade agreements

1.1.1 Origins

7. The origin of the EU's policy on human rights clauses lies in its realisation, in the wake of Ugandan human rights atrocities in the late 1970s, that the Lomé Convention (the predecessor to the Cotonou Agreement) contained no legal mechanism permitting the EU to suspend its obligation to make STABEX payments to Uganda. This prompted the EU to seek to introduce a 'human rights' clause into the Lomé Convention and other trade and cooperation agreements that would permit it to suspend its obligations under those agreements in the event of human rights violations. The first agreements containing human rights clauses were concluded in the early 1990s with countries newly emerged from dictatorships in South America and Central and Eastern Europe. Such clauses are now contained in agreements with over 120 countries in the world.

1.1.2 Recent developments

8. The current policy framework for including human rights clauses in the EU's international agreements dates from 1995, when the EU Council formally adopted a policy of adopting operative human rights clauses in all new general cooperation and trade agreements.¹ The Council refined this policy in 2009 as follows:

In order to have a comprehensive framework with third countries covering the main areas of cooperation, including the [sic] political cooperation, the EU has a

¹ Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM(95) 216 and EU Council Conclusions of 29 May 1995 (reported in EU Bulletin 1995-5, point 1.2.3).

preference to enter into framework agreements prior to conclude [sic] sector agreements which in principle do not include political clauses.²

9. Two comments might be made of this statement. One, terminological, is that it would appear that the reference to 'sectoral agreements' is in fact to free trade agreements, not true sectoral agreements on, for example, fisheries, coal and steel and textiles. Second, and more importantly, this statement neglects to mention the relevance of the EU's negotiation strategy to this policy. It is common knowledge that many of the countries negotiating free trade agreements with the EU are reluctant to include a human rights clause in these agreements. Linking the trade agreement to a human rights clause in a different agreement is likely to be more acceptable to such countries. However, this strategy increases the risk that the resulting trade agreement is not properly covered by a human rights clause in another agreement.

10. Since 2009, there have also been some other developments relevant to human rights clauses. One concerns (true) sectoral trade agreements. These did not traditionally contain any reference to human rights, a practice much criticised by the European Parliament.³ However, the 2013 Protocols to the EU-Morocco and EU-Cote d'Ivoire Fisheries Partnership Agreements (FPAs) both contain express clauses linking these Protocols to human rights clauses in other applicable agreements.⁴ This is of particular significance to the EU-Morocco FPA Protocol, given the implications of this Protocol for the self-determination rights of the people of Western Sahara.⁵

11. A second development results from the EU's new competence in foreign direct investment under the 2009 Lisbon Treaty. It may be assumed that any investment obligations in a trade agreement would be treated the same as any trade obligations in that agreement. However, should the EU ever negotiate a pure investment protection agreement, it would also need to be ensured that such an agreement is also covered by a human rights clause. Beyond this, it must be asked whether, assuming that a standard human rights clause is applicable, such a clause is capable to dealing with the types of human rights issues that can arise in the context of investment obligations. This issue is discussed below.

² EU Council, *Reflection Paper on Political Clauses in Agreements with Third Countries*, Doc 7008/09, 27 February 2009 (partially derestricted).

³ Eg European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, para 12. The Commission's view was that it was not 'convinced that (sectoral agreements) provide a suitable context to negotiate a human rights clause' and the Council Secretariat said that 'political' clauses are not appropriate for sectoral agreements: unpublished internal documents, cited in Florence Benoit-Rohmer et al, *Human Rights Mainstreaming in the EU's External Relations*, European Parliament Study EXPO/B/DROI/2008/66, September 2009, at 36.

⁴ The Parliament consented to both Protocols in December 2013. The EU-Morocco Protocol 'is implemented in accordance with Article 1 of the Association Agreement on developing dialogue and cooperation and Article 2 of the same Agreement concerning the respect for democratic principles and fundamental human rights' (Article 1(2)). The EU-Cote d'Ivoire Protocol may be suspended in the event of 'activation of the consultation mechanisms laid down in Article 96 of the Cotonou Agreement owing to one of the essential and fundamental elements of human rights and democratic principles as provided for in Article 9 of the Cotonou Agreement' (Article 8(1)(c) and 9(1)(c)).

⁵ On this issue, see Martin Dawidowicz, 'Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC-Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination* (Cambridge: Cambridge University Press, 2013). Self-determination is a core human right, as stated in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR). Respect for self-determination has been described an *erga omnes* obligation under customary international law by the International Court of Justice. This obligation is therefore binding on the EU both under international law and under Article 3(5) TEU.

1.1.3 Human rights clauses in context: other EU conditionality clauses

12. Human rights clauses are also included in a number of other EU instruments, including the EU's autonomous instruments on financial and technical cooperation,⁶ as well as in financing agreements with developing countries.⁷ There are also (slightly different) human rights provisions in the EU's Generalised System of Preferences (GSP) program.⁸ It is possible for third countries to be subject to more than one of these provisions at the same time.

13. Since 2008, the EU's trade agreements have also featured a new form of conditionality in the form of 'sustainable development' chapters.⁹ These chapters contain obligations, modelled on similar provisions in US and Canadian free trade agreements, requiring the parties to comply with labour and environmental standards (including ILO core labour standards), and, conversely, not to use labour and environmental regulation as a means of economic protection. Because core labour standards are also basic human rights, there is an overlap between these obligations and human rights clauses, but, at least formally, this does not undermine the validity or effectiveness of either of these sets of provisions.¹⁰

1.2 Structure and content of existing human rights clauses

1.2.1 Outline

14. Modern human rights clauses share the same basic structure.¹¹ They begin with an obligation to comply with human rights, which is set out in an 'essential elements' clause, typically located as one of the first articles of the agreement. This obligation is then enforced by a 'non-execution' (or 'non-fulfilment') clause permitting one party to take 'appropriate measures' if the other party violates the essential elements clause. There are some technical differences in the conditions applicable to the taking of such measures.¹² More importantly for present purposes, there is significant variation in the mechanisms established under these agreements for monitoring the implementation of the parties' human rights obligations.

1.2.2 'Essential elements' clauses

15. The standard 'essential elements' states as follows:

Respect 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 both Parties and constitutes an essential element of this Agreement.¹³

⁶ Eg the European Neighbourhood and Partnership Instrument (Reg 1638/2006 [2006] OJ L310/1) and the Development Cooperation Instrument (Reg 1905/2006 [2006] OJ L378/41).

⁷ Eg Annex I of the 2012 Model General Conditions to Financing Agreements and Art 23(1) of the European Development Fund, at http://ec.europa.eu/europeaid/work/procedures/financing/financing_agreement/index_en.htm.

⁸ Regulation (EU) No 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2008] OJ L211/1.

⁹ The first agreement was the EU-Cariforum Economic Partnership Agreement [2008] OJ L289/I/3.

¹⁰ Lorand Bartels, 'Human Rights and Sustainable Development Obligations in the EU's Free Trade Agreements' (2013) 40 *Legal Issues of Economic Integration* 297.

¹¹ Exceptions are cooperation agreements with India, Mongolia and Sri Lanka, early agreements that do not contain a non-execution clause. The agreement with India is discussed below in this respect.

¹² See attached table.

¹³ Article 1 of the EU-Central America Association Agreement.

16. In this standard clause, the reference point for human rights is the 1948 Universal Declaration of Human Rights.¹⁴ In many respects, the Universal Declaration reflects customary international law, and to this extent is already binding on all international actors. The Universal Declaration contains obligations covering civil, political, economic, social and cultural rights. Some of the most significant are rights of non-discrimination on grounds of race, sex and religion, as well as the right to life, liberty and security of the person, freedom from arbitrary arrest and torture, access to justice and a fair trial, privacy, rights to work, leisure and social security, the right to education and rights of political participation.

17. The Korea agreement is unusual in referring also to 'other relevant international human rights instruments'. This is a very desirable additional phrase, as it has a much broader scope and is also 'future-proof' insofar as it incorporates any later human rights treaties that may be concluded between the parties and other changes in a party's obligations (eg by withdrawing reservations to human rights obligations).

18. Special clauses are used for countries that are also members of the Council of Europe or the Organization for Security and Cooperation in Europe (OSCE). In such cases, the essential elements clause contains a reference to the constituent instruments of these organizations. So, for example, the essential elements clauses in the agreements with Georgia and Moldova state as follows (emphasis added):

Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the Universal Declaration of Human Rights *and as defined in the European Convention of Human Rights, 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.¹⁵

19. This is significant, because the European Convention establishes a relatively high level of human rights protection in relation to the rights mentioned by the Universal Declaration. It also includes additional human rights obligations, such as a prohibition on the use of the death penalty.¹⁶ The Helsinki Final Act and, in particular, the Charter of Paris emphasise minority rights and provide detail on the nature of democratic principles.¹⁷

20. Another important feature of essential elements clauses is that they require the parties to comply with these human rights both in their internal policies and in their international policies. This means, for example, that involvement in human rights violations in other countries is also prohibited. An example would be the EU's appropriate measures under the Cotonou Agreement against Liberia as a result of that country's assistance to the Front uni révolutionnaire (RUF) in Sierra Leone.¹⁸

¹⁴ Universal Declaration of Human Rights, at <http://www.un.org/en/documents/udhr/>.

¹⁵ These latter agreements, like some others, add that '[c]ounteracting the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement.'

¹⁶ *Al-Saadoon v United Kingdom* (App no 614898/08) (2010) 51 EHRR 9.

¹⁷ It is also notable that these clauses omit any reference to the 'rule of law'. However, it is not certain that this makes any real difference, given that the essence of this concept of the 'rule of law' is covered by human rights and democratic principles in any case.

¹⁸ Letter annexed to Council Decision of 25 March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement [2002] OJ L96/23.

1.2.3 Monitoring

21. None of the existing agreements containing human rights clauses has been accompanied by a permanent committee under the agreement with a mandate of monitoring the implementation of the essential elements clause. This contrasts with the many other permanent subject specific monitoring mechanisms established under these agreements, including those concerning trade and labour obligations.

22. This does not mean that such committees could not be established subsequently. Some subcommittees on human rights and democratic principles have been established on an *ad hoc* basis in agreements containing a human rights clause.¹⁹ Human rights issues can also be discussed within the primary bilateral council established by the agreement, and in some cases (discussed here) within bilateral parliamentary committees and civil society consultative committees.

Parliamentary committees

23. All of the EU's association agreements contain interparliamentary committees²⁰ comprising members of the European Parliament and the parliament of the partner country. These committees have the power to address any matter concerning the implementation of these agreements. This includes matters arising under human rights clauses. It may be expected that future association agreements continue this practice.

24. As a rule, other trade agreements do not contain a joint parliamentary committee, this being left to the institutional structure established by the accompanying cooperation agreement. There is a Joint Parliamentary Committee in the Cariforum Economic Partnership Agreement, but this can be explained by the fact that the relevant framework cooperation agreement (the Cotonou Agreement) has a greater number of parties. It is to be expected that future Economic Partnership Agreements will follow this model.

25. How these framework cooperation agreements deal with parliamentary committees varies. The 2003 Andean agreement, still not in force, states that '[t]he Parties encourage the European Parliament and the Andean Parliament to establish an Inter-parliamentary Committee, within the framework of this Agreement, in accordance with past practice.'²¹ By contrast, the 2010 Korea cooperation agreement states that dialogue is to take place, among other things, by means of 'exchanges of delegations between the European Parliament and the National Assembly of the Republic of Korea.'²² This is not the same thing as a dedicated joint parliamentary organ established as part of the agreement.

Civil society

26. There is also significant variation in the way that these different agreements foresee a role for civil society in the monitoring of the parties' obligations under an agreement. The Georgia and Moldova association agreements give a broad mandate to 'civil society platforms', which, despite their name, function (at least *de facto*) as organs with the right to receive information on the decisions and

¹⁹ The first of these was established in the EU-Morocco Association Agreement, by Association Council Decision No 1/2003 [2003] OJ L79/14, Annex 1.

²⁰ The naming of these committees is curious. In some agreements the Committee is called a 'Parliamentary Association Committee' and in others an 'Association Parliamentary Committee'. Similarly named committees in the former 'Europe' association agreements with Central and Eastern European Countries were renamed 'Joint Parliamentary Committees': Michael Alexander Rupp, 'The Pre-Accession Strategy and the Governmental Structures of the Visegrad Countries' in Karen Henderson (ed), *Back to Europe* (London: UCL Press, 1999) at 85.

²¹ Article 52(4) of the 2003 EC-Andean Pact cooperation agreement.

²² Article 3(3)(e) of the EU-Korea framework cooperation agreement.

recommendations of the Association Councils and the power to make recommendations to the Association Councils on any matter concerning the implementation of the agreement.

27. The EU-Cariforum agreement establishes a Consultative Committee with a mandate 'encompass[ing] all economic, social and environmental aspects of the relations between the [parties], as they arise in the context of the implementation of this Agreement.'²³ This covers the human rights clause, at least insofar as the human rights at issue can be considered 'economic, social and environmental aspects of relations between the parties'.

28. Civil society groups (Domestic Advisory Groups) are established under the Korea free trade agreement, but these groups are only able to discuss matters arising under the sustainable development chapter in that agreement. Insofar as this chapter covers labour standards, these groups may discuss matters falling under the human rights clause.²⁴ But there is much that is outside the terms of reference of these groups.

29. There are also civil society groups under the EU-Colombia/Peru free trade agreement and the EU-Central America association agreement, but their status and powers are inferior to those of the other agreements.

1.2.4 Enforcement

30. A principal feature of human rights clauses, corresponding to their original rationale, is that they allow one party unilaterally and immediately to suspend the agreement in the event that the other party violates human rights. This is effected by means of a non-execution clause, which states (with some variation in the wording) that a party may take 'appropriate measures' if the other party violates the essential elements clause. In principle, such measures can include the suspension of any obligations between the parties, including any financial or trade obligations,²⁵ and this is expressly recognised in the Georgia and Moldova association agreements and in the Cariforum EPA. Such measures can also include the suspension of obligations outside of the agreement containing the non-execution clause, as discussed below.

31. There are certain conditions on the adoption of 'appropriate measures' (on which see the attached table). All 'non-execution' clauses state that priority must be given to measures that least disrupt the functioning of the agreement. In many cases, it is added that appropriate measures must be taken in accordance with international law, and that 'suspension would be a measure of last resort'. Sometimes it is also said that the measures must be revoked as soon as the reasons for their adoption have disappeared. These conditions may be understood as different iterations of the principle of proportionality, according to which measures may not be more harmful than necessary to achieve a given objective. Procedurally, the adoption of appropriate measures must be notified to the joint council, and consultations must be held, if requested. The consultation procedure under the Cotonou Agreement is particularly elaborate, and is preceded by a mandatory political dialogue in non-urgent cases.

²³ Article 232(1) of the EU-Cariforum agreement.

²⁴ See above at n 10.

²⁵ See the list of potential measures contained in Annex 2 of COM (95) 216, above at n 1.

1.3 Human rights clauses in practice

32. The foregoing survey of human rights clauses has focused on their potential use, according to their texts and the institutional structure of the agreements in which they are contained. In the two decades since they have existed, however, they have been applied in only a very small subset of these potential cases. The EU has taken 'appropriate measures' on twenty-three occasions, typically by redirecting development aid from government projects to civil society. All of these cases involved ACP countries, as well as situations of major political instability. Fifteen of these cases involved *coups d'état*, seven involved flawed elections, and one involved a deteriorating political and security situation.²⁶

33. It can therefore be said that the human rights clause has, in practice, been treated not as a human rights clause but rather as a *political* clause, with occasional human rights elements. Indeed, this view of human rights clauses is evident in the very title of the EU Council's 2009 policy document on these clauses, which, in a change from earlier practice, terms them 'political clauses'.²⁷ Whether this new description of the human rights clauses – which is in fact a misdescription – is a cause or an effect of the EU's limited use of these clauses remains an open question.

2. IMPROVEMENTS TO FUTURE HUMAN RIGHTS CLAUSES

2.1 Outline

34. This Part discusses possible improvements to future human rights clauses in relation to their coverage (Section 2.2) the obligations set out in essential elements clauses (Section 2.3), and the monitoring (Section 2.4) and enforcement (Section 2.5) of these obligations. This Part also proposes changes to future trade and investment agreements in order to ensure that they do not impede the ability of the parties to these agreements to comply with their human rights obligations (Section 2.6).

2.2 Coverage of human rights clauses

2.2.1 Association agreements

35. It can be assumed that human rights clauses will be included in all future association agreements. The recent Georgia and Moldova association agreements (initialled on 29 November 2013) contain human rights clauses.

2.2.2 Trade agreements

36. As mentioned, since 2009 the EU's preference is to link trade agreements to a human rights clause in a framework cooperation agreement.²⁸ This has been done in a number of cases already, such that some comments can already be made on the EU's implementation of this policy

Economic Partnership Agreements

37. The Cariforum Economic Partnership Agreement (EPA) makes an express link to the human rights clause in the Cotonou Agreement. It states:

Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a Signatory CARIFORUM State of any measures, including trade-related

²⁶ See Johanne Døhlle Saltnes, 'The EU's Human Rights Policy: Unpacking the Literature on the EU's Implementation of Aid Conditionality', Arena Working Paper No 2, March 2013, at 7 (Table 1).

²⁷ See above at n 2.

²⁸ The EU-Peru/Colombia trade agreement contains an independent human rights clause, notwithstanding the fact that there is also a human rights clause in a cooperation agreement between the parties. However, this cooperation agreement, signed in 2003, has not yet ratified, making this a special case.

measures under this Agreement, deemed appropriate, as provided for under Articles 11(b), 96 and 97 of the Cotonou Agreement and according to the procedures set by these Articles.²⁹

38. The Interim Economic Partnership Agreements (iEPAs) use the same wording, although they do not expressly mention the suspension of trade obligations. The Eastern and Southern Africa IEPA states as follows.

Nothing in this Agreement shall prejudice the application of measures deemed appropriate as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement and according to procedures set by these Articles.³⁰

39. These are perfectly effective clauses insofar as they confirm that obligations under these agreements may be suspended in the form of appropriate measures under the Cotonou Agreement. But in so doing, these clauses also confirm that appropriate measures of this nature could be taken even without a linkage clause. In short, these clauses have the paradoxical effect of confirming their own redundancy.

40. Commenting on the ESA IEPA, the Parliament '[deplored] the absence of a strong human rights clause in the IEPA, and [repeated] its call for trade agreements concluded by the EU to include binding human rights clauses'.³¹ In light of what has been said, this concern is misplaced. On the other hand, there is an additional reason that supports the Parliament's concern. The Cotonou Agreement will expire in 2020, and when that occurs, these clauses will lose their effect, unless the replacement of the Cotonou Agreement (assuming there is one) continues the effect of the clauses mentioned. This is a difficulty with linkage clauses that must be addressed in connection with any framework cooperation agreement of limited duration.

Ordinary trade and framework cooperation agreements

41. The linkage clause in the Korea trade agreement is as follows:

The present Agreement shall be an integral part of the [sic] 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.³²

42. This clause is – perhaps intentionally – vague on the legal relationship between the trade agreement and the framework cooperation agreement. What it does *not* say is that the trade agreement is an integral part of the cooperation framework agreement. It only says that it is part of 'overall bilateral relations' governed by that agreement. This may not be enough to subject the trade agreement to the cooperation agreement.

43. In this respect, the Singapore agreement (initialled on 20 September 2013) is clearer. The linkage clause in this agreement makes specific reference to a 'common institutional framework' as follows (with emphasis):

²⁹ Article 241(2) of the Cariforum EPA.

³⁰ Article 65(1) of the ESA IEPA; Article 80(2) Ghana IEPA; Article 73(2) Pacific IEPA.

³¹ European Parliament resolution of 17 January 2013 on the implementation of the Interim Economic Partnership Agreement (IEPA) between the European Community and the Eastern and Southern Africa States, in the light of the current situation in Zimbabwe.

³² Art 15.14(2) EU-Korea FTA.

This Agreement shall be an integral part of the overall bilateral relations as governed by the Partnership and Cooperation Agreement *and shall form part of a common institutional framework*. It constitutes a specific agreement giving effect to the trade provisions of the Partnership and Cooperation Agreement.³³

44. For the sake of clarity, as between these two models a linkage clause of the Singapore type is to be preferred. Overall, however, a linkage clause in the form of the Cariforum agreement is to be preferred.

45. However, while linkage clauses can clarify the situation, from a legal perspective they are unnecessary so long as the framework cooperation agreement contains a non-execution clause providing for 'appropriate measures'. This is because, as discussed, that non-execution clause would – in its own terms – permit the suspension of obligations in the trade agreement.

46. The key question, then, is not whether there is an effective linkage clause (although such a clause is desirable, to avoid any doubt on the issue), but rather whether the cooperation agreement contains a non-execution clause permitting the adoption of 'appropriate measures'. All existing cooperation agreements contain such clauses, except for a number that were concluded prior to 1993, namely with Mongolia, India, and Sri Lanka. In these three agreements it is only possible to suspend the cooperation agreement itself, but not any other obligations.

47. This means that for any future EU-India free trade agreement a solution must be found that expressly permits the suspension of the agreement in the event of a violation of the essential elements clause in the 1993 India cooperation agreement. A simple linkage clause based on the models discussed here will not be sufficient.

48. The Parliament must also ensure that any future cooperation agreements with developed countries (for example, with Canada and the United States) contain effective human rights clauses providing for 'appropriate measures', on the lines of the standard model.

2.3 Essential elements clauses

49. As noted, essential elements clauses all refer to human rights as defined by reference to the Universal Declaration of Human Rights and covers all traditional human rights – civil, political, social, economic and cultural – without distinction, as well as democratic principles and sometimes the rule of law. In the case of Council of Europe and OSCE members (all Eastern Partnership countries except for Belarus) it is to be expected that there will also be a reference to the European Convention and to the relevant OSCE instruments. As mentioned, the Korea agreement also includes reference to 'other relevant international human rights instruments'.

2.3.1 Human rights standards

50. Several observations might be made about the instruments referenced in essential elements clauses. In the first place, while setting a basic standard, the Universal Declaration, but other instruments as well, can become dated. The Universal Declaration says nothing about the death penalty, or self-determination, or anything specific on disability or sexuality discrimination. In order to keep the essential elements clause up to date, the formulation used in the Korea agreement ('and other relevant international human rights instruments') should be used systematically in all future essential elements clauses.

³³ Art 17.17 EU-Singapore FTA.

51. In the context of negotiations on agreements with Russia, Kazakhstan, Azerbaijan and Armenia, the Parliament has suggested that a reference be included to human rights enshrined in the constitution of the partner country.³⁴ This suggestion has some merit, but also carries with it some difficulties. One is that reciprocity would demand that an equivalent reference be made to the constitutional framework of the EU and its Member States. Another, and more significantly, is that constitutional protections can be removed, which means that this is not necessarily a safe guarantee.

52. In the same context, the European Parliament has also called for 'clauses and benchmarks relating to the protection and promotion of human rights'.³⁵ The concept of human rights benchmarks is one that should be given serious consideration. At the same time, it may not be feasible – or even appropriate – to include benchmarks in the text of an agreement of indefinite duration. An alternative would be to set out such benchmarks in a separate document, it being understood that a failure to meet these benchmarks will trigger the application of appropriate measures under the agreement.

2.3.2 Corporate Social Responsibility

53. Particularly in the context of treaties containing investment obligations, the European Parliament has frequently called for the inclusion of provisions on corporate social responsibility (CSR) based, *inter alia*, on the UN Guiding Principles on Business and Human Rights.³⁶

54. There are already some examples of CSR clauses in the EU's trade agreements. The Korea trade agreement states that:

the Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability³⁷

More generally, the EU-Colombia/Peru trade agreement states that '[t]he Parties agree to promote best business practices related to corporate social responsibility'.³⁸

55. Such provisions serve a number of purposes. One is to raise the playing field by seeking to promote the production of products in the partner country that do not undercut EU products produced in compliance with CSR norms. This is reflected in the Parliament's statement that:

non-compliance with CSR principles constitutes a form of social and environmental dumping which works to the detriment, in particular, of undertakings and workers in Europe, who are required to comply with more stringent labour, environmental and fiscal standards.³⁹

56. In theory, clauses of this type could have a stronger effect, and permit the EU to regulate in favour of imports of products and services that are produced by corporations that comply with CSR principles.

³⁴ Eg para 1(c) of European Parliament resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Azerbaijan Association Agreement.

³⁵ *ibid.*

³⁶ European Parliament resolution of 25 November 2010 on corporate social responsibility in international trade agreements; European Parliament resolution of 6 April 2011 on the future European international investment policy, para 27. The Guiding Principles are available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³⁷ Article 13.6 EU-Korea FTA.

³⁸ EU-Colombia/Peru FTA, Article 271(3). There are also a number of non-EU trade agreements with clauses to similar effect, eg the Canada-Peru and Canada-Panama FTAs and the US-Australia FTA and US-Morocco FTAs. See also Article 32 of the now abandoned 2007 draft model Norwegian bilateral investment treaty.

³⁹ *ibid.*, para M.

This would ordinarily be prohibited on the grounds that it is not possible to discriminate between products solely on the basis of how a product or service is produced (so-called unincorporated product and production methods). But the situation would be different if the exporting country recognised the legitimacy of regulatory distinctions between products according to whether they are produced according to CSR standards.

57. A second effect of CSR clauses is to block any objection to the EU's regulation of the activities of EU corporations in the partner country. In principle, the EU is permitted by ordinary principles of public international law to regulate its nationals, including corporations. However, even if lawful, such extraterritorial regulation may create tensions with the other country in certain circumstances. For example, a requirement that EU corporations report on their investment activities in other countries might conflict with confidentiality rules in those countries.⁴⁰

58. In sum, CSR provisions in trade and investment agreements can have value by encouraging other countries to promote CSR principles, which is a value in itself, in both human rights and economic terms. More concretely, however, they can also prevent third countries from objecting to the EU's own CSR regulations when this comes at an economic cost to their exporters, or otherwise causes tension. The CSR provisions currently in existence go about as far as they can in achieving the first of these objectives. It is however doubtful whether they achieve the second set of objectives. What is required for these is a more concrete acceptance by the other country of the legitimacy of regulations based on CSR principles. This could be achieved by a statement to the effect that:

the parties affirm their commitment to the UN Guiding Principles on Business and Human Rights [and agree to promote best business practices related to corporate social responsibility].

59. Some academics have also contended that CSR provisions could affect claims brought by an investor against a state party before an investment tribunal. The idea is that the tribunal will take into account the conduct of the investor in determining the claim. Accordingly, an investor that has violated CSR principles would not be protected under the investment protection obligations in the agreement, or its rights would be reduced in some other way (eg by reducing the damages available as a remedy).⁴¹

⁴⁰ A recent example of CSR reporting requirements is in the 2012 US Burma 'Responsible Investment Reporting Requirements'. Any US company investing more than \$500,000 in Burma must lodge a report annually on the following matters:

- a. Due diligence policies and procedures (including those related to risk and impact assessments) that address operational impacts on human rights, worker rights, and/or the environment in Burma;
- b. Policies and procedures that address anti-corruption in Burma;
- c. Policies and procedures that address community and stakeholder engagement in Burma (if the submitter has undertaken any stakeholder engagement to date, also summarize);
- d. Policies and procedures that address hearing grievances from employees and local communities, including whether grievance processes provide access to remedies, and how Global corporate social responsibility policies, including those that address human rights, sustainability, worker rights, anti-corruption, and/or the environment; and
- f. Whether and the extent to which the policies and procedures described in Question 5.a through 5.d are applied to, required of, or otherwise communicated to related entities in Burma, including but not limited to subsidiaries, subcontractors, and other business partners.

See <http://www.humanrights.gov/2012/07/11/burmaresponsibleinvestment/>.

⁴¹ Eva van der Zee, 'Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?' (2013) 40 *Legal Issues of Economic Integration* 33, at 59; Angelica Bonfanti, 'Applying Corporate Social Responsibility to Foreign Investments: Failures and Prospects' in Tullio Treves et al (eds), *Foreign Investment, International Law and Common Concerns* (Oxford: Routledge, 2014) at 246.

60. In principle, such a result is achievable. In some cases, tribunals have held that an investment agreement did not protect an investment that had been entered into corruptly.⁴² However, simply introducing a CSR clause into an investment agreement would not have this effect. It would also be necessary that the third country require that investors comply with CSR principles, and that the agreement contain a requirement that investors conduct themselves in accordance with those laws. Consideration should be given to the precise wording of any such provisions.⁴³

2.4 Monitoring

61. As mentioned, there are no permanent human rights committees under any of the EU's agreements. This contrasts with the permanent committees that these agreements establish on a range of other topics.

62. It would be preferable for any agreement containing a human rights clause also to include a dedicated committee with a mandate to discuss human rights concerns, as well as to monitor the implementation of human rights by the parties. Such a committee should include representatives not only of the executive governments of the parties, but also representatives from the European Parliament and civil society. It should also have the power to make recommendations to the parties individually and jointly, as appropriate, and its recommendations should also be taken into account in determining how to enforce the human rights clause.

63. Internally, consideration might also be given to the establishment of an obligation requiring the Commission or the EEAS to report regularly to Parliament on the compliance of partner countries with a human rights clause in an agreement. This would be similar to the Commission's biennial reports to the Parliament on the effective implementation of the human rights conditions under the GSP+ scheme.⁴⁴

2.5 Enforcement

64. As described above, the primary means of enforcing essential elements clauses is by one party adopting unilateral 'appropriate measures' under a non-execution clause in the event that the other party violates these obligations.

65. In practice, the human rights clause is enforced by means of a Council Decision to take appropriate measures, which follows a proposal by the Commission to this effect.⁴⁵ The European Parliament has only a very limited role in such decisions. Rule 91 of the Parliament's Rules of Procedure provide that the Commission will make a statement to Parliament in the event that it proposes to suspend an agreement, which will be followed by a debate and possible recommendations.

66. One way in which the human rights clause could be made more robust is by establishing a mechanism that would enable other actors, such as individuals, NGOs, and other EU institutional actors, including the European Parliament, to request that the Commission commence an investigation into an alleged violation of the human rights clause. There are models for such a mechanism in the free trade agreements of other countries.

⁴² Eg *Metal-Tech v Uzbekistan* (ICSID Case No ARB/10/3), 4 October 2013.

⁴³ An alternative is for the agreement to impose international human rights obligations directly on corporations, but after decades of failures to achieve such a result there is no chance that this will be accepted in the foreseeable future. For a comprehensive survey of international obligations imposed directly on corporations see Markos Karavias, *Corporate Obligations Under International Law* (Oxford: Oxford University Press, 2013).

⁴⁴ Article 14 of the GSP Regulation, above at n 8.

⁴⁵ This practice is based on the assumption that the adoption of 'appropriate measures' constitutes the suspension of the application of an agreement under Article 218(9) TFEU.

2.5.1 A right of petition in non-EU FTAs

67. Beginning with NAFTA, US and Canadian agreements (and some other countries) foresee individual petitions to commence investigations into alleged violations of labour and environmental obligations under those agreements. The agreements require the establishment of national contact points which are to consider public communications concerning alleged violations of labour and environmental obligations by the other party to the agreement. In some cases, the agreement expressly provides that a person may file a submission with an organ of the agreement or a national secretariat 'asserting that a Party is failing to effectively enforce its environmental laws'.⁴⁶

68. In the twenty years since this model was first adopted, these mechanisms have generated a total of 47 proceedings, 41 under NAFTA and six under US free trade agreements.⁴⁷ The complaint lodged against Bahrain under the US-Bahrain free trade agreement illustrates the process. Following events in Bahrain in 2011, when mass numbers of employees were dismissed for trade union membership and protesting against the government, a public communication was made to the US Department of Labor. This Department investigated the matter and recommended that the US Trade Representative (USTR) launch formal consultations with Bahrain in relation to Bahrain's labour obligations under the US-Bahrain FTA.⁴⁸ Such consultations were launched in May 2013.⁴⁹ Although the specific impact of the US request for consultations under US-Bahrain is yet to be seen, it appears to have led to a debate on reform by the Bahraini government.⁵⁰

69. A similar discussion appears to have been initiated by a complaint filed under the US-Peru Trade Promotion Agreement in 2010. The complainant alleged that the government of Peru had failed to meet its obligations relating to the effective recognition of the collective right to bargaining under Article 17.2 of that agreement. Following an extensive review by the DOL, the complaint was dismissed.⁵¹ The DOL report noted, however, that the Peruvian response to the complaint resulted in a codification of the law relating to collective bargaining, for example, by amending Peru's labor laws to require mandatory arbitration if parties to a collective labor dispute fail to reach a consensus.⁵²

2.5.2 The EU GSP Regulation

70. The EU's GSP Regulation foresees a role, albeit subsidiary, for a variety of actors in the enforcement of human rights obligations of GSP beneficiaries. Primarily, the European Commission is required to assess all relevant information from civil society, social partners, the European Parliament and the Council in determining whether a GSP+ beneficiary is effectively implementing its relevant human rights and sustainable development obligations. Such information may also constitute evidence giving rise to a reasonable doubt as to whether a GSP+ beneficiary is meeting the relevant conditions for obtaining GSP+ benefits, leading to the initiation of the procedure for withdrawing these preferences.⁵³

⁴⁶ Eg Article 14 NAAEC; Article 17.7 of the Environment Co-operation Agreement among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement (Brunei Darussalam, the Republic of Chile, New Zealand, and the Republic of Singapore).

⁴⁷ ILO/IILS, *Social Dimensions of Free Trade Agreements* (2013), at 42-43.

⁴⁸ US Department of Labor, *Public Report of Review of US Submission 2011-01 (Bahrain)*, www.dol.gov/ilab/programs/otla/20121220Bahrain.pdf.

⁴⁹ Bahrain Submission, www.dol.gov/ilab/programs/otla/bahrainsub.htm.

⁵⁰ ILO/IILS, *Social Dimensions of Free Trade Agreements*, above at n 47, at 54-55.

⁵¹ US Office of Trade and Labor Affairs, *US Submission 2010-03 (Peru)*, www.dol.gov/ilab/programs/otla/PeruSubmission2010.pdf.

⁵² *ibid.*

⁵³ GSP Regulation, above at n 8, Article 14(3) and Article 15(3).

71. The GSP Regulation does not require the Commission to refer to such information in forming its opinion on whether to investigate the human rights record of ordinary GSP beneficiaries in relation to a possible withdrawal of ordinary GSP benefits.⁵⁴ If the Commission does decide to launch an investigation, however, then it is obliged to take into account such information during the investigation process.⁵⁵

2.5.3 Assessment

72. The EU's trade agreements lag noticeably behind other countries, such as the United States and Canada by not giving individuals, civil society and even other EU institutions any role in its decision to enforce the human rights obligations of other countries. These agreements do not even go as far as the EU's GSP Regulation, which at least foresees some role in this regard.

73. There 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.

2.6 Implementation

2.6.1 Conflicts between economic and human rights obligations

74. The last two decades of increasing globalisation have shown that trade and investment obligations can inhibit the ability of countries to comply with their human rights obligations in a number of circumstances. Investment obligations can potentially inhibit the ability of countries to comply with their human rights obligations,⁵⁶ intellectual property obligations can raise the prices of certain products and services, making it difficult for a country to ensure rights to health and food, and trade obligations can encourage the production of cash crops in the form of 'land grabbing' at the expense of local people and indigenous groups.⁵⁷

75. Recognising this, Principle 9 of the UN Guiding Principles on Business and Human Rights recommends that:

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.⁵⁸

Existing human rights clauses do not achieve this goal, because while they allow one party to enforce the obligations of the other party, they do not allow a party to suspend obligations to comply with its *own* human rights obligations. The following considers two ways in which an agreement can provide a means of suspending any obligation that comes into conflict with a party's human rights obligations.

⁵⁴ *ibid*, Article 19(3).

⁵⁵ *ibid*, Article 19(6).

⁵⁶ This is recognized, *inter alia*, in Principle 9 of the Ruggie Principles.

⁵⁷ See, generally, Lorand Bartels, 'Trade and Human Rights' in Daniel Bethlehem et al (eds), *Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009).

⁵⁸ Principle 9 of the UN Guiding Principles, above at n 36.

2.6.2 Suspension of obligations by bilateral agreement

76. The first option is bilateral, and entails the grant of a power to the bilateral organs established under the agreement to suspend the agreement when necessary to comply with the human rights obligations set out in the essential elements clause. Some of these central organs already have such a power. For example, the EU-Cariforum Joint Council has the power 'to take decisions in respect of all matters covered by the Agreement'.⁵⁹ But this is not always the case. The EU-Central America Association Council only has a more limited power 'to take decisions in the cases provided for in this Agreement'.⁶⁰ It is therefore recommended that future bilateral organs established under agreements be granted the power to suspend obligations in the agreement when they conflict with a party's obligations in the essential elements clause. This power should also be exercisable on the basis of a recommendation of the human rights committee that, it is recommended here, should be established under the agreement.

2.6.3 A human rights exception

77. The second option is unilateral, and entails the insertion of a new human rights exception permitting a party to adopt measures necessary to comply with its human rights obligations under the essential elements clause, regardless of any obligations in the agreement.

78. Since 1947, all trade (and some investment) agreements, including the WTO Agreements and Article 36 TFEU, have permitted unilateral measures for public policy reasons, such as public morals, health and safety, and environmental protection.

79. These exceptions are a creature of their time, and they have been added to over the years by judicial means (rather strikingly by the European Court of Justice in the form of extensive 'mandatory requirements') and, increasingly, by treaty drafting. Thus, the EU-Cariforum agreement contains a footnote stating that:

The Parties agree that ... measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.⁶¹

Similarly, two New Zealand free trade agreements add the following exceptions:

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.⁶²

There are also other examples of exceptions to trade agreements providing for positive discrimination in favour of aboriginal people and, in some US agreements, 'small and minority businesses'.⁶³

⁵⁹ Article 229(1) of the EU-Cariforum Economic agreement, above at n 9. The revision clause in Article 246 also indicates that the Joint Council has the power to revise the agreement.

⁶⁰ Article 6(1) of the EU-Central America agreement, above at n 13.

⁶¹ Article 224(1) footnote 1, Cariforum-EU Economic Partnership Agreement.

⁶² NZ-Thailand CEPA, Article 15.8 and Trans-Pacific SEP, Article 19.5.

⁶³ See, further, Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge: Cambridge University Press, 2009) at 348-351.

80. There is no legal or policy reason why the standard list of exceptions in the EU's trade and investment agreements should not be amended to permit the parties to adopt measures necessary to comply with their human rights obligations, as set out in the agreement. To the contrary, this would ensure that the human rights and economic obligations set out in the agreement do not collide.

3. THE ROLE OF THE EUROPEAN PARLIAMENT

3.1 The European Parliament's power to ensure the effective application of human rights clauses

81. The European Parliament has always been a leading voice in the adoption of human rights clauses, and, following the Lisbon Treaty, it now has a critical role in ensuring that these clauses are given their proper effect.

82. The Parliament has two relevant powers: the first is its power to withhold consent to almost all international agreements;⁶⁴ the second is its power of co-legislation on human rights issues, including extraterritorial human rights issues. The following elaborates on the steps that the Parliament can take to improve the effectiveness of human rights clauses not only in theory, but also in practice.

3.1.1 Use of consent power to effect changes to human rights clauses

83. This study makes several recommendations directed at improving the coverage and wording of human rights clauses in international agreements. All of these recommendations can be implemented if the European Parliament chooses to use its consent power to insist on these reforms.

84. This would not be a novel use of this power. The Parliament has rejected deficient agreements in the past (for example, the SWIFT agreement) and there is also a precedent for such action in the precise context of human rights clauses. It appears that, after a number of delays, the Parliament's Committee on Foreign Affairs (AFET) has adopted a recommendation to give consent to the 1998 Turkmenistan Partnership and Cooperation Agreement⁶⁵ but only on condition that the agreement contain a monitoring mechanism with a 'rapid reaction' option.⁶⁶ It appears further that this has been agreed with the other EU institutions, although there are no public documents available on the details.

3.1.2 Use of legislative power to establish a right of petition

85. One of the recommendations made in this study concerns the process leading up to the adoption of appropriate measures, and in particular the role of civil society (and the European Parliament) in this process. This could be done by an EU regulation adopted jointly by the Council and the Parliament, on a proposal of the Commission, in accordance with the ordinary legislative procedure. Nonetheless, two possible obstacles need to be discussed.

86. One possible obstacle is practical. There might be some reluctance on the part of the other institutions to play their part in this process. But there is a precedent in the amendments to the Korea safeguards regulation, which were demanded by the Parliament as a condition of consenting to the Korea trade agreement.⁶⁷

⁶⁴ The Parliament has no consent power in relation to agreements exclusively relating to the common foreign and security policy (Article 218(6) TFEU) or concerning monetary or foreign exchange regime matters (Article 219(3) TFEU).

⁶⁵ PE448.922v02-00 (26 January 2011).

⁶⁶ PE448.924v02-00 (26 January 2011).

⁶⁷ Eg Regulation (EU) No 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea [2011] OJ L145/19.

87. A different question is whether the EU has the competence to adopt such a regulation. Two legal bases might be envisaged. The first is Article 207 TFEU, which gives the Parliament the power to legislate on matters concerning the common commercial policy. Article 207(1) states that '[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action' and, under Article 21 TEU, these principles and objectives include the promotion of compliance with human rights.

88. There is also a precedent for such uses of Article 207. For example, the 2011 regulation suspending the 1977 EEC-Syria cooperation agreement, on purely human rights grounds, was based on Article 207 TFEU.⁶⁸ There are also other examples of regulations with a human rights objective based on Article 207 TFEU (or its predecessors).⁶⁹

89. Alternatively, there is the possibility of resort to the implied power in Article 352 TFEU. Declaration No 41 TEU states that Article 352 TFEU can be used on the basis of the objectives set out in Article 3(5) TEU, which in turn states that the EU 'in its relations with the wider world ... shall contribute to ... the protection of human rights'.

90. This is not affected by the fact that Article 352 TFEU 'cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy'.⁷⁰ Academic commentary supports the use of Article 352 for external human rights measures,⁷¹ and specifically for human rights clauses.⁷² This is also supported by practice, insofar as none of the EU regulations providing for 'appropriate measures' has been based on the common foreign and security policy. All of these regulations cite the Treaty on the Functioning of the European Union and the relevant agreement (in all cases to date, the Cotonou Agreement).⁷³

3.1.3 Use of consent power to effect changes in third countries

91. Beyond these legal changes, the Parliament can also exercise its consent power, prior to the conclusion of an agreement, to demand that specific third countries undertake to improve their human rights record as a condition of its consent to new agreements. Such undertakings should be recorded in side agreements to the main agreement, and it should be understood that a breach of these undertakings subsequent to the entry into force of the agreement will lead to the adoption of appropriate measures.

92. This has been done on a number of occasions in the past, most notably in relation to the EU-Turkey Customs Union Decision in 1995, which was only approved after Turkey undertook to adopt

⁶⁸ EU Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic (2011/523/EU) [2011] OJ L228/19, as amended by Council Decision 2012/123/CFSP of 27 February 2012 [2012] OJ L54/18.

⁶⁹ See Enzo Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford University Press, 2007), Ch 7.

⁷⁰ Article 352(4) TFEU. Cf also Article 31(1) and Article 40 TEU, which also draws a line around the CFSP.

⁷¹ Piet Eeckhout, *EU External Relations Law*, 2nd ed (Oxford: Oxford University Press, 2011), at 99.

⁷² Bruno de Witte, 'The EU and International Legal Order: The Case of Human Rights' in Panos Koutrakos and Malcolm Evans (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), at 137, noting that Article 352 (ex Article 308) TFEU was used to support a cooperation agreement between the Fundamental Rights Agency and Council of Europe Bodies.

⁷³ See, eg, Council Decision of 18 July 2011 amending the appropriate measures laid down by Decision 2009/618/EC concerning the conclusion of consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement and repealing that Decision (2011/465/EU) [2011] OJ L195/2.

certain constitutional changes and released some political prisoners.⁷⁴ More recently, the Parliament demanded that Colombia adopt a 'road map' for the improvement of human rights in that country before it would consent to a trade agreement with that country.⁷⁵ Colombia responded by submitting a detailed list of proposed reforms to the European Parliament⁷⁶ and committing to an annual human rights dialogue with the EEAS (and member states as observers).⁷⁷ The Parliament then gave its consent to the agreement.

93. The exercise of the Parliament's power to withhold consent to an agreement is not to be underestimated. Nonetheless, on the current wording of human rights clauses, the Parliament loses its primary leverage over third countries at that point. It can, of course, adopt legislative resolutions on human rights in third countries, but these cannot be enforced. It can also refuse or delay giving its consent to new protocols to the agreement, such as financial protocols or protocols on further liberalization, as it has done with Israel⁷⁸ and Uzbekistan.⁷⁹ However, this form of leverage is not always available. It is therefore important that, as recommended in this study, the Parliament be given greater influence in the monitoring and enforcement of human rights clauses, which are designed to be applicable in the post-consent phase of relations between the parties to a trade agreement.

4. RECOMMENDATIONS

A. Coverage of human rights clauses

1. The European Parliament should ensure that all future trade and investment agreements are covered by an effective human rights clause providing for 'appropriate measures' in the event of a violation of an essential elements clause (paras 47-48).
2. It is legally effective not to include human rights clauses in trade and investment agreements so long as they are covered by a human rights clause providing for the taking of 'appropriate measures' in an applicable framework cooperation agreement. The existing framework cooperation agreements with India, Mongolia and Sri Lanka do not contain such clauses and careful drafting will be required in any future trade agreements with these countries to ensure that these agreements are covered by an effective human rights clause (para 48).

B. Human rights obligations

3. Alongside the standard references, essential elements clauses should contain references to human rights as described in 'all other relevant international agreements' as in the clause in the Korea framework cooperation agreement (para 50).
4. In certain cases, it may be appropriate to negotiate specific benchmarks in relation to human rights obligations. It would be appropriate it to be agreed that a failure to meet such a benchmark could trigger the adoption of appropriate measures. However, it may be more

⁷⁴ [1995-96] OJ Annex, Debates of the European Parliament, No 4-472/155 (13 December 1995). For an account, see Stefan Krauss, 'The European Parliament in EU External Relations: The Customs Union with Turkey' (2000) 5 *European Foreign Affairs Review* 215, at 230-2 and 235.

⁷⁵ European Parliament resolution on the EU trade agreement with Colombia and Peru (13 June 2012), para 15.

⁷⁶ http://www.colombia-eu.org/en_GB/background/action-plan (26 October 2012).

⁷⁷ http://eeas.europa.eu/colombia/docs/hr_dialogue_tor_en.pdf (19 September 2012).

⁷⁸ Debate on Israel's participation in Community programmes (3 December 2008).

⁷⁹ Resolution of 15 December 2011 on the EC-Uzbekistan partnership and cooperation agreement and bilateral trade in textiles.

appropriate to include such benchmarks in a side agreement rather than in the main agreement, which is of indefinite duration (paras 52 and 91).

5. Trade and cooperation agreements should contain clauses in which the parties expressly recognize the legitimacy of regulation by the other party to promote adherence to the principles of Corporate Social Responsibility. Such a clause could take the following form: 'the parties affirm their commitment to the UN Guiding Principles on Business and Human Rights [and agree to promote best business practices related to corporate social responsibility]' (para 58).
6. Consideration might also be given to the drafting of a provision that would condition an investor's rights under an investment agreement on its compliance with CSR principles (para 60).

C. Monitoring

7. All agreements containing human rights clauses should provide for permanent human rights committees with a mandate to monitor the implementation of the parties' obligations, as set out in the respective essential elements clause. Such human rights committees should comprise representatives of the parties, of the parliaments of the parties, and of civil society. Alternatively, interparliamentary committees and civil society committees should be established with the same mandate. Such committees should have the power to recommend that the parties, through the bilateral joint council, suspend any obligation that is or is likely to impede a party's ability to comply with its obligations as set out in the respective essential elements clause (para 62).
8. Consideration should be given to a requirement, modelled on that in the GSP Regulation, that the Commission or the EEAS report biennially to the Parliament on third countries' implementation of their obligations under essential elements clauses (para 63).

D. Enforcement

9. Consideration should be given to the adoption of an EU regulation providing for a mechanism according to which representatives of civil society, as well as the European Parliament, are able to request that the Commission commence an investigation into violations by a third party of its obligations under an essential elements clause (paras 73 and 85).

E. Implementation

10. All agreements containing human rights clauses should provide for a bilateral organ established under the agreement with the power to suspend obligations in the agreement if these impede the ability of a party to comply with its obligations under essential elements clause, both on its own initiative and on the recommendation of a committee as described in Recommendation 7 (para 76).
11. All trade and investment agreements should permit the parties to adopt unilateral measures necessary to enable them to comply with their human rights obligations under the essential elements clause. This should be done by adding a clause to this effect to the list of general exceptions already contained in all such agreements (para 80).

Annex I: European Parliament Resolutions on EU trade agreements and voting record on consent to agreements (7th Parliament 2009-2013)

1 Consent by the European Parliament

Colombia and Peru

[Commission Proposal](#) of 22 September 2011 on the conclusion of a Trade agreement with Columbia and Peru

[Council Decision](#) on the conclusion of the Trade agreement of 31 May 2012

[European Parliament resolution](#) of 13 June 2012 on the EU trade agreement with Colombia and Peru (raising human rights concerns)

[Commission response](#) of 26 September 2012

[International Trade Committee report](#) tabled for plenary (rapporteur: MEP Mario David, EPP) of 27 November 2012 (suggesting consent, although human rights concerns remain)

[Plenary debate](#) of 10 December 2012

[European Parliament legislative resolution](#) of 11 December 2012

The resolution was adopted by a majority of 486 votes (72%) to 147 votes (22%) with 41 abstentions (6%).

85% of MEPs voted along European political group lines.

The majority was formed by the following political groups:

EPP (232 in favour, 0 against, 9 abstentions, cohesion: 94,4%⁷⁷)

S&D (119 in favour, 36 against, 14 abstentions, cohesion: 55,62%)

ALDE (75 in favour, 2 against, 3 abstentions, cohesion: 90,63%)

ECR (46 in favour, 0 against, 0 abstentions, cohesion: 100%)

The majority of the following political groups voted against the resolution:

Greens/EFA (1 in favour, 52 against, 0 abstentions, cohesion: 97,17%)

GUE/NGL (0 in favour, 30 against, 0 abstentions, cohesion: 100%)

EFD (6 in favour, 11 against, 11 abstentions, cohesion: 8,93%)

NI⁷⁸ (7 in favour, 16 against, 4 abstentions, cohesion: 38,89%)

[Text of the trade agreement](#) as published in the Official Journal

Central America

[Commission Proposal](#) of 25 October 2011 on the conclusion of an Association agreement with Central America

[Council Decision](#) on the conclusion of the Association agreement of 14 May 2012

[Foreign Affairs Committee Report](#) tabled for plenary (rapporteur: José Ignacio Salafranca Sánchez-Neyra, EPP) of 8 November 2012 (suggesting consent) including Opinions of Development Committee and International Trade Committee

[Plenary debate](#) of 10 December 2012

⁷⁷ As calculated by VoteWatch Europe: <http://www.votewatch.eu/en/votewatch-guide.html>.

⁷⁸ Non-attached members

[European Parliament resolution](#) on the draft Council decision on the conclusion of the Association Agreement of 11 December 2012

[Commission response](#) of 27 March 2013

[European Parliament legislative resolution](#) of 11 December 2012

The resolution was adopted by a majority of 557 votes (82%) to 100 votes (15%) with 21 abstentions (3%).

95% of MEPs votes along European political group lines.

The majority was formed by the following political groups:

EPP (239 in favour, 1 against, 2 abstentions, cohesion: 98,14)

S&D (166 in favour, 1 against, 8 abstentions, cohesion: 92,29%)

ALDE (77 in favour, 0 against, 1 abstention, cohesion: 98,08%)

ECR (44 in favour, 0 against, 1 abstention, cohesion: 96,67%)

EFD (21 in favour, 3 against, 5 abstentions, cohesion: 58,62%)

The majority of the following political groups voted against the resolution:

Greens/EFA (1 in favour, 51 against, 0 abstentions, cohesion: 97,12%)

GUE/NGL (0 in favour, 30 against, 0 abstentions, cohesion: 100%)

NI (9 in favour, 14 against, 4 abstentions, cohesion: 27,78%)

[Text of the Association agreement](#) as published in the Official Journal

South Korea

No human rights concerns were raised, an agreement on labour standards was reached.

[Commission Proposal](#) of 9 April 2010 on the conclusion of a Free Trade agreement between the EU and the Republic of Korea

[Council Decision](#) on the conclusion of the Trade agreement of 20 August 2010

[International Trade Committee report](#) tabled for plenary (rapporteur: Robert Sturdy, ECR) of 9 February 2012 (suggesting consent), welcoming that “ (...) with regard to labour rights, the FTA outlines a shared undertaking that goes beyond core ILO labour standards (...)” (p. 10).

[Plenary debate](#) of 16 February 2011

[European Parliament legislative resolution](#) of 17 February 2011

[European Parliament legislative resolution](#) of 17 February 2011 on the bilateral safeguard clause (495 in favour, 16 against and no abstentions)

The resolution was adopted by a majority of 465 votes (76%) to 128 votes (21%) with 19 abstentions (3%).

90% of MEPs voted along European political group lines.

The majority was formed by the following political groups:

EPP (213 in favour, 0 against, 11 abstentions, cohesion: 92,63%)

S&D (131 in favour, 25 against, 0 abstentions, cohesion: 75.96%)

ALDE (64 in favour, 1 against, 1 abstention, cohesion: 95.45%)

ECR (39 in favour, 0 against, 0 abstention, cohesion: 100%)

The majority of the following political groups voted against the resolution:

Greens/EFA (0 in favour, 51 against, 1 abstentions, cohesion: 97.12%)

GUE-NGL (0 in favour, 28 against, 3 abstentions, cohesion: 85.48)

NI (10 in favour, 13 against, 1 abstention, cohesion: 31.25%)

EFD (8 in favour, 10 against, 2 abstentions, cohesion: 25%)

[Text of the Free Trade agreement](#) as published in the OJ

Iraq

[Commission proposal](#) on the conclusion of a Partnership and Cooperation Agreement with Iraq of 5 November 2010

[Council decision](#) of 2 July 2012

[Foreign Affairs Committee report](#) tabled for plenary (Rapporteur: Mario Mauri, EPP) of 11 December 2012 (suggesting consent) including an Opinion of the International Trade Committee

[European Parliament resolution](#) of 17 January 2013 on the EU-Iraq Partnership and Cooperation Agreement

[European Parliament legislative resolution](#) of 17 January 2013 on the draft Council decision on the conclusion of a Partnership and Cooperation Agreement with Iraq (no roll call vote)

[Text](#) of the association agreement as published in the Official Journal

Israel

[Commission proposal](#) of 22 October 2009 on the conclusion of an additional Protocol to the Euro-Mediterranean Agreement establishing an Association with Israel on Conformity Assessment and Acceptance of Industrial Product

[Council decision](#) of 19 July 2012

[International Trade Committee Report](#) of 26 September 2012 (Rapporteur: Vital Moreira, S&D) suggesting consent

[Plenary debate](#) of 23 October 2012

[European Parliament legislative resolution](#) of 23 October 2012 on the draft Council decision on the conclusion of a Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products

The resolution was adopted by a majority of 379 votes (58%) to 230 votes (35%) with 41 abstentions (6%).

81% of MEPs voted along European political group lines.

The majority was formed by the following political groups:

EPP (228 in favour, 2 against, 9 abstentions, cohesion: 93.1%)

ALDE (42 in favour, 22 against, 10 abstentions, cohesion: 35.14%)

ECR (38 in favour, 0 against, 3 abstentions, cohesion: 89.02%)

EFD (24 in favour, 1 against, 2 abstentions, cohesion: 83.33%)

The majority of the following European political groups votes against:

S&D (33 in favour, 118 against, 13 abstentions, cohesion: 57.93%)

Greens/EFA (2 in favour, 52 against, 2 abstentions, cohesion: 89.29%)

GUE-NGL (3 in favour, 26 against, 0 abstentions, cohesion: 84.48%)

Equal number of votes in favour and votes against:

NI (9 in favour, 9 against, 2 abstentions, cohesion: 17.5%)

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 23-25)

Eastern and Southern Africa

[Commission Proposal](#) of 16 December 2008

[Council decision](#) of 4 July 2012

[International Trade Committee](#) report of 19 December 2012 (Rapporteur: Daniel Caspary, EPP)

[Plenary debate](#) of 16 January 2013

[European Parliament resolution](#) of 17 January 2013 on the implementation of the Interim Economic Partnership Agreement (IEPA), in the light of the current situation in Zimbabwe

[Commission response](#) of 19 June 2013

[European Parliament legislative resolution](#) of 17 January 2013 on the draft Council decision on the conclusion of the Interim Agreement establishing a framework for an Economic Partnership Agreement with Eastern and Southern Africa States

The resolution was adopted by a majority of 494 votes (79%) to 97 votes (16%) with 33 abstentions (5%).

93% of MEPs voted along European political group lines.

The majority was formed by the following political groups:

EPP (215 in favour, 0 against, 0 abstentions, cohesion: 100%)

S&D (143 in favour, 4 against, 14 abstentions, cohesion: 83.23%)

ALDE (70 in favour, 1 against, 0 abstentions, cohesion: 97.89%)

ECR (46 in favour, 0 against, 0 abstentions, cohesion: 100%)

The majority of the following political groups voted against the resolution:

Greens/EFA (0 in favour, 53 against, 0 abstentions, cohesion: 100%)

GUE-NGL (0 in favour, 29 against, 0 abstentions, cohesion: 100%)

NI (7 in favour, 10 against, 4 abstentions, cohesion: 21.43%)

The majority of the following political group abstained:

EFD (13 in favour, 0 against, 15 abstentions, cohesion: 30.36%)

[European Parliament resolution](#) of 17 January 2013 on the implementation of the Interim Economic Partnership Agreement (IEPA) between the European Community and the Eastern and Southern Africa States, in the light of the current situation in Zimbabwe

[Text of the agreement](#) as published in the OJ

Central Africa

[Commission Proposal](#) of 10 July 2008

[Council decision](#) of 23 October 2012

[International Trade Committee report](#) tabled for plenary (Rapporteur: David Martin, S&D) suggesting consent

[Plenary debate](#) of 13 June 2013

[European Parliament legislative resolution](#) of 13 June 2013 (no roll call vote)

Pacific

[Commission proposal](#) of 16 December 2008

[Council decision](#) of 9 February 2010

[International Trade Committee report](#) tabled for plenary (rapporteur: David Martin, S&D) of 9 December 2010 (suggesting consent)

[Plenary debate](#) of 17 January 2011

[European Parliament resolution](#) of 19 January 2011 on the Interim Partnership Agreement between the EC and the Pacific States

[European Parliament legislative resolution](#) of 19 January 2011 on the draft Council decision on the conclusion of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part (no roll call vote)

African, Caribbean and Pacific Group of States (Cotonou revision)

[European Parliament resolution](#) of 20 January 2010 on the second revision of the ACP-EC Partnership Agreement (the "Cotonou Agreement")

[Commission proposal](#) of 26 July 2011 concerning the conclusion of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of State

[Council decision](#) of 1 December 2011

[Development Committee report](#) of 22 March 2013 tabled for plenary (Rapporteur: Michael Cashman, S&D) suggesting consent but with strong reservations

[Plenary debate](#) of 13 June 2013

[European Parliament legislative resolution](#) of 13 June 2013 (consent but expression of strong reservations, no roll call vote)

[Text of the agreement](#) as published in the Official Journal

Central Asia (pre-Lisbon, not ratified)

[European Parliament resolution](#) of 15 December 2011 on the state of implementation of the EU Strategy for Central Asia

Turkmenistan

[European Parliament resolution](#) of 22 April 2009 on the Interim Trade Agreement with Turkmenistan

[European Parliament legislative resolution](#) of 22 April 2009 on the proposal for a Council and Commission decision on the conclusion of the Interim Agreement on trade and trade-related matters with Turkmenistan

The resolution was adopted by a majority of 469 votes (69,48%) to 162 votes (24%) with 44 abstentions (6,52%).

81,19% of MEPs voted along party lines.

The majority was formed by the following political groups:

EPP (251 in favour, 3 against, 2 abstentions, cohesion: 97,07%)

PES⁷⁹(108 in favour, 63 against, 17 abstentions, cohesion: 36,17%)

ALDE (67 in favour, 6 against, 8 abstentions, cohesion: 74,07%)

UEN⁸⁰ (32 in favour, 3 against, 1 abstention, cohesion: 83,33%)

⁷⁹ Party of European Socialists.

⁸⁰ Union for Europe of Nations.

The majority of the following political groups voted against:

Greens/EFA (0 in favour, 39 against, 2 abstentions, cohesion: 92,68%)

GUE-NGL (0 in favour, 33 against, 1 abstention, cohesion: 92,68%)

NI (5 in favour, 8 against, 11 abstentions, cohesion: 18,75%)

IND/DEM⁸¹ (6 in favour, 7 against, 2 abstentions, cohesion: 20%)

Tajikistan

[European Parliament resolution](#) of 17 September 2009 on the conclusion of a Partnership and Cooperation Agreement between with Tajikistan

[European Parliament legislative resolution](#) of 17 September 2009 on the proposal for a Council and Commission decision on the conclusion of a Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan

The resolution was adopted by a majority of 555 (90%) to 43 (7%) with 17 abstentions (3%).

95% of MEPs voted along European political group lines.

The majority was formed by the following political groups:

EPP (229 in favour, 1 against, 0 abstentions, cohesion: 99,35%)

S&D (151 in favour, 1 against, 0 abstentions, cohesion: 99,01%)

ALDE (74 in favour, 0 against, 0 abstentions, cohesion: 100%)

ECR (48 in favour, 1 against, 0 abstentions, cohesion: 96,94%)

Greens/EFA (41 in favour, 1 against, 0 abstentions, cohesion: 96,43%)

NI (9 in favour, 7 against, 8 abstentions, cohesion: 6,25%)

The majority of the following political groups voted against:

GUE-NGL (1 in favour, 23 against, 1 abstention, cohesion: 88%)

EFD (2 in favour, 9 against, 8 abstentions, cohesion: 21,05%)

2 Negotiations concluded, no consent by Parliament yet

Georgia

[European Parliament resolution](#) of 17 November 2011 containing recommendations on the negotiations of the EU-Georgia Association Agreement

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 37-41)

Negotiations concluded, no consent by Parliament yet

Moldova

[European Parliament resolution](#) of 15 September 2011 containing the Parliament's recommendations on the negotiations between the EU and Moldova

[Commission response](#) of 7 December 2011

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 42-46)

⁸¹ Independence/Democracy.

3 Ongoing negotiations

US

[European Parliament resolution](#) of 23 May 2013 on EU trade and investment negotiations with the United States of America (see paras 13, 25)

Canada

[European Parliament resolution](#) of 8 June 2011 on EU-Canada trade relations (no human rights concerns raised, public health concern raised in para 6)

Malaysia

[European Parliament resolution](#) of 11 September 2013 containing its recommendation on the negotiations for an EU-Malaysia partnership and cooperation agreement (see Recital I, Recommendations n-u)

Vietnam

[European Parliament resolution](#) of 18 April 2013 on Vietnam, in particular freedom of expression

Japan

[European Parliament resolution](#) of 16 February 2012 on the death penalty in Japan

[European Parliament resolution](#) of 25 October 2012 on EU trade negotiations with Japan (no human rights concerns raised)

India

[European Parliament resolution](#) of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations

[European Parliament resolution](#) of 23 May 2013 on India: execution of Mohammad Afzal Guru and its implications

Mercosur

[European Parliament resolution](#) of 17 January 2013 on trade negotiations between the EU and Mercosur (see para 7)

Azerbaijan

[European Parliament resolution](#) of 18 April 2012 containing the Parliament's recommendations on the negotiations between the EU and Azerbaijan

[Commission response](#) of 19 September 2012

[European Parliament resolution](#) of 13 June 2013 on Azerbaijan: the case of Ilgar Mammadov

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 31-32)

Kazakhstan

[European Parliament resolution](#) of 15 March 2012 on Kazakhstan

[European Parliament resolution](#) of 22 November 2012 containing recommendations on the negotiations for an EU - Kazakhstan enhanced partnership and cooperation agreement

[Commission response](#) of 02 April 2013

[European Parliament resolution](#) of 18 April 2013 on the human rights situation in Kazakhstan

Southern Mediterranean (Morocco, Jordan, Tunisia, Egypt)

[European Parliament resolution](#) of 10 May 2012 on Trade for Change: The EU Trade and Investment Strategy for the Southern Mediterranean following the Arab Spring revolutions

[International Trade Committee draft resolution](#) of 28 August 2013 on trade with Euromed

[European Parliament resolution](#) of 12 September 2013 on the situation in Egypt

[European Parliament legislative resolution](#) of 10 October 2013 on the general principles for the participation of the Hashemite Kingdom of Jordan in Union programmes

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 26-28, 33-35, 40-41)

Forthcoming negotiations

China

[European Parliament resolution](#) of 14 March 2013 on EU-China relations

[European Parliament resolution](#) of 9 October 2013 on the EU-China negotiations for a bilateral investment agreement

Council approves launch of investment talks with China ([Press release](#)) of 18 October 2013

Frozen/put on hold

Armenia

[European Parliament resolution](#) of 18 April 2012 containing the Parliament's recommendations on the negotiations between the EU and Armenia

[Commission response](#) of 25 July 2012

Belarus

[European Parliament recommendation](#) of 12 September 2013 to the Council, the Commission and the European External Action Service on EU Policy towards Belarus

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 33-36)

Iran

[European Parliament resolution](#) of 10 March 2011 on the EU's approach towards Iran

[European Parliament resolution](#) of 2 February 2012 on Iran and its nuclear programme

[European Parliament resolution](#) of 10 October 2013 on recent cases of violence and persecution against Christians (inter alia in Iran)

Syria

[European Parliament resolution](#) of 15 September 2011 on the situation in Syria

[European Parliament resolution](#) of 13 September 2012 on Syria

[European Parliament resolution](#) of 12 September 2013 on the situation in Syria

Ukraine

[European Parliament resolution](#) of 9 June 2011 on Ukraine: the cases of Yulia Tymoshenko and other members of the former government

[European Parliament resolution](#) of 27 October 2011 on the current developments in Ukraine

[European Parliament resolution](#) of 1 December 2011 containing the European Parliament's recommendations on the negotiations of the EU-Ukraine Association Agreement (human rights concerns raised)

[European Parliament resolution](#) of 24 May 2012 on Ukraine

[European Parliament resolution](#) of 13 December 2012 on the situation in Ukraine

[Commission proposal](#) of 15 May 2013

[European Parliament resolution](#) of 23 October 2013 on the European Neighbourhood Policy (see paras 47-51)

Annex 2 – A comparison of human rights clauses in significant and recent agreements

Agreements	India (1993)	Cotonou (2000, 2005 and 2010)	Korea (2010)	Colombia/Peru (2012)	Central America (2012)	Georgia and Moldova (2013)
Essential elements	Article 1	Art 9	Article 1	Article 1	Article 2	Article 2(1)
	<p>1. Respect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement.</p>	<p>2(4). 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>1. ... 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>Respect 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.</p>	<p>1. Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.</p>	<p>Respect for the democratic principles, human rights and fundamental freedoms, as proclaimed in the Universal Declaration of Human Rights and as defined in the European Convention of Human Rights, 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. Countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement.</p>
		<p>4. The principles underlying the essential and fundamental elements as defined in this Article shall apply equally to the ACP States on the one hand, and to the European Union and its Member States, on the other hand.</p>				

Non-execution						
Agreements	India (1993)	Cotonou (2000, 2005 and 2010)	Korea (2010)	Colombia/Peru (2012)	Central America (2012)	Georgia and Moldova (2013)
	None	Article 96	Article 45	Article 8	Article 355	Article 419 (Georgia) Article 455 (Moldova)
		1a. Both Parties agree to exhaust all possible options for dialogue under Article 8, except in cases of special urgency, prior to commencement of the consultations referred to in paragraph 2(a) of this Article.				
When appropriate measures may be taken		2(a) If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken.	3. If either Party considers that the other Party has failed to fulfil its obligations under this Agreement, it may take appropriate measures in accordance with international law. ...	Without prejudice to the existing mechanisms for political dialogue between the Parties, any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement.	2. If a Party considers that another Party has failed to fulfil an obligation under this Agreement, it may have recourse to appropriate measures ...	1. A Party may take appropriate measures ... if the complaining Party continues to consider that the other Party has failed to fulfil an obligation under this Agreement. ...
Meaning of 'special urgency'	None	2(b)(1) The term "cases of special urgency" shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.	Joint Interpretative Declaration Concerning Articles 45 and 46 ... The Parties agree that for the purpose of the correct interpretation and practical application of this Agreement, the term "cases of special urgency" in Article 45 (4) means a case of a material breach of this Agreement by one of the Parties. A material breach consists in either repudiation of this Agreement not sanctioned by the general rules of international law or a particularly serious and substantial violation of an essential element of the Agreement. The Parties shall assess a possible material breach of Article 4 (2), taking account of the official position, where available, of the relevant international agencies.	None	3. The Parties agree that the term "cases of special urgency" in paragraph 2 means a case of material breach of this Agreement by one of the Parties. 4. A material breach of this Agreement consists in: (a) repudiation of this Agreement not sanctioned by general rules of international law; (b) violation of the essential elements of this Agreement.	3. The exceptions referred to in paragraphs 1 and 2 of this Article shall concern: (a) denunciation of this Agreement not sanctioned by the general rules of international law, or (b) violation by the other Party of any of the essential elements of this Agreement, referred to in Article 2 of Title I (General Principles) of this Agreement.

Non-execution (cont)						
Agreements	India (1993)	Cotonou (2000, 2005 and 2010)	Korea (2010)	Colombia/Peru (2012)	Central America (2012)	Georgia and Moldova (2013)
	None	Art 96	Article 45	Article 8	Article 355	Art 419 (Georgia) Article 455 (Moldova)
Proportionality conditions on appropriate measures		2(a) These [appropriate] measures shall be revoked as soon as the reasons for taking them no longer prevail. 2(c)(1) The "appropriate measures" referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. 2(c)(2) It is understood that suspension would be a measure of last resort.	Joint Interpretative Declaration Concerning Articles 45 and 46 ... The Parties agree that for the purpose of the correct interpretation and practical application of this Agreement, the term "appropriate measures" in Article 45 (3) are measures proportionate to the failure to implement obligations under this Agreement. Measures may be taken with regard to this Agreement or to a specific agreement falling under the common institutional framework. In the selection of measures priority must be given to those which least disrupt the functioning of the agreements, taking account of possible use of domestic remedies where available.	The measures will be proportional to the violation. Priority will be given to those which least disturb the functioning of this Agreement. These measures shall be revoked as soon as the reasons for their adoption have ceased to exist.	2. In selecting which measures to adopt, priority shall be given to those which are least disruptive to the implementation of this Agreement. 3. The Parties further agree that the term "appropriate measures" referred to in paragraph 2 means measures taken in accordance with international law. It is understood that suspension would be a measure of last resort.	2. In the selection of appropriate measures, priority shall be given to those which least disturb the functioning of this Agreement. Except in cases described in paragraph 3 of this Article, such measures may not include the suspension of any rights or obligations provided for under provisions of this Agreement set out in Title IV (Trade and Trade-related Matters).
Notification and consultations		2 (a) If, despite the political dialogue on the essential elements as provided for under Article 8 and paragraph 1a of this Article, a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.	4. In cases of special urgency, the measure shall be notified immediately to the other Party. At the request of the other Party, consultations shall be held for a period of up to twenty (20) days. After this period, the measure shall apply. In this case, the other Party may request arbitration according to Article 46 with a view to examining any aspect of, or the basis for, the measure.	The latter Party may ask for an urgent meeting to be called to bring the Parties concerned together within 15 days for a thorough examination of the situation with a view to seeking an acceptable solution.	2. Such measures shall be notified immediately to the Association Committee and shall be the subject of consultations in the Committee if a Party so requests. 5. If a Party has recourse to a measure in case of special urgency, the other Party may request that an urgent meeting be called to convene the Parties within fifteen days.	The measures taken under paragraph 1 of this Article shall be notified immediately to the Association Council and shall be the subject of consultations in accordance with [Article 417(2) of this Agreement/Article 453(2)], and of dispute settlement in accordance with [Article 417(3) and Article 418 of this Agreement/Article 454].

Agreements	India (1993)	Cotonou (2000, 2005 and 2010)	Korea (2010)	Colombia/Peru (2012)	Central America (2012)	Georgia and Moldova (2013)
		<p>To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annexe VII.</p> <p>The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution. The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In no case shall the dialogue under the consultations procedure last longer than 120 days. [...]</p> <p>2(b)(2) The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so. 2(c)(3) If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers.</p> <p>At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).</p>				

Linkage clauses			
Agreements	Cariforum (2008)	Korea (2010)	Singapore (2013)
	Article 2	Article 15.14	Article 17.17
	<p>1. 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. This Agreement shall build on the provisions of the Cotonou Agreement and the previous ACPEEC Partnership Agreements in the area of regional cooperation and integration as well as economic and trade cooperation.</p>	<p>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.</p>	<p>1. This Agreement shall be an integral part of the overall bilateral relations as governed by the Partnership and Cooperation Agreement and shall form part of a common institutional framework. It constitutes a specific agreement giving effect to the trade provisions of the Partnership and Cooperation Agreement</p>

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