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Article

Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements

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Abstract

In the mid-1990s, the EU adopted a general policy of including human rights clauses in all of its international trade agreements. Through these human rights clauses, in addition to other tools such as Human Rights Dialogue and sanctions, the EU seeks to promote the protection of human rights in its external relations. There are, however, some issues arising regarding the content, use, implementation and activation of these clauses. Not only do human rights clauses in different agreements vary in wording and scope, but also the actual implementation and enforcement by the EU differ from case to case, raising questions as to the selective character and the consistency of the EU's action and, consequently, as to

the EU's credibility as a normative international actor. The main deficiencies in this regard are the selective and at times inconsistent inclusion and activation of human rights clauses, as shown by an examination of the EU's agreements and their implementation and enforcement in practice. This article examines human rights clauses in the EU's international trade agreements and the implementation and enforcement thereof, in order to shed light on the promises and pitfalls of the EU's human rights efforts.

Keywords: EU external action; human rights conditionality; human rights clauses; EU trade agreements; consistency of EU external action

1. Introduction

Respect for human rights is one of the core values of the European Union (EU) and its Member States and appears prominently in the EU's 'value catalogue' of Article 2 Treaty on European Union (TEU).¹ In addition to ensuring the protection of human rights within the EU proper, the EU also dedicates itself to the promotion of human rights in its external relations. With the entry into force of the Treaty of Lisbon, the practice of protecting human rights in EU external relations is enshrined in primary EU law, with Articles 3(5) and 21 TEU stipulating that the EU shall contribute to the protection of human rights in its external relations. The pursuit of these objectives plays a prominent role in the EU's Common Commercial Policy (CCP) and, by extension, in its international trade relations. One of the ways in which the EU pursues this objective within the CCP is by integrating human rights into its international trade relations, primarily by including human rights clauses into its international trade agreements. By introducing such clauses and stipulating that respect for human rights forms an 'essential element' of the agreement, the EU links its trade policy to the promotion of human rights, employing a conditionality-based policy.² Another way of integrating human rights into the EU's external trade policy is by way of Human Rights Impact Assessments (HRIA), which are conducted at the beginning of and during the negotiating phase of trade agreements or independently of such agreements.³

In 1995, the EU adopted a general policy of inserting human rights clauses in all its political framework agreements, and later in all its international agreements, including its trade agreements.⁴ Through the inclusion of such clauses, the EU seeks to pursue non-trade objectives through its trade policy, in this case the contribution to the protection of human rights, also beyond its own borders. Although at first sight a commendable approach, seeing as the EU aims to contribute to better human rights standards, the EU's policy has also attracted some criticism, especially regarding the implementation and enforcement of the human rights clauses. In spite of the general policy to include a clause in all EU international agreements, not all agreements contain a human rights clause. Additionally, where there were applicable human rights clauses, they have only been activated in a limited number of cases. Such practices raise questions as to the consistency of the EU's implementation and enforcement of its general policy on human rights clauses. Similarly, it is worth considering the human rights clause in the context of the other tools the EU has at its disposal when it comes to human rights protection, an evaluation which is necessary to consider the suitability of human rights clauses as a tool of human rights protection.

Thus, when it comes to the EU's general policy of including human rights clauses in its agreements, and the EU's implementation thereof, several issues arise, such as the drafting and scope of the human

¹Treaty on European Union (Consolidated Version) [2012] OJ C 326/13, Article 2: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' See also Rudolf Geiger, 'Article 21 [Principles of European External Policy]' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties* (C H Beck 2015) 120, paras 7–8.

²Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 7–12; Emilie M Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) 7 *Perspectives on Politics* 33, 33; Peter Kotzian, Michèle Knodt and Sigita Urdze, 'Instruments of the EU's External Democracy Promotion' (2011) 49 *Journal of Common Market Studies* 995, 1004; Lachlan Mackenzie and Katharina L Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA' (2017) 55 *Journal of Common Market Studies* 832; Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20 *European Law Journal* 733, 740; Fabienne Zwagemakers, 'The EU's Conditionality Policy: A New Strategy to Achieve Compliance' (2012) IAI Working Papers 12/03, 3–5 <<https://eulacfoundation.org/en/content/eus-conditionality-policy-new-strategy-achieve-compliance>> accessed 12 March 2019. See also Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235, 245.

³For an analysis of the European Commission's Trade and Sustainability Impact Assessments see Simon Walker, 'Human Rights in the Trade and Sustainability Impact Assessment of the EU–Tunisia Free Trade Agreement' (2018) 10 *Journal of Human Rights Practice* 103, 104.

⁴Commission, 'Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries' (Communication) COM (95) 216 final; Council of the European Union, 'Conclusions on human rights clauses in Community agreements with non-member countries of 29 May 1995' (*Bulletin of the European Communities*, No 5/1995, 9, point 1.2.3).

rights clauses, the legal bases of the EU's policy and practice, the actual use and enforcement of human rights clauses, and the broader context of human rights conditionality. This article aims to comprehensively address these issues, discuss the underlying legal and practical issues, and answer related questions, such as: how consistent is the EU's practice in drafting and including human rights clauses in its international trade agreements? Does the EU adequately take account of the European and international legal frameworks when it creates and implements such clauses? Are the human rights clauses consistently and indiscriminately applied and enforced by the EU? To this end, the article first provides an overview of the EU's tools of external human rights promotion (Section 2.1) with a special focus on human rights clauses (Section 2.2) and the role of the European Parliament (Section 2.3). It then delineates and analyses the legal framework within which these clauses are created and enforced, both at the EU and the international level (Section 3), and lastly, considers the use and enforcement of such clauses in EU practice, with a focus on the selectivity and consistency of EU action (Section 4).

2. EU instruments for human rights protection

2.1. Human rights tools: An overview

When it comes to the protection of human rights in EU external relations, human rights clauses are not the only tool at the disposal of the EU to improve human rights standards in third countries. In its relations with third countries, the EU can use diplomatic instruments to promote the observation of human rights. The Strategic Framework for Human Rights and Democracy, adopted by the Foreign Affairs Council in 2012, demonstrates the EU's future agenda.⁵ Simultaneously, the first Action Plan on Human Rights and Democracy (2012–2014) was adopted and later renewed for the 2015–2019 period.⁶ In the context of human rights protection, the most relevant diplomatic instrument is the Human Rights Dialogue.⁷ Human Rights Dialogues aim at improving human rights conditions on a bilateral (and multilateral) basis by providing assistance to the targeted countries, and aim at a better understanding of local conditions.⁸ Moreover, some international agreements also provide for political dialogue in order to ensure the implementation of human rights clauses. The most prominent example is the Cotonou Agreement with the African, Caribbean and Pacific (ACP) States.⁹ As a result of bargaining during treaty negotiations, these instruments are not included in every agreement to the same extent, and some countries do not accept the establishment of Human Rights Dialogues. Columbia and Peru, for example, did agree to an annual Human Rights Dialogue with the European External Action Service (EEAS) following a resolution of the European Parliament demanding the improvement of human rights standards.¹⁰ Obviously, the use of diplomatic pressure in the context of human rights is not *stricto sensu* an example of a tool used to

⁵Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy 2012' (2012) 11855/12.

⁶Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy 2012' (n 5) Action Plan, V.25.b.

⁷Karen E Smith, 'The EU, Human Rights and Relations with Third Countries: "Foreign Policy" With an Ethical Dimension?' in Karen E Smith and Margot Light (eds), *Ethics and Foreign Policy* (Cambridge University Press 2001) 188; Vaughne Miller, 'The Human Rights Clause in the EU's External Agreements' (2004) House of Commons Library Research Paper 04/33, 10 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP04-33>> accessed 13 December 2018; Sandra Fernandes, 'EU Policies Towards Russia, 1999–2007: *Realpolitik* Intended' in Nathalie Tocci (ed), *The European Union as a Normative Foreign Policy Actor* (CEPS Working Document 281 2008) 9–10; Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649, 685; Zwagemakers (n 2) 3; Gstöhl and Hanf (n 2) 740; Daniela Sicurelli, 'The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam' (2015) 11 *Journal of Contemporary European Research* 230, 236; Mackenzie and Meissner (n 2) 837.

⁸European External Action Service, 'EU Action Plan on Human Rights and Democracy 2015–2019' (22 June 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/4083/eu-action-plan-human-rights-and-democracy-2015-2019_en> accessed 13 December 2018.

⁹Der-Chin Horng, 'The Human Rights Clause in the European Union's External Trade and Development Agreements' (2003) 9 *European Law Journal* 677, 681; Miller (n 7) 10; Directorate-General for External Policies of the Union/Lorand Bartels, 'Human Rights and Democracy Clauses in the EU's International Agreements' (September 2005) DG ExPo/B/PolDep/Study/2005/06, 7, 9, 12.

¹⁰Mackenzie and Meissner (n 2) 835–7.

enforce legal obligations. Nonetheless, it can be considered a tool in the wider context of measures that contribute to improving human rights standards.

When entering into new agreements, the Commission conducts an Impact Assessment (IA) at the beginning of, and a Trade and Sustainability Impact Assessment (TSIA) during, the negotiating phase.¹¹ The TSIA provides ‘the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations’.¹² In the EU Action Plan on Human Rights and Democracy of 2012, the Council stipulated the inclusion of human rights situations in the TSIA.¹³ Furthermore, HRIAs can also be conducted without being connected to trade agreements.¹⁴ However, the TSIA have been criticised because solid analyses of the impact of trade agreements on human rights were missing and the TSIA could only provide limited insights into human rights impacts of proposed agreements.¹⁵ As the assessment is conducted before the conclusion of new agreements, the rationale behind HRIAs is that States shall not face conflicting obligations (e.g. stemming from previously ratified human rights treaties) when entering into new trade agreements.¹⁶

In contrast, the mechanism of human rights conditionality aims at positively affecting respect for human rights outside the EU, not necessarily or only in relation to trade agreements. Conditionality mechanisms can be applied both *ex ante* (adaptations to the human rights situation are necessary a priori) and *ex post* (human rights clauses) vis-à-vis non-EU countries. Thereby, the functioning of conditionality is based on the impact the EU has on these countries when granting financial aid, market access, or institutional ties in exchange for their compliance with the EU’s standards.¹⁷ Conditionality mechanisms can either be constructed in a positive manner (‘carrots’), that is, rewards or benefits, or in a negative manner (‘sticks’), that is, punishment or a suspension of benefits.¹⁸ Via trade agreements, EU internal market access is granted as a reward for compliance. Hence, in international agreements, a double conditionality is incorporated: positive (financial) incentives for ensuring human rights and democracy

¹¹On the methodology see Elisabeth Bürgi Bonanomi, ‘Measuring Human Rights Impacts of Trade Agreements – Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology’ (2017) 9 *Journal of Human Rights Practice* 481.

¹²Samantha Velluti, ‘The Promotion and Integration of Human Rights in EU External Trade Relations’ (2016) 32 *Utrecht Journal of International and European Law* 41, 58; Commission, ‘Sustainability Impact Assessment’ (2017) <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm> accessed 13 December 2018.

¹³Council, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy 2012’ (n 5) Action Plan, I.1; Isabelle Ioannides, *The Effects of Human Rights Related Clauses in the EU-Mexico Global Agreement and the EU-Chile Association Agreement – Ex-Post Impact Assessment* (European Parliamentary Research Service 2017) 29.

¹⁴Walker (n 3) 103.

¹⁵Velluti (n 12) 58; several authors have discussed (Human Rights) Impact Assessments: Leila Neimane and Ilva Rudusa, ‘Trade Sustainability Impact Assessments – Transformation and Modelling: Roles of the European Union and Switzerland’ (2017) 1 *Journal of Education Culture and Society* 239; Simon Mark Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia 2009); Walker (n 3) 103.

¹⁶Human Rights Council of the UNGA/Report of the Special Rapporteur on the right to food, Olivier De Schutter, ‘Guiding principles on human rights impact assessments of trade and investment agreement – Addendum’ (2011) A/HRC/19/59/Add.5, point 2.1.

¹⁷Elena Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 175; Frank Schimmelfennig, ‘Europeanization Beyond Europe’ (2012) 7 *Living Reviews in European Governance* 8 <<http://www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/download/lreg-2012-1Color.pdf>> accessed 13 December 2018. See also Johanne Døhlie Saltnes, ‘The EU’s Human Rights Policy. Unpacking the Literature on the EU’s Implementation of Aid Conditionality’ (2013) Arena Working Paper 2/2013, 2–6 <<http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp2-13.pdf>> accessed 13 December 2018; Frank Schimmelfennig and Ulrich Sedelmeier, ‘Introduction: Conceptualizing the Europeanization of Central and Eastern Europe’ in Frank Schimmelfennig and Ulrich Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Cornell University Press 2015) 12–6.

¹⁸Smith (n 7) 188–90; Richard Youngs, *The European Union and the Promotion of Democracy: Europe’s Mediterranean and Asian Policies* (Oxford University Press 2001) 21–6; Martin Holland, *The European Union and the Third World* (Palgrave 2002) 132; Frank Schimmelfennig, ‘The EU: Promoting Liberal Democracy through Membership Conditionality’ in Trine Flockhart (ed), *Socializing Democratic Norms: The Role of International Organizations for the Construction of Europe* (Palgrave Macmillan 2005) 106; Directorate-General for External Policies of the Union/Lorand Bartels, ‘The Application of Human Rights Conditionality in the EU’s Bilateral Trade Agreements and Other Trade Arrangements with Third Countries’ (November 2008) EXPO-B-INTA-2008-57, 1; Manners (n 2) 245; Kotzian, Knodt and Urdze (n 2) 1004.

are supplemented with sanctions in case of violations.¹⁹ Conditionality is one of the most important instruments for the EU to promote human rights values as stipulated in Article 3(5) TEU and Article 21 TEU by connecting them to its trade policy and is, in the context of trade agreements, expressed by the use of human rights clauses.²⁰ In general, the EU uses ‘a positive, incentive-based form of conditionality’, which it considers ‘more legitimate and potentially more effective’.²¹

Human rights conditionality is not only part of bilateral free trade agreements or Economic Partnership Agreements (under the Cotonou Framework), but also appears in other contexts. The EU applies positive conditionality to assure the achievement of its objectives, such as the functioning of the enlargement process (e.g. through Stability and Association Agreements under the Stability and Association Process), which has been enshrined in the Treaties since the Treaty of Amsterdam and is also expressed in the Copenhagen Criteria.²² Furthermore, autonomous instruments on financial and technical cooperation, such as the European Neighbourhood and Partnership Instrument and the Development Cooperation Instrument, use conditionality clauses.²³ Under the Generalised Scheme of Preferences (GSP), the EU grants preferential access in the form of tariff preferences to countries that fulfil certain economic requirements.²⁴ Under the Generalised Scheme of Preferences+ (GSP+), which is an autonomous trade arrangement, the EU grants preferential treatment to States that have ratified and implemented international conventions on human and labour rights, sustainable development and good governance.²⁵

Negative conditionality can then either be applied by withdrawing or redirecting financial assistance, by withdrawing preferences or by imposing sanctions.²⁶ For example, sanctions have been imposed on Fiji, the Central African Republic, Guinea-Bissau, Mauritania, Guinea and Madagascar in response to *coups d'état*, by invoking Article 96 of the Cotonou Agreement or its predecessor provisions (see Section 2.2.2).²⁷ In addition, and independent of the EU's trade agreements, economic or financial sanctions can be adopted pursuant to Article 215 Treaty on the Functioning of the European Union (TFEU) (restrictive measures) if rights of the EU and/or its Member States or *erga omnes* obligations²⁸ have been

¹⁹Stefan Griller, ‘Die Außenwirkung der Europäischen Union für Freiheitsgewährleistung und Grundrechtsschutz’ in Peter-Christian Müller-Graff (ed), *Die Rolle der Erweiterten Europäischen Union in der Welt* (Nomos 2006) 333.

²⁰Bartels (n 2) 7–12; Hafner-Burton (n 2) 33; Kotzian, Knodt and Urdze (n 2) 1004; Mackenzie and Meissner (n 2) 835–7; Gstöhl and Hanf (n 2) 740; Zwagemakers (n 2) 3–5; Manners (n 2) 245.

²¹Youngs (n 18) 192; Smith (n 7) 190; Karen E Smith, ‘Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations’ (2006) 44 *Journal of Common Market Studies* 113, 126.

²²Fierro (n 17) 136, 138; Bernard Steunenberg and Antoaneta Dimitrova, ‘Compliance in the EU Enlargement Process: The Limits of Conditionality’ (2007) 11 *European Integration online Papers*, 3 <<http://eiop.or.at/eiop/texte/2007-005a.htm>> accessed 13 December 2018. The accession criteria were first mentioned in the Conclusion of the Presidency at the European Council in Copenhagen (21–22 June 1993) 12, para 7.A.iii. According to these criteria, the stability of institutions guaranteeing human rights is part of the political dimension. In the Treaty of Lisbon, these criteria are enshrined in Article 49 TEU through the reference to respect for the values of Article 2 TEU, including respect for human rights.

²³Directorate-General for External Policies of the Union/Lorand Bartels, ‘The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements’ (February 2014) EXPO/B/DROI/2012-09, 8; Directorate-General/Bartels, ‘Human Rights and Democracy Clauses’ (n 9) 7. See for conditionality in the European Neighbourhood Policy: Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (Hart Publishing 2014) 59–66.

²⁴Velluti (n 12) 50.

²⁵Directorate-General/Bartels, ‘The Application of Human Rights Conditionality’ (n 18) 8; Velluti (n 12) 50; Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

²⁶Directorate-General/Bartels, ‘The Application of Human Rights Conditionality’ (n 18) 7, 9–10; Clara Portela, *European Union Sanctions and Foreign Policy* (Routledge 2010) 127, 148.

²⁷Karen Del Biondo, ‘EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice’ (2011) 7 *Journal of Contemporary European Research* 380, 381, 395; see also several Council Decisions on sanctions, available at <https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-08-04.pdf> accessed 13 December 2018.

²⁸The adoption of sanctions (or countermeasures) in response to breaches of obligations *erga omnes* is not, as at the time of writing, generally accepted in the literature and is not clarified in the context of Article 54 of the Articles on Responsibility of States for Internationally Wrongful Acts: Paolo Palchetti, ‘Reaction by the European Union to Breaches of Erga Omnes Obligations’ in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International 2002) 219, 220; International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’ in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two) 139; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2010) 19–25.

violated.²⁹ Such sanctions were, for example, adopted against Iran in response to the deterioration of the human rights situation.³⁰ Apart from that, the EU imposed sanctions on China after the Tiananmen Square incidents, on Myanmar (Burma) and Zimbabwe, and against individuals in Iran and Ukraine – generally in response to human rights violations.³¹ A possible sanction could also be the (partial) suspension or even the termination of the agreement.³² Thus, trade embargoes can either be imposed as appropriate measures under the non-execution clause (international treaty law) or as economic or financial sanctions under general international law.³³

Sanctions must be in compliance with international law and should be used as *ultima ratio*, not least because of the potential negative impact on human rights standards as a consequence.³⁴ The EU has stated that, when adopting restrictive measures, the humanitarian needs of targeted persons and international obligations shall be taken into account, thus complicating the use and enforcement of certain mechanisms.³⁵ (Non-)effective targeting is only one of the disadvantages being discussed in relation to economic sanctions.³⁶ However, restrictive measures can also be adopted in cases where developed countries oppose submitting themselves to the EU's conditionality mechanisms.³⁷

2.2. Human rights clauses in the EU's international trade agreements

Until the end of the 1980s, the promotion of human rights was not a priority in EU external relations. At that time, the idea that there can be no development without democracy, no democracy without the protection of human rights, and no democracy without development gained acceptance; subsequently, this idea was expressed in treaty provisions.³⁸ Starting with the revised Lomé IV Convention (1995), human rights clauses have systematically been included in the EU's trade agreements.³⁹ The Lomé Conventions intended to promote trade, 'taking account of their respective levels of development, and, in particular, of the need to secure additional benefits for the trade of ACP States, in order to accelerate the rate of growth of their trade ...'.⁴⁰ In addition, a good governance approach has been developed, which links transparency and accountability to the respect for human rights.⁴¹

²⁹Portela (n 26) 23; Marco Gestri, 'Sanctions Imposed by the European Union: Legal and Institutional Aspects' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016) 70, 75; Treaty on the Functioning of the European Union (Consolidated Version) [2012] OJ C 326/47.

³⁰See e.g. Council, Implementing Decision 2011/670/CFSP of 10 October 2011 implementing Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran [2011] OJ L 267/13.

³¹Commission, 'European Union Restrictive measures (sanctions) in force' (2017) <https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-08-04.pdf> accessed 13 December 2018.

³²Henning C Schneider and Jörg Philipp Terhechte, 'Artikel 215 AEUV [Wirtschaftsembargo; Beschlussfassung; Rechtsschutz]' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (61. Ergänzungslieferung, C H Beck April 2017) para 2; Hans-Joachim Cremer, 'Artikel 215 AEUV [Restriktive Maßnahmen]' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (5th edn, C H Beck 2016) para 4; Marc Bungenberg, 'Artikel 215 AEUV [Wirtschaftsembargo; Beschlussfassung; Rechtsschutz]' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015) para 15.

³³Bartels (n 2) 120–7; Commission, 'Communication' (n 4); Fierro (n 17) 100–1. See also Section 3.

³⁴Smith (n 7) 190; Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 11; Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (2012) 15114/05, para 9.

³⁵Council, 'Guidelines on implementation and evaluation of restrictive measures (sanctions)' (n 34) para 9.

³⁶See e.g. European Union Institute for Security Studies/Iana Dreyer and José Luengo-Cabrera (eds), *On Target? EU Sanctions as Security Policy Tools* (EU Institute for Security Studies 2015).

³⁷On the non-inclusion of human rights clauses in agreements with developed countries see Directorate-General/Bartels, 'Human Rights and Democracy Clauses' (n 9) 6; Mackenzie and Meissner (n 2) 837. See also Section 4.1.

³⁸Griller (n 19) 333.

³⁹Hornig (n 9) 678; Velluti (n 12) 53.

⁴⁰Article I of the Lomé I Convention.

⁴¹Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (Kluwer Law International 2000) 190; Kotzian, Knodt and Urdze (n 2) 1004; Schimmelfennig (n 17) 13. For an example, see Article 9(3) of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ('Cotonou Agreement') [2000] OJ L 317/3.

2.2.1. Historical development

The necessity for a human rights clause was first mentioned in the context of the Lomé I Convention in response to human rights violations in Uganda in the late 1970s.⁴² However, at the time of the conclusion of the Lomé II Convention (1979), the ACP Group of States were reluctant to accept the inclusion of a human rights clause.⁴³ When concluding the Lomé III Convention (1984), the EU's negotiating position was weakened because of its continued trading with the apartheid regime in South Africa.⁴⁴ As a result, the first human rights clause was only inserted in the Lomé IV Convention (1989).⁴⁵ Article 5 Lomé IV Convention stipulated 'respect for and promotion of human rights' and that 'development policy and cooperation are closely linked' in that respect. In a rather programmatic manner, the parties 'reiterate their deep attachment to human dignity and human rights', but distinct human rights guarantees were not formulated, nor did the clause provide for a suspension of the treaty.⁴⁶

A so-called 'basis clause' was included in 1990 in the Framework Agreement with Argentina and subsequently in agreements with Chile, Uruguay and Paraguay. The clause was called 'basis clause' because, pursuant to Article 1 of the Argentinian Framework Agreement, cooperation was 'based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina'.⁴⁷ Nevertheless, the vagueness of the provision led to doubts about whether a violation could trigger the consequences of Article 60(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).⁴⁸ In that case, a material breach of a treaty could trigger the termination or the – whole or partial – suspension of the treaty. In the light of this article, a 'violation of a provision essential to the accomplishment of the object or purpose of the treaty' constitutes such a breach. The rule reflected in Article 60(3)(b) VCLT functions as a default rule on termination or suspension in cases of material breach if the international agreement in question does not contain such a provision (see Section 3.2).

In 1991 the Council of the European Communities declared that it intended to insert human rights clauses into future cooperation agreements, following the precedent of Lomé IV.⁴⁹ One year later, the Council stated that 'respect for democratic principles and human rights . . . and the principles of the market economy are essential components of cooperation or association agreements . . .'.⁵⁰ As a reaction to the Council's statement, the basis clause was altered to an 'essential elements clause' in the sense of Article

⁴²Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 6.

⁴³Fierro (n 17) 55.

⁴⁴Fierro (n 17) 57.

⁴⁵Fierro (n 17) 67; Gstöhl and Hanf (n 2) 739; Nicholas Hachez, "Essential Elements" Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights? (2015) Leuven Centre for Global Studies Working Paper No. 158, 7 <<https://ghum.kuleuven.be/ggs/publications/wp158hachez.pdf>> accessed 13 December 2018.

⁴⁶Piet Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundation* (Oxford University Press 2004) 476; Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 [1991] OJ L 229/3.

⁴⁷Council Decision 90/530/EEC of 8 October 1990 concerning the conclusion of the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, [1990] OJ L 295/66; Eeckhout (n 46) 477; Directorate-General/Bartels, 'Human Rights and Democracy Clauses' (n 9) 4; Directorate-General/Bartels, 'The Application of Human Rights Conditionality' (n 18) 2; Lorand Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (German Institute for Human Rights 2014) 12: Bartels calls this clause the first 'operative' human rights clause. However, he criticises the underlying idea of invoking the doctrine of *rebus sic stantibus* on the basis of this clause, since the invocation of the doctrine of *rebus sic stantibus* is generally only possible when there are circumstances unforeseen at the time of the conclusion of the agreement.

⁴⁸Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); Eibe Riedel and Martin Will, 'Human Rights Clauses in External Agreements of the EC' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 729.

⁴⁹Gstöhl and Hanf (n 2) 739; Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development of 28 November 1991 (*Bulletin of the European Communities*, No 11/1991, p 124, point 2.3.1, para 10); Motion for a European Parliament Resolution on the human rights and democracy clause in European Union agreements, Report of 23 January 2006, Explanatory Statement, para 2 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+REPORT+A6-2006-0004+0+DOC+XML+V0//EN>> accessed 13 December 2018. For a critical discussion of the EU's policy of (non-)inclusion see Section 4.1.

⁵⁰Council of the European Union, 'Statement on respect for democratic principles, human rights and the principles of the market economy' (*Bulletin of the European Communities*, No 5/1992, 82, point 1.2.13.)

60(3)(b) VCLT.⁵¹ An example can be found in Article 1 of the Framework Agreement with Brazil, which stipulates that cooperation is ‘based on respect for the democratic principles and human rights . . . which constitute an essential component of this Agreement’.⁵² In subsequent treaties, the essential elements clause was supplemented with a ‘suspension clause’, as, for example, in the agreements with the Baltic countries, which was thus called the ‘Baltic clause’.⁵³ However, the clause’s scope was limited to serious breaches of the agreement and there was no provision on either dialogue with, or notification of, the other party.⁵⁴ The succeeding ‘Bulgarian clause’ (or ‘non-execution clause’) included consultations and stipulated ‘appropriate measures’ as a reaction to violations,⁵⁵ which may be why third States have more easily accepted the clause.⁵⁶ Once agreed upon and inserted into an agreement, the clause can be considered binding on the parties.⁵⁷ Likewise, the revised version of the Lomé IV Convention (1995)⁵⁸ contained not only an essential elements clause, but also a non-execution clause.⁵⁹ The EU managed to include a reference to the rule of law in the essential elements clause but the ACP countries successfully negotiated a revised version of the non-execution clause which emphasised the consultation mechanism even more than the ‘Bulgarian clause’ did (Article 366a Lomé IVbis).⁶⁰

2.2.2. Drafting and scope of current human rights clauses: Status quo and examples

In its conclusions of 1995, following a communication of the European Commission,⁶¹ the Council ‘approved the inclusion of a suspension mechanism to be included in Community agreements with non-member countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights’.⁶² The European Commission stated that certain criteria should be fulfilled when drafting such clauses: (i) the preamble should contain ‘pertinent references to respect for human rights in general and to universal and/or regional instruments’; (ii) in the body of the agreement, an Article X should define respect for democratic principles and fundamental human rights as an ‘essential element’ of the agreement and an ‘Article Y on the non-execution, in cases of breach of an essential element of the agreement, which allows the parties to take appropriate measures after consulting the Association or Cooperation Council, except in cases of special urgency’; and (iii) in the annex to the agreement there should be declarations interpreting the terms ‘special urgency and appropriate measures’.⁶³ In the Cotonou Agreement (2000) – the successor to the Lomé Convention(s) – these criteria were stipulated in several Articles: Article 9(2) ensured respect for human rights and democratic principles and the rule of law; Article 9(3) codified the new good governance approach as a ‘fundamental element’; and Article 9(4) specified the active promotion of these values.⁶⁴ Additionally,

⁵¹Hornig (n 9) 678; Eeckhout, *External Relations of the European Union* (n 46) 477; Claire Gammage, ‘Protecting Human Rights in the Context of Free Trade? The Case of the SADC Group Economic Partnership Agreement’ (2014) 20 *European Law Journal* 779, 781; Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) 25 *European Journal of International Law* 1071, 1079; Bartels (n 47) 13; Bartels again criticises the clause because, in his opinion, declaring that human rights are an essential element of an agreement does not create obligations.

⁵²Framework Agreement for the Cooperation between the European Economic Community and the Federative Republic of Brazil [1995] OJ L 262/54.

⁵³Hornig (n 9) 678; Eeckhout (n 46) 477; Bartels (n 2) 23; Gstöhl and Hanf (n 2) 739; Bartels (n 47) 13; Hachez (n 45) 9–10.

⁵⁴Riedel and Will (n 48) 729; Fierro (n 17) 222; Hornig (n 9) 678; Eeckhout (n 46) 477; Bartels (n 2) 23; Directorate-General/Bartels (n 18) 5.

⁵⁵Eeckhout (n 46) 477; Bartels (n 2) 24; Directorate-General/Bartels (n 18) 5; Hachez (n 45) 10.

⁵⁶Hornig (n 9) 679.

⁵⁷Bartels, ‘The EU’s Human Rights Obligations’ (n 51) 1079.

⁵⁸Agreement Amending the Fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995 [1998] OJ L 156/3.

⁵⁹Arts (n 41) 190; Eeckhout (n 46) 29; Bartels, ‘The EU’s Human Rights Obligations’ (n 51) 1079.

⁶⁰Riedel and Will (n 48) 731; Arts (n 41) 191.

⁶¹Commission, ‘Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries’ (n 4).

⁶²Council, ‘Conclusions on human rights clauses in Community agreements with non-member countries’ (n 4).

⁶³Commission, ‘Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries’ (n 4); Riedel and Will (n 48) 731; Bartels (n 47) 10; Gstöhl and Hanf (n 2) 739; Hachez (n 45) 11; Velluti (n 12) 54.

⁶⁴Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part [2000] OJ L 317/3.

Article 96(2), as a targeted suspension clause limited to violations of essential elements, described the procedure (including political dialogue and consultations) in the event of non-observance of obligations by a party to the agreement.⁶⁵ Thus, the Cotonou Agreement is equipped with the most elaborate system of norms ensuring human rights conditionality.⁶⁶

In 2012 the EU Strategic Framework and Action Plan on Human Rights and Democracy stipulated that the ‘EU seeks to have such a clause in all its political framework agreements, such as Association Agreements and Partnership and Cooperation Agreements, with third countries’.⁶⁷ The succeeding Action Plan (2015–2019) states that human rights clauses ‘are systematically included in all new EU international agreements’.⁶⁸ Even if the latest generation of human rights clauses have been called a ‘standard clause’ by some authors,⁶⁹ the clause might still not be as standardised as the Commission had intended in 1995. First, the references to human rights in the essential elements clause vary. In many clauses, reference is made to the Universal Declaration of Human Rights, which contains obligations that – as far as they reflect customary international law – are already binding on States irrespective of the international agreement concluded with the EU.⁷⁰ Other clauses refer to specific (regional) human rights catalogues (e.g. the Helsinki Final Act, the Charter of Paris for a New Europe, or the European Convention on Human Rights and Fundamental Freedoms).⁷¹ In the EU-Korea Framework Agreement, a new passage was included (‘other relevant international human rights instruments’) ensuring that prospective human rights agreements fall within the material scope of the human rights clause.⁷² Except for the Association Agreements with Israel and with Tunisia, all the EU’s trade agreements or framework agreements applicable to trade agreements contain a reference to the Universal Declaration of Human Rights. The agreements with Albania, Bosnia and Herzegovina, Georgia, Kosovo, Macedonia, Moldova, Montenegro, Serbia and Ukraine refer to the Helsinki Final Act, the Charter of Paris for a New Europe, and the European Convention on Human Rights. In the agreements with Andorra, San Marino and Turkey respect for human rights is not mentioned; however, these countries are all party to the European Convention on Human Rights. Moreover, the level of conditionality expressed in the non-execution clause varies depending on the EU’s economic leverage in relation to another country.⁷³ Except for the Agreements with Georgia and Moldova, where there is only a reference to the Association Council, all the EU’s trade agreements or applicable framework agreements contain a – more or less detailed – non-execution clause. For example, the non-execution clause in Article 96 of the Cotonou Agreement governing the relationship with numerous former colonies is quite elaborate,⁷⁴ whereas the non-execution clause in Article 45 of the EU-Korea Framework Agreement is less detailed.⁷⁵

Within the framework of the Cotonou Agreement (Article 36), the EU negotiates bilateral Economic Partnership Agreements (EPAs) in order to progressively remove ‘barriers to trade between them and [to] enhanc[e] cooperation in all areas relevant to trade’.⁷⁶ As long as trade agreements are linked (by reference) to the related framework agreement, no separate essential elements clause needs to be included

⁶⁵Directorate-General/Bartels (n 18) 5; Eeckhout (n 46) 478–9; Gstöhl and Hanf (n 2) 40.

⁶⁶Hachez (n 45) 10.

⁶⁷Council, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy 2012’ (n 5).

⁶⁸Council of the European Union, ‘Conclusions of 20 July 2015 on the Action Plan on Human Rights and Democracy 2015–2019’, 108975/15, para 33 lit e.

⁶⁹Riedel and Will (n 48) 732; Bartels (n 47) 26.

⁷⁰Hurst Hannum, ‘The UDHR in National and International Law’ (1998) 3 *Health and Human Rights* 144, 145.

⁷¹Hafner-Burton (n 2) 34; Directorate-General/Bartels, ‘The European Parliament’s Role’ (n 23) 9; Hachez (n 45) 16.

⁷²Directorate-General/Bartels, ‘The European Parliament’s Role’ (n 23) 9; Hachez (n 45) 16.

⁷³Daniela Donno, ‘Legalization and Leverage: Human Rights Conditionality in the European Union’s Economic Agreements’ APSA 2012 Annual Meeting Paper, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2108882> accessed 13 December 2018; Velluti (n 12) 57.

⁷⁴Bartels (n 47) 10; Hachez (n 45) 10.

⁷⁵Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 10 May 2010; Hachez (n 45) 12.

⁷⁶Article 36 of the Cotonou Agreement; James Thuo Gathii, ‘The Cotonou Agreement and Economic Partnership Agreements’ in United Nations (ed), *Realizing the Right to Development – Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013) 259.

in the trade agreement itself.⁷⁷ However, the (interim) EPAs do not refer to respect for human rights in the same manner.⁷⁸ References vary from being based on the essential elements clause of the Cotonou Agreement (e.g. in Article 2(1) of the South African Development Community (SADC) EPA) to the principle that the agreements build on the *acquis* of the Cotonou Agreements (e.g. in Article 4 of the Eastern African Community (EAC) EPA) to no reference at all (e.g. in the Central Africa, Ghana and Côte d’Ivoire EPAs).⁷⁹ This issue is particularly important when the Cotonou Agreement expires on 29 February 2020 (Article 95(1) of the Cotonou Agreement) and with it the non-execution clause in Article 96. If EPA human rights clauses have an existence which can be separated from their reference to Article 9 of the Cotonou Agreement, the respect for human rights will constitute an essential element of the EPA even after the expiry of the Cotonou Agreement.⁸⁰ Consequently, Article 60(3)(b) VCLT will then once again function as a default clause as it did in the pre-Article 4 Lomé IVbis EU–ACP relationship. This would not be the case if the EPA did not refer to respect for human rights in any way.⁸¹

2.3. The role of the European Parliament

Since the late 1970s the European Parliament has drawn attention to the inclusion of human rights clauses in international agreements, which has been noted by the Commission and has resulted in the drafting of a standard human rights clause and the policy of including such a clause in all political framework agreements.⁸² Although the Commission and the Council adopted several policies and principles on the protection of human rights beginning in 1995, and the Treaty of Lisbon introduced substantial amendments to the EU’s legal framework and competences in 2009, the European Parliament remains a vigorous actor in the field of human rights and is still the main EU institution globally pursuing respect for human rights.⁸³ Frequently, for example in 2016, the European Parliament expresses its concerns in resolutions reacting to the EU’s Annual Report on human rights.⁸⁴ Through its resolutions, the European Parliament monitors compliance with human rights clauses.⁸⁵ For example, in 2017, the European Parliament adopted resolutions on corruption and human rights in third countries⁸⁶ and on the EU’s political relations with certain regions, in which it emphasises the importance of human rights as the

⁷⁷EU Non-paper, ‘Using EU Trade Policy to promote fundamental human rights – Current policies and practices’ (2012) 4 <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf> accessed 13 December 2018.

⁷⁸Directorate-General for External Policies of the Union/Lorand Bartels, ‘Human Rights Provisions in Economic Partnership Agreements in Light of the Expiry of the Cotonou Agreement in 2020’ (2017) EP/EXPO/B/DEVE/FWC/2013-08/Lot5/11, 15.

⁷⁹For a detailed compilation of the EPA clauses see Directorate-General/Bartels, ‘Economic Partnership Agreements’ (n 78) 14–9.

⁸⁰Cf. the analysis of the clause in the light of Article 60(3)(a) VCLT; Directorate-General/Bartels, ‘Economic Partnership Agreements’ (n 78) 14, 21.

⁸¹Cf. Directorate-General/Bartels, ‘Economic Partnership Agreements’ (n 78) 14.

⁸²Eeckhout (n 46) 476; Resolution of the European Parliament of 17 May 1983 on Human Rights in the World [1983] OJ C 161/58; Fierro (n 17) 67; Sicurelli (n 7) 239; Council, ‘Conclusions on human rights clauses in Community agreements with non-member countries’ (n 4); Commission, ‘Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries’ (n 4).

⁸³Ioannides (n 13) 29; Laura Feliu and Francesc Serra, ‘The European Union as a “Normative Power” and the Normative Voice of the European Parliament’ in Stelios Stavridis and Daniela Irrera (eds), *The European Parliament and Its International Relations* (Routledge 2015) 15, 30.

⁸⁴See the latest European Parliament resolution of 14 December 2016 on the Annual Report on human rights and democracy in the world and the European Union’s policy on the matter, 2015, P8_TA-PROV(2016)0502.

⁸⁵Ioannides (n 13) 29.

⁸⁶European Parliament resolution of 13 September 2017 on corruption and human rights in third countries P8_TA-PROV(2017)0346. In para 19, the European Parliament calls ‘on the EU to include an anti-corruption clause alongside human rights clauses in agreements with third countries that should require monitoring and consultations and, as a last resort, to impose sanctions or suspend such agreements in the event of serious and/or systemic corruption leading to serious human rights violations’.

basis of the respective relationships.⁸⁷ Other resolutions in 2017 directly criticised human rights violations in third countries⁸⁸ or criticised the EU's non-action in the context of human rights clauses in 2008.⁸⁹

In 2010 the European Parliament once again emphasised its support for the inclusion of legally binding human rights clauses (also in new-generation free trade agreements and into chapters on sustainable development) but pointed out that 'major challenges persist with regard to monitoring and implementing these clauses' and thus stressed that 'these clauses must also be included in all trade and sectoral agreements, with a clear and precise consultation mechanism modelled on Article 96 of the Cotonou Agreement'.⁹⁰ In 2016 the European Parliament reiterated the importance of the systemic inclusion of human rights clauses into all the EU's international agreements and declared that it still saw a need for establishing an *ex ante* monitoring mechanism prior to the conclusion of an agreement, which should then constitute a fundamental part of the respective agreement.⁹¹ Additionally, an *ex post* monitoring mechanism should govern responses to, and consequences of, infringements of human rights clauses.⁹² In the renewed Action Plan for the years 2015–2019, the Council stated its intention to continue 'to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements' in the form of *ex ante* IAs, sustainability IAs and *ex post* evaluations to be carried out by the EEAS, the Commission, the Council and the Member States by 2017.⁹³ Furthermore, as per the renewed Action Plan, the EEAS and the Commission are tasked with ensuring policy coherence between the IAs and other human rights-related policy instruments (including country strategies, Human Rights Dialogues, and financing instruments).⁹⁴ The Commission recommitted itself to these objectives in the *Trade for all* strategy of 2015,⁹⁵ which was welcomed by the European Parliament in 2016.⁹⁶ At first sight, it seems that the Commission and the Council have acknowledged the European Parliament's demands and incorporated them into their policies. Nonetheless, it remains to be seen whether and to what extent the (policy) objectives of the latest Action Plan will be translated, and implemented in practice. Since the Action Plan does not entrust the European Parliament with tasks in the context of human rights clauses, it can only remind the other EU institutions of their commitments.

Of greater relevance and importance – also in legal terms – are the Parliament's new powers under the Treaty of Lisbon. Prior to the changes introduced by that treaty, the consent of the European Parliament was only a requirement for the conclusion of association agreements and other significant agreements, but not for trade agreements.⁹⁷ Now, the European Parliament needs to give its consent to the types of agreements mentioned in Article 218(6)(a) TFEU, meaning that the European Parliament can now insist on the inclusion of human rights clauses by otherwise withholding its consent.⁹⁸ Bartels names

⁸⁷European Parliament resolution of 3 October 2017 on EU political relations with ASEAN, P8_TA-PROV(2017)0367; European Parliament resolution of 13 September 2017 on EU political relations with Latin America P8_TA-PROV(2017)0345.

⁸⁸European Parliament resolution of 14 September 2017 on Myanmar, in particular the situation of Rohingyas P8_TA-PROV(2017)0351; European Parliament resolution of 5 October 2017 on the situation of persons with albinism in Africa, notably in Malawi P8_TA-PROV(2017)0381.

⁸⁹European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights, P6_TA(2008)0405, para 21.

⁹⁰European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, P7_TA(2010)0434, para 12.

⁹¹European Parliament resolution of 14 December 2016 on the Annual Report on human rights and democracy in the world and the European Union's policy on the matter 2015, P8_TA-PROV(2016)0502, para 88.

⁹²European Parliament resolution of 14 December 2016 on the Annual Report on human rights and democracy in the world and the European Union's policy on the matter 2015, P8_TA-PROV(2016)0502, para 88.

⁹³Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy 2012' (n 5) Action Plan, V.25. b.

⁹⁴Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy 2012' (n 5) Action Plan, V.28. c.

⁹⁵Commission, *Trade for All – Towards a More Responsible Trade and Investment Policy* (European Union 2015) <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 13 December 2018.

⁹⁶European Parliament resolution of 14 December 2016 on the Annual Report on human rights and democracy in the world and the European Union's policy on the matter 2015, P8_TA-PROV(2016)0502, para 92.

⁹⁷Directorate-General/Bartels (n 9) 9.

⁹⁸Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 21, fn 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)'; Paul Craig and Gráinne de Búrca, *EU Law – Texts, Cases, and Materials* (Oxford University Press 2015) 353; Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and

two possibilities in this regard: (i) use of consent power to effect changes to human rights clauses and (ii) use of consent power to effect changes in third countries prior to the conclusion of an agreement.⁹⁹ During the negotiation phase, the Commission only has to inform the European Parliament about the progress of the negotiations due to the applicability of the exception of Article 207(3) TFEU, and therefore does not have to inform the European Parliament immediately and fully at all stages of the procedure as normally required by Article 218(10) TFEU.¹⁰⁰ Nevertheless, pursuant to Article 218(11) TFEU, the European Parliament can also obtain an Opinion of the Court of Justice on whether an agreement is in compliance with the Treaties.¹⁰¹ What can be problematic, however, is that once the European Parliament has consented to an agreement, apart from the adoption of resolutions, it loses its influence on the third country, which is why some authors suggest the establishment of permanent monitoring committees in which the European Parliament takes part.¹⁰²

3. The legal framework of human rights clauses

3.1. The European legal framework

With the entry into force of the Treaty of Lisbon, the position of human rights in the policies of the EU was reinforced once more, with several provisions declaring the EU's commitment to human rights an objective of both internal and external action.¹⁰³ For example, Article 3(5) TEU states that the EU, in its external relations, shall 'contribute to . . . the protection of human rights'. A similar sentiment can be found in Article 21(1) and (2) TEU, which list the 'universality and indivisibility of human rights and fundamental freedoms' as a guiding principle of the EU's external action, and state that, through its common policies and actions, the EU seeks to 'consolidate and support . . . human rights'. With this confirmation of the EU's foundational values, principles and objectives as leitmotiv for its external action, Articles 3(1), 3(5) and 21(1) TEU codify a normative dimension of the EU's external relations, including its trade relations.¹⁰⁴

The inclusion of human rights clauses in the EU's trade agreements, then, seems to be a logical extension of the protection of human rights as an EU objective. With the Treaty of Lisbon, trade, an area where the EU has exclusive competence,¹⁰⁵ was explicitly included as a policy area through which the EU is to pursue and achieve the principles and objectives listed in Article 21(1) and (2) TEU.¹⁰⁶ In the TFEU several articles provide for the link between the principles and objectives of EU external action and the EU's CCP.¹⁰⁷ Article 207(1) TFEU, introduced by the Treaty of Lisbon, states – *inter alia* – that '[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action', and Article 205 TFEU refers directly to the principles and objectives of Article 21 TEU. The reference to Article 21 TEU is of particular importance since this article provides the clear legal foundation for the inclusion of non-trade objectives in the EU's external trade relations.¹⁰⁸

As discussed in Section 2.2, the EU has been including human rights clauses in trade agreements since the early 1990s. Before the amendments introduced by the Treaty of Lisbon, however, the legal basis

Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review* 153, 168. On the debate regarding the Constitution Treaty see Markus Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy' (2005) 42 *Common Market Law Review* 91, 122–5.

⁹⁹Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 21–2.

¹⁰⁰Daniel-Erasmus Khan, 'Article 207 [Principles of the Common Commercial Policy]' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties* (C H Beck 2015) 761, para 23.

¹⁰¹Rudolf Geiger, 'Article 218 [Negotiation and Conclusion of Agreements, Opinion of the ECJ]' in Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (eds), *European Union Treaties* (C H Beck 2015) 793, paras 20–1.

¹⁰²Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 23.

¹⁰³See e.g. Articles 3, 6 and 21 TEU, Article 205 TFEU.

¹⁰⁴De Búrca (n 7) 687; Sicurelli (n 7) 232–3; Velluti (n 12) 42, 45–6. See also more generally Manners (n 2).

¹⁰⁵TFEU (n 29) Article 3.

¹⁰⁶Gstöhl and Hanf (n 2) 734–6.

¹⁰⁷European Parliament's Directorate-General for External Policies/Roberto Bendini, 'In-depth Analysis: The European Union's Trade Policy, Five Years After the Lisbon Treaty' (March 2014) DG EXPO/B/PolDep/Note/2014_76, 9: 'This is an important innovation – the recognition, for the first time, that, external policies and international trade are strictly linked.'

¹⁰⁸Dimopoulos (n 98) 161–3; Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Hart Publishing 2015) 123, 126–7; Gstöhl and Hanf (n 2) 736.

for such clauses was not as clear.¹⁰⁹ Respect for human rights was included as a general foundational principle of the EU and as a general objective in the EU's economic, financial and technical cooperation with third countries.¹¹⁰ The specific objective of respect for human rights was only included in the Treaties in the area of development cooperation.¹¹¹ The absence of a clear legal basis for human rights clauses in trade agreements has in practice proven unproblematic, with the Court of Justice confirming the legality of such clauses. In Opinion 2/94, the Court emphasised respect for human rights as a foundational principle of the EU and as a 'condition of the lawfulness' of EU acts generally, *inter alia* referring to the objective of respecting human rights in the area of development cooperation.¹¹² In *Portugal v Council*, the Court was tasked with determining the legality of the inclusion of a human rights clause in a development cooperation agreement based on Articles 113, 130y and 228 EC Treaty (the predecessors of Articles 207, 211 and 218 TFEU). In its decision, the Court affirmed the legality of such clauses and determined that the objectives to be pursued in the EU's external action 'are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters', allowing the EU to include human rights provisions in its external action.¹¹³

The broad objectives of Article 21 (and Article 3(5)) TEU should not be understood, however, as conferring a general human rights competence on the EU.¹¹⁴ The Treaties do not only provide the constitutional foundation for the inclusion of human rights in the EU's external action, they also limit it. In Article 3(6) TEU the EU is reminded that it must pursue its objectives 'by appropriate means commensurate with the competences which are conferred upon it in the Treaties'. Article 21(3) TEU provides that the principles and objectives are to be respected and pursued in 'the development and implementation of the different areas of the Union's external action covered by this Title (the Common Foreign and Security Policy) and by Part Five of the TFEU (including the CCP and cooperation with third countries), and of the external aspects of its other policies', thus limiting the EU's margin of discretion.¹¹⁵ What is more, even though the wording of these provisions ('The Union shall') does create an obligation of the EU and its institutions to pursue these objectives in their external action generally, and in the CCP in particular, at the same time it leaves a large measure of discretion to the EU as to 'when, whether and how'¹¹⁶ it does so.¹¹⁷ The objectives of Articles 21 and 3(5) TEU thus do not create an obligation on the side of the EU to undertake specific, treaty-prescribed human rights measures, but make them a general objective to be pursued in all areas of EU external action, leaving the decision of when, whether and how up to the EU. Generally speaking, if the EU were to have a general human rights competence or any specific obligations in this regard, amending the Treaties would be necessary.¹¹⁸

¹⁰⁹Reid (n 108) 123, 126–7. See also the discussion of the Pre-Lisbon legal situation in Bartels (n 2) 169–227.

¹¹⁰Treaty establishing the European Community (Consolidated version 2002) [2002] OJ C 325/1, Article 181a(1): 'Without prejudice to the other provisions of this Treaty, and in particular those of Title XX, the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries. Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.'

¹¹¹Treaty establishing the European Community (Nice Consolidated Version) (n 110) Article 177.

¹¹²Opinion 2/94, Opinion pursuant to Article 228(6) of the EU Treaty [1996] ECR I-1759, paras 32–4; Horng (n 9) 688–9.

¹¹³Case C-268/94 *Portugal v Council* (India Agreement) [1996] ECR I-6177, para 37; Andrew Williams, *EU Human Rights Policies. A Study in Irony* (Oxford University Press 2004) 35–6; Horng (n 9) 688–90.

¹¹⁴Bartels (n 2) 46–9; Olivier de Schutter and Israel de Jesus Butler, 'Binding the EU to International Human Rights Law' (2008) 27 *Yearbook of European Law* 277; Enzo Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 *European Journal of International Law* 1093, 1098; Bartels, 'The EU's Human Rights Obligations' (n 51) 1079; Velluti (n 12) 46. See also Opinion 2/94 (n 113) para 27: 'No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.'

¹¹⁵Cannizzaro (n 114) 1098. See also Article 7 TEU.

¹¹⁶Dimopoulos (n 98) 165.

¹¹⁷Marise Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (2006) EUI Working Paper Law 2006/30, 5–6 <<http://cadmus.eui.eu/handle/1814/6293>> accessed 13 December 2018; Reid (n 108) 126–7; Bartels, 'EU's Human Rights Obligations' (n 51) 1075; Dimopoulos (n 98) 165.

¹¹⁸Velluti (n 12) 46; Cannizzaro (n 114) 1095, 1099.

The insertion of human rights clauses into trade agreements – a practice incidentally established long before the Treaty of Lisbon had been adopted – must be seen in this light. The EU is not necessarily under an obligation to specifically include these clauses but is free to include such provisions as a matter of policy, provided it acts within its given competences and within legal limits: after all, the principle of conferral of Article 5 TEU limits both the internal and the international actions of the EU, regardless of the type of competence conferred.¹¹⁹ One such legal limit is international law, which is binding on the EU and must be respected when the EU exercises its powers.¹²⁰ Certain principles of international law, especially the principles of sovereign equality and non-intervention, may limit the EU's scope of action when it comes to the external promotion of (a specific understanding of) the rule of law, democracy and human rights.¹²¹ These principles provide for the right of States to freely choose and develop their domestic political, economic, social and cultural systems, without interference by outside actors.¹²² Promotion by the EU of specific domestic reforms could lead to accusations of undue intervention in the domestic jurisdiction of other States. Such objections, however, do not necessarily mean that the EU is not free to include clauses on these topics in their trade agreements, not least because the conclusion of such agreements indicates that the other treaty party has consented to these provisions.¹²³

3.2. The international legal framework

3.2.1. The role of international human rights law

The previous section focused on the EU's competence and obligation to pursue respect for human rights in its external relations from an EU law perspective. The fact that the EU pursues its external relations on an international plane, however, necessarily brings with it the matter of the relevant international legal framework, for example any possible obligations under international human rights law. As briefly described above, the EU is not considered to have a general human rights competence¹²⁴ and generally does not conclude or join international human rights treaties.¹²⁵ The EU is therefore not bound by the provisions of multilateral human rights treaties as it is not a party. It is, however, bound by the human rights provisions in its trade agreements by virtue of Article 216(2) TFEU, and by any human rights obligations under customary international law.¹²⁶ In practice, customary international human rights law is of little relevance to the EU's external action as there currently exists no customary positive obligation

¹¹⁹Jan Wouters, Dominic Coppens and Bart De Meester, 'External Relations After the Lisbon Treaty' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 168; Horng (n 9) 688; Cannizzaro (n 114) 1098–9. For a detailed analysis see Geert de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) chapter 1.

¹²⁰Articles 3(5), 21(1) and 21(2) TEU, 216(2) TFEU; Sandra Hummelbrunner and Anne-Carlijn Prickartz, 'It's Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' (2016) 32 *Utrecht Journal of International and European Law* 19, 23–5; Joined Cases C-21/72, C-22/72, C-23/72, and 24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, EU:C:1972:115; Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, EU:C:1992:453, paras 9–10; Case C-84/95 *Bosphorus Hava Yollari Turizmve Ticaret AS v Minister for Transport, Energy and Communications and Others*, EU:C:1996:312, paras 24–6; Case T-115/94 *Opel Austria GmbH v Council of the European Communities*, EU:T:1997:3, paras 84, 90; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz*, EU:C:1998:293, paras 45–6; Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864, paras 101, 123.

¹²¹Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union. A Legal Appraisal* (Cambridge University Press 2008) 29–31; Kirsten Schmalenbach, 'Artikel 21 EUV' in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2013) para 5.

¹²²*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, paras 258, 263; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without a vote).

¹²³Schmalenbach (n 121) paras 5, 11.

¹²⁴See above n 114 and the sources listed therein.

¹²⁵Bartels, 'The EU's Human Rights Obligations' (n 51) 1078–9; De Schutter and Butler (n 114) 19. The exception is the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, which the EU joined to the extent allowed by its competences. See also the Declaration made upon formal confirmation, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 13 December 2018.

¹²⁶Article 216(2) TFEU: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.' See also Bartels, 'The EU's Human Rights Obligations' (n 51) 1079–80; Bartels (n 2) 93–9.

to ensure respect for human rights by other actors.¹²⁷ Customary international human rights law could in principle impose a limit on EU external action, for example if a customary international obligation required the EU to refrain from promoting human rights or otherwise limit its external action in that area, but it is hard to imagine a situation where international human rights law would *limit* the EU's practice of including clauses designed to ensure respect for human rights.

3.2.2. 'Essential elements' and 'non-execution' clauses in international treaty law

The human rights clauses in the EU's trade agreements are, legally and logically, part of an international treaty. Within the broader framework of international law this means that, in principle, international treaty law is applicable to the trade agreement and to the human rights clauses, including the operation and potential suspension of the agreement. As a preliminary remark, it is necessary to point out that the VCLT, as an international convention, applies to treaties between States, and only to those treaties concluded by States party to the VCLT.¹²⁸ There is, however, a large body of customary international treaty law, and the rules contained in the VCLT are generally considered to reflect customary international law on treaties.¹²⁹ Even though the VCLT is thus technically not applicable in many situations, it is nevertheless possible to apply the customary international rules that the VCLT's provisions reflect.

The clauses in the EU's trade agreements are designed as 'essential element' clauses, meaning that it is designated in the human rights clause that respect for human rights (and for democratic principles and the rule of law) constitutes the basis for, and forms an essential element of, the agreement.¹³⁰ Violations of these principles that are of a sufficiently serious nature by one of the parties would allow the other party to suspend the agreement or take other measures.¹³¹ Such provisions are not uncommon in international treaty law: the VCLT provides some basic rules for the termination or suspension of a treaty as a consequence of a breach in Article 60.¹³² In the past, EU institutions have referred to Article 60 VCLT as governing the potential suspension of trade agreements, a view shared by Advocate General La Pergola in *Portugal v Council*.¹³³ The rule codified in Article 60 VCLT is a default provision in the sense that it applies when the treaty itself contains no rules governing suspension or termination in the case of a material breach.¹³⁴ In addition, in the absence of specific rules in the agreement itself, the procedural rules related to suspension of the operation of treaties, codified in Article 65 VCLT, would be applicable.¹³⁵ This would mainly entail the other party having to be notified of an intention to suspend the agreement,

¹²⁷Cannizzaro (n 114) 1097–8.

¹²⁸VCLT (n 48) Articles 1–4.

¹²⁹Eg Duncan B Hollis, 'Introduction' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 3. The customary character of the rules on treaty termination in case of a breach was confirmed in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, para 94.

¹³⁰For a comprehensive discussion on wording, content and scope of the human rights clauses see Section 2.2.

¹³¹Velluti (n 12) 53; Hachez (n 45) 8.

¹³²VCLT (n 48) Article 60; Thomas Giegerich, 'Article 60' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012). See also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 25 ILM 543, which contains a similar provision in Article 60.

¹³³*Portugal v Council* (India Agreement) (n 113) para 19; Case C-268/94 *Portugal v Council* (India Agreement) [1996] ECR I-6180, Opinion of AG La Pergola, para 28.

¹³⁴Article 60(4) VCLT: 'The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.' Bruno Simma and Christian J Tams, 'Reacting against Treaty Breaches' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (paperback, Oxford University Press 2014) 578–9. See also Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *European Journal of International Law* 468, 474; Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' in Jan Wouters, Axel Marx, Dylan Geraets and Bregt Natens (eds), *Global Governance through Trade. EU Policies and Approaches* (Edward Elgar Publishing 2015) 76, esp. fn 18; Directorate-General/Bartels, 'Human Rights and Democracy Clauses' (n 9) 8.

¹³⁵Commission, 'Communication' (n 4) 8. There is some discussion on whether Article 65 VCLT reflects customary international law. Currently, the consensus seems to be that, if it does not already reflect general customary international law, it is at the least developing into custom: Heike Krieger, 'Article 65' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer, 2012) 1133–4. Cf *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 109: 'Both Parties agree that Articles 65 to 67 of the Vienna Convention on

and a three-month waiting period between notification and suspension having to be observed, which could be extended in the event an amicable solution was being sought.¹³⁶

Whereas customary international treaty law was thus applicable to earlier human rights clauses, later human rights provisions were supplemented with a so-called ‘non-execution clause’, which usually¹³⁷ stipulates that if one party is considered to have failed in fulfilling its obligations under the agreement, the other party may take ‘appropriate measures’.¹³⁸ Such measures could take various forms, such as the suspension of framework meetings, high-level bilateral contacts, technical cooperation and financial cooperation; postponement of new projects; or trade embargoes.¹³⁹ Most non-execution clauses stipulate that before such measures are taken the other party and/or the treaty committee are to be consulted, except in ‘cases of special urgency’.¹⁴⁰ Some other limits also apply: when selecting which measures to take, the party taking the measures has to give priority to those which ‘least disturb the functioning of the agreement’, and the measures should be proportional to the breach.¹⁴¹ The complete suspension of the operation of an agreement would thus probably not be considered an ‘appropriate’ measure, although this would also depend on the seriousness of the breach.¹⁴² Lastly, the appropriate measures would have to be in conformity with international law, which contains its own (customary) rules on the conditions applicable to countermeasures, including an obligation of previous notification, the rule that countermeasures must have certain specific objectives, and the rule that they must be temporary and proportionate.¹⁴³ The detailed non-execution clauses as developed by the EU thus provide both the EU and its treaty partners with additional legal certainty concerning suspension, termination and other appropriate measures in response to human rights violations. Generally, they seek to maintain the balance between uninterrupted treaty relationships, on the one hand, and the possibility of adopting appropriately severe measures in response to human rights violations, on the other.

The invocation of the essential elements and non-execution clauses is thus either governed by customary international treaty law, which is the case for the earlier agreements, or by the regime created by the trade agreement itself, which usually mostly mirrors the system of the VCLT in terms of substance and procedure.¹⁴⁴

4. Implementation and enforcement of human rights clauses

4.1. (Non-)inclusion of human rights clauses in trade agreements

There is one important exception to the EU’s general human rights clauses policy, one which is potentially quite impactful when it comes to establishing a general policy of promoting human rights in external trade relations. The EU’s sectoral trade agreements, covering matters such as fisheries, textiles

the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.’

¹³⁶VCLT (n 48) Article 65(1) and (3).

¹³⁷Commission, ‘Communication’ (n 4) Annex I; Bartels (n 2) 107; Hachez (n 45) 10; Horng (n 9) 679. See also Section 2.

¹³⁸Bartels (n 2) 107; Velluti (n 12) 53; Reid (n 108) 153–4.

¹³⁹Bartels (n 2) 110–6; Commission, ‘Communication’ (n 4) 17; Fierro (n 17) 100–1.

¹⁴⁰Laura Beke, David D’Hollander, Nicolas Hachez and Beatriz Pérez de las Hera, ‘Report on the Integration of Human Rights in EU Development and Trade Policies’ (2014) FRAME Deliverable 9.1, 62; Commission, ‘Communication’ (n 4) 8; Hachez (n 45) 10.

¹⁴¹Bartels (n 47) 13; Commission, ‘Communication’ (n 4) 7, 13; Bartels (n 2) 108–9, 116–20; Beke and others (n 140) 62; Hachez (n 45) 10. For an overview of human rights clauses and their specific stipulations in several significant and recent agreements, see Directorate-General/Bartels, ‘The European Parliament’s Role’ (n 23) Annex 2.

¹⁴²Commission, ‘Communication’ (n 4) 8; Bartels (n 2) 117; Beke and others (n 140) 62; Hachez (n 45) 10; Bartels (n 47) 13. In the Cotonou Agreement the fact that suspension should be a last resort is specifically included: Cotonou Agreement (n 64) Article 96(2)(b); Reid (n 108) 151.

¹⁴³Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1994] OJ L 327/3, Joint Declaration in relation to Article 107(2): ‘The Parties agree that “appropriate measures” referred to in Article 107(2) [the non-execution clause] are measures taken in accordance with international law’; International Law Commission, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/10, Part Three Chapter II; Simma and Tams (n 134) 850–2; Commission, ‘Communication’ (n 4) 16; Bartels (n 2) 117–20; Bartels (n 47) 13.

¹⁴⁴Commission, ‘Communication’ (n 4) 8; Bartels (n 2) 102–20; Hachez (n 45) 8; Beke and others (n 140) 60.

and steel, do not usually contain human rights clauses.¹⁴⁵ Considering that these sectors can be particularly prone to human rights violations, especially violations of labour rights, the omission of human rights clauses from such agreements has been subject to criticism, including by the European Parliament.¹⁴⁶ More recent EU practice, however, seems to indicate that the EU is trying to remedy this gap in its human rights policy. Since 2011 several Protocols to sectoral trade agreements have contained a clause linking the Protocols to human rights clauses in other agreements applicable between the EU and the other party, as in the 2013 Protocols to the EU-Morocco and the EU-Ivory Coast Fisheries Partnership Agreements.¹⁴⁷ In other cases, the EU has signalled its intention to include such clauses in other Protocols as well, and has in some cases started negotiating such Protocols.¹⁴⁸

A different situation of non-inclusion, in which human rights clauses are technically included but not (yet) applicable, arises where the trade provisions of broader agreements are applied provisionally. These broader agreements, which include provisions on topics other than or beyond trade, are usually mixed agreements and thus require Member State ratification before they can enter into force.¹⁴⁹ In the area of trade, where the EU has exclusive competence, the EU can seek the provisional application of the trade provisions of the broader agreement while it awaits the ratification and entry into force of the broader agreement.¹⁵⁰ The EU can do so, for example, by concluding an interim agreement with the treaty party, which usually repeats the trade provisions and often also includes a human rights clause.¹⁵¹ It is also possible, however, that the original agreement foresees the provisional application of certain provisions, or that the parties reach a separate decision on the provisional application.¹⁵² In these cases, it is possible that although the trade provisions are provisionally applied, no human rights clause is included or applicable to the provisional application of the trade provisions.¹⁵³ In the case of the 2012 EU-Central America Association Agreement, the trade pillar of the agreement was provisionally applied although it was unclear whether the essential elements and non-execution clauses applied as they were contained in different parts of the agreement.¹⁵⁴ If the EU wants to send the message that its trade relations are contingent on respect for human rights, the provisional application of trade relations without the concurrent application of the

¹⁴⁵Joana Abrisketa, Cristina Churruga, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa and Alexandra Timmer, 'Human Rights Priorities in the European Union's External and Internal Policies: An Assessment of Consistency with a Special Focus on Vulnerable Groups' (2015) FRAME Deliverable 12.2, 66; Zwagemakers (n 2) 5; Hachez (n 45) 12–3; Directorate-General/Bartels, 'The European Parliament's Role' (n 22) 7; Directorate-General/Bartels (n 18) 4; Directorate-General/Bartels (n 9) 6.

¹⁴⁶Tobias Dolle, 'Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights – Advantages and Disadvantages' in Norman Weiß and Jean-Marc Thouvenin, *The Influence of Human Rights on International Law* (Springer 2015) 220; Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 7; Directorate-General/Bartels (n 18) 4; Abrisketa and others (n 145) 66; European Parliament Resolution of 14 February 2006 on the human rights and democracy clause in European Union Agreements P6_TA(2006)0056, I, para 8; European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights P6_TA(2008)0405, para 19.

¹⁴⁷Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 7.

¹⁴⁸Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on External Dimension of the Common Fisheries Policy' (13 July 2011) COM (2011) 424 final, 11–2; European Union External Action Service, *Human Rights and Democracy in the World. Report on EU Action in 2011* (European Union 2012) 21; Dolle (n 146) 220, 226.

¹⁴⁹Marc Maresceau, 'A Typology of Mixed Bilateral Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 12; Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 258–9; Hachez (n 45) 13. For a recent Court Opinion on competence and broader agreements see: ECJ, Opinion 2/15, Opinion pursuant to Article 218(11) TFEU [2017] ECLI:EU:C:2017:376.

¹⁵⁰Hachez (n 45) 13.

¹⁵¹Eeckhout (n 149) 259; Hachez (n 45) 13.

¹⁵²Hachez (n 45) 13–4. The Comprehensive Economic and Trade Agreement between the EU and Canada, for example, was applied provisionally before its full and definitive entry into force: European Commission – Press Release, 'EU-Canada trade agreement enters into force' (20 September 2017) <http://europa.eu/rapid/press-release_IP-17-3121_en.htm> accessed 10 December 2018.

¹⁵³Hachez (n 45) 13–4.

¹⁵⁴Agreement establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, signed 29/06/2012, Article 353(4); Hachez (n 45) 14.

human rights clause seems contradictory. Consequently, in such cases, there is an incongruity in the EU's general policy and practice of including human rights clauses in its external trade relations.

Lastly, it is worth noting that the trade relationships between the EU and developed countries at times seem to deviate from the trade relationships between the EU and less developed/developing countries. The EU's practice on human rights clauses has been criticised for this discrepancy, in part because it might create the perception of the EU 'exporting' or 'imposing' its values and its human rights standards upon the developing countries it trades with.¹⁵⁵ As briefly described above, the Cotonou Agreement, with ACP countries as treaty parties, contains a much more detailed non-execution clause than that of the Framework Agreement with the Republic of Korea, although it is hard to say whether this is specifically the result of (a lack of) negotiating power.¹⁵⁶ Vice versa, where the EU is negotiating with a developed country, which will usually be a strong negotiating party, the possibility arises that the human rights clause is foregone when the negotiating party opposes the inclusion of such a clause.¹⁵⁷ Several agreements with developed countries, such as the customs union with San Marino or the cooperation agreement with Andorra, do not contain human rights provisions.¹⁵⁸

There is, however, some evidence that the EU insists on the inclusion of human rights clauses in trade agreements with developed countries, even in the face of the latter's opposition thereto: in 1996–1997, the conclusion of a trade agreement with Australia and New Zealand fell through because they refused to sign an agreement including a human rights clause.¹⁵⁹ In the case of trade agreements with other developed countries, the situation is slightly different as a result of already existing (political) treaty frameworks. In the case of Singapore, for example, an 'essential elements' human rights clause is included in the Partnership and Cooperation Agreement (PCA), which governs the overall bilateral relations between the EU and Singapore, within which the Free Trade Agreement (FTA) is a specific agreement.¹⁶⁰ So even though the EU-Singapore FTA does not itself contain a human rights clause, it is nonetheless directly linked to the PCA, which does include such a clause.¹⁶¹ Similarly, the Strategic and Partnership Agreement between the EU and Canada, which governs their broader bilateral relations, contains an 'essential elements' human rights clause, whereas the EU-Canada Comprehensive Economic and Trade Agreement does not.¹⁶²

In the case of Japan and the United States of America, it is not yet clear whether human rights clauses will be included: the Economic Partnership Agreement concluded with Japan does not contain a human rights clause, but one has been included in the Strategic Partnership Agreement signed in July 2018, and the result of the negotiations on the Transatlantic Trade and Investment Partnership with the United States of America are not or only partially public.¹⁶³ Whether the EU will insist on including a human rights

¹⁵⁵Zsolt Körtvélyesi, 'Inconsistency and Criticism: Mapping Inconsistency Arguments Regarding Human Rights Promotion in EU External Relations' in Wolfgang Benedek, Florence Benoît-Rohmer, Matthias C Kettman, Reinhard Klaushofer and Manfred Nowak (eds), *European Yearbook on Human Rights 2016* (NWV 2016) 234–5; Khaliq (n 121) 452; Dolle (n 146) 226.

¹⁵⁶See above nn 74 and 75.

¹⁵⁷Zwagemakers (n 2) 5; Dolle (n 146) 226. Cf also Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 14: '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.'

¹⁵⁸Directorate-General/Bartels (n 9) 6; Directorate-General/Bartels (n 18) 3.

¹⁵⁹Directorate-General/Bartels (n 9) 6; Hafner-Burton (n 2) 34; Hachez (n 45) 14; Dolle (n 146) 225.

¹⁶⁰Proposal for a Council Decision on the signing, on behalf of the Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part [2014] COM (2014) 070 final – 2014/0036 (NLE), Article 1 para 1; Free Trade Agreement Between the European Union and the Republic of Singapore, Article 17.17, para 1 <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 13 December 2018.

¹⁶¹FTA EU-Singapore (n 160) Article 17.17, para 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.'

¹⁶²Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] 5368/2/16; Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2016] 10973/16.

¹⁶³Agreement between Japan and the European Union for an Economic Partnership <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>> accessed 13 December 2018; Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part, available online: <<https://www.mofa.go.jp/files/000381942.pdf>> accessed

clause in the (trade) agreements it is currently negotiating will only be seen after these agreements are made public.¹⁶⁴

As this section has shown, there are still areas of improvement when it comes to the EU's aim of including human rights clauses into its international agreements although the number and scope of these exceptions seem to become smaller as the EU continues developing its policy, especially concerning sectoral agreements and agreements with developed countries.

4.2. (Non-)activation of human rights clauses: Selectivity and consistency

Although the EU's policy prescribes the systematic inclusion of human rights clauses in its trade agreements, the activation of such clauses has not been as systematic but rather has shown some issues regarding selectivity and consistency. In the last decades, human rights clauses have only been activated or triggered in a number of cases, which is relatively small compared to the potential number of cases in which the clause could have been activated.¹⁶⁵ The clause was activated in 23 cases, in which official consultations as per the human rights clause were initiated by the EU, all against countries that are part of the ACP Group of States.¹⁶⁶ A common denominator in the instances in which the human rights clauses were activated can be found in the reason for their activation. In all cases, there was a component of political unrest: in 15 cases, a coup d'état had taken place, in the other eight cases there were flawed elections, a deterioration of respect for human rights or for the rule of law, or a combination of these elements.¹⁶⁷ In none of the cases was there 'only' a deterioration of respect for human rights as a trigger for the activation of the human rights clause.¹⁶⁸ Additionally, there are several cases where the human rights clause was not activated, sometimes described as 'non-cases', even though the conditions were similar to the cases where the human rights clause was triggered.¹⁶⁹

It is therefore perhaps not surprising that some aspects of the selective activation or non-activation of the human rights clause by the EU have attracted criticism. The European Parliament has, for example, criticised the above-mentioned 'non-cases', emphasising that a general human rights policy can only be credible if the human rights clauses are actually activated in cases of human rights violations.¹⁷⁰ The selectivity of the activation has also been criticised as the clauses have so far mostly been activated in response to political unrest and only in certain countries, raising concerns as to the fairness of the EU's activation practice.¹⁷¹ In this context, the European Parliament has also criticised the selectivity of the EU's response regarding the type of violations: whereas instances of political unrest trigger the activation of a human rights clause, violations of other rights, including, among others, women's rights, minority rights, LGBT rights and children's rights, do not trigger such a response.¹⁷² Such selective activation of the human rights clause seems to be at odds with the EU's Strategic Framework and Action Plan on Human Rights and Democracy of 2012, in which it is stated that 'when faced with violations of human rights, the EU will make use of the full range of instruments at its disposal, including sanctions

13 December 2018, Preamble, Articles 2, 43. See also Enrico D'Ambrogio, *The EU-Japan Strategic Partnership Agreement (SPA). A Framework to Promote Shared Values* (European Parliamentary Research Service 2019).

¹⁶⁴Hachez (n 45) 6.

¹⁶⁵Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 12. See also n 170 and the sources listed therein.

¹⁶⁶Døhlie Saltnes (n 17) 6–7; Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 12; Hachez (n 45) 18; Smith (n 7) 190.

¹⁶⁷Døhlie Saltnes (n 17) 7; Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 12; Hachez (n 45) 18–9.

¹⁶⁸See the overview in Døhlie Saltnes (n 17) at 7. See also Directorate-General/Bartels, 'The European Parliament's Role' (n 23) 12: '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.'

¹⁶⁹The term is used by Døhlie Saltnes (n 17), who identifies several cases of *coups d'état*, flawed elections and deterioration of respect for human rights and the rule of law in ACP countries, where no action under the human rights clauses was taken, at 8–9. See also Directorate-General/Bartels (n 18) 11; Abrisketa and others (n 145) 66; Beke and others (n 140) 69.

¹⁷⁰European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights P6_TA(2008)0405, para 21; Beke and others (n 140) 68–9; Directorate-General/Bartels (n 18) 11–2.

¹⁷¹Zwagemakers (n 2) 5; Hachez (n 45) 18; Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (2nd edn, Palgrave Macmillan 2014) 143; Fierro (n 17) 309.

¹⁷²Directorate-General/Bartels (n 18) 11; Abrisketa and others (n 145) 66.

or condemnation. The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries'.¹⁷³

Similarly, a (perceived) lack of consistency has been a point of criticism when it comes to the EU's external action and human rights.¹⁷⁴ Ever since the entry into force of the Treaty of Lisbon, the requirement that the EU's external action is consistent has been enshrined in primary law, where Article 21(3) TEU provides that '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies'.¹⁷⁵ In practice, however, several aspects of the EU's external action relating to human rights have been criticised as inconsistent or incoherent, for several reasons. One of these reasons can be linked directly to Article 21(2) TEU and relates to the objectives of external action listed therein.¹⁷⁶ Although these individual objectives are obviously meaningful and worth pursuing, they may not always be compatible in practice and might therefore entail inherent inconsistencies.¹⁷⁷ The strengthening of international security as an objective (Article 21(2)(c) TEU) might clash with the objective of consolidating and supporting human rights (Article 21(2)(b) TEU), as can happen with 'terrorist lists' for example. Similarly, the integration of all countries into the world economy (Article 21(2)(e) TEU) may require those countries to make concessions when it comes to human rights, particularly social and labour rights (Article 21(2)(b) TEU) or the preservation of the environment (Article 21(2)(f)). Persistently insisting on changes in another State's human rights or environmental regime may lead to a decline in the bilateral relationship, which can in turn negatively affect the objective of international cooperation and the strengthening of international peace and security.¹⁷⁸

Another inherent risk of inconsistency arises as a consequence of diverging conceptions of (specific) human rights and of human rights priorities among EU Member States, among Member States and the EU, and among the EU institutions.¹⁷⁹ In this context, it has been argued that in EU external relations there is a disproportionate focus on civil and political rights, while socio-economic rights are given less attention.¹⁸⁰ A different line of criticism focuses on the inconsistency between the EU's internal understanding and its external promotion of human rights, often linked to variations in conceptions of human rights on a national level and, similarly, on an EU level.¹⁸¹ Member States' conceptions of human rights can vary based on their historical development (e.g. liberal-democratic versus communist traditions), their constitutional traditions, and their political priorities.¹⁸² On the EU level, for example, the protection of minority rights has been named as an area of human rights that the EU promoted actively externally, but which was

¹⁷³Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy 2012' (n 5) 3. See also Beke and others (n 140) 69.

¹⁷⁴Felipe Gómez Isa, Ester Muñoz Nogal, María Nagore, Łukasz Szoszkiewicz, Katrin Wladasch, Wenhai Dai, Si Lv, Xiaojing Nie, Zirong Zhou, Diego Armando Uchuypoma Soria, Chiara Marinelli and Renato Constantino, 'Challenges to the Effectiveness of EU Human Rights and Democratisation Policies' (2016) FRAME Deliverable 12.3, 14; Abrisketa and others (n 145); Velluti (n 12) 42–3.

¹⁷⁵Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law, Collected Courses of the Academy of European Law* (Oxford University Press 2008).

¹⁷⁶Article 21(2) TEU lists, among others, the following objectives: (a) to safeguard the EU's values, fundamental interests and security; (b) to consolidate and support democracy, the rule of law and human rights; (c) to preserve peace, prevent conflicts and strengthen international security; (d) to foster the sustainable development of developing countries; (e) to encourage the integration of all countries into the world economy; (f) to preserve and improve the quality of the environment; (g) to assist those confronting natural or man-made disasters; and (h) to promote an international system based on strong multilateral cooperation and good global governance.

¹⁷⁷Keukeleire and Delreux (n 171) 26–7; Gómez Isa and others (n 174) 14.

¹⁷⁸Keukeleire and Delreux (n 171) 26–7; Gómez Isa and others (n 174) 14.

¹⁷⁹Velluti (n 12) 42; Abrisketa and others (n 145) 10–1; Døhlie Saltnes (n 17) 4–5.

¹⁸⁰Alexandra Gatto, 'The Integration of Social Rights Concerns in the External Relations of the European Union' in Gráinne de Búrca, Bruno de Witte and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford University Press 2005) 4; Körtvélyesi (n 155) 238.

¹⁸¹Abrisketa and others (n 145) 10–1.

¹⁸²JS Davidson, 'East versus West: Human Rights and Cultural Difference' (2001) 8 *Canterbury Law Review* 3; Cécile Fabre, 'Social Rights in European Constitutions' in Gráinne de Búrca, Bruno de Witte and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford University Press 2005); Körtvélyesi (n 170) 238–9; Williams (n 113) 84–94.

not prioritised internally towards the Member States.¹⁸³ In addition, Member States, just like the EU, may have particular human rights priorities, or may have ‘special relationships’ with certain countries (e.g. with former colonies or particular trade partners) that prevent them from accusing these countries of human rights violations.¹⁸⁴ In practice, these potential inconsistencies are exemplified by the variations in EU strategies and EU actions towards different countries/regions, varying from ‘Realpolitik’ towards Russia, to ‘imperialism’ towards Kosovo and ‘status quo player’ towards North Africa.¹⁸⁵

The problems concerning selectivity and consistency will most likely negatively impact the EU’s external relations and might lead to a decline in the EU’s credibility as a normative international actor.¹⁸⁶ Inconsistencies and selectivity in the EU’s external action, whether as a result of internal differences, varying strategies and priorities, or special relationships, might hamper its ability to present itself as a principled and fair protector of human rights.¹⁸⁷ The EU itself has indeed recognised the necessity of more consistent external action on human rights and has adopted various measures designed to enhance consistency. In the EU Strategic Framework and Action Plan on Human Rights and Democracy, the Council committed itself to promoting human rights ‘in all areas of its external action without exception’.¹⁸⁸ An EU Special Representative on Human Rights was nominated, in part to oversee the EU’s human rights strategy; individual human rights strategies were developed for the third countries; and human rights specialists were added to the various international EU delegations.¹⁸⁹ Whether these measures and strategies will ensure more consistent EU external action on human rights will have to be evaluated by their implementation and enforcement in practice.

5. Conclusion

Although the inclusion of human rights clauses in the EU’s international trade agreements is an important tool in ensuring the protection of human rights worldwide, these clauses are but a part of the EU’s international human rights efforts. The EU has a number of human rights tools at its disposal, ranging from HRIA, to Human Rights Dialogues and autonomous instruments, to human rights clauses and sanctions. When assessing the EU’s efforts in the field of human rights, it is therefore important to consider these tools and their interrelation as tools that can be used separately, concurrently and complementarily. A prominent EU approach to ensuring human rights protection in its external relations is the use of conditionality-based instruments, one of them being human rights clauses in the EU’s international trade agreements. At first sight, trade (agreements) might not seem the most logical way of pursuing the objective of supporting and consolidating human rights on the international plane. Within the EU, however, human rights are an integral part not only of its founding values, but also of its trade policy, which is most visible in the EU’s general policy of including human rights clauses in all its international trade agreements. With the CCP, the EU has a tool that enables it to integrate other policy objectives into its trade policy, including human rights. In the absence of a specific legal basis and a model clause,

¹⁸³Williams (n 113) 85–6.

¹⁸⁴Døhlie Saltnes (n 17) 4–5; Abrisketa and others (n 145) 10–1.

¹⁸⁵Nathalie Tocci (ed), *The European Union as a Normative Foreign Policy Actor* (CEPS Working Document 281 2008); Körtvélyesi (n 155) 234.

¹⁸⁶Khaliq (n 121) 452; Körtvélyesi (n 155) 234; Council of the European Union, ‘Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union – Adoption’ 10116/14 [2014] para 13: ‘Recognises the importance of consistency between internal and external aspects of human rights’ protection and promotion in the Union framework in terms of enhancing the Union’s credibility in its external relations and leading by example in the area of human rights’. This matter was also raised by the European Parliament: European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights P6_TA(2008)0405, para 21: ‘[c]onsiders that failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union’s human rights strategy, sanctions policy and credibility’.

¹⁸⁷Khaliq (n 121) 452; Körtvélyesi (n 155) 234; Council, ‘Conclusions on the consistency between internal and external aspects of human rights protection’ (n 186) para 13; European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights P6_TA(2008)0405, para 21.

¹⁸⁸Council, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy 2012’ (n 5); Keukeleire and Delreux (n 171) 138.

¹⁸⁹Keukeleire and Delreux (n 171) 138.

the (early) human rights clauses varied in wording and scope: whereas the Cotonou Agreement features elaborate details on procedure, the EU-Korea Framework Agreement provides more general modalities. Similarly, there were and still are variations in the use of suspension or non-execution clauses as well, and some agreements failed to include such a clause at all. One of the biggest challenges of the next years for the EU's human rights policy will be the expiry of the Cotonou Agreement. With the expiry of the agreement, the detailed non-execution mechanism of Article 96 will also no longer be applicable to the related EPAs. Only where the EPAs contain their own essential elements clause on respect for human rights, and thus the explicit confirmation that respect for human rights is an 'essential element' of the agreement in question, can the mechanism reflected in Article 60(3)(b) VCLT unquestionably be applied in response to human rights violations. Unfortunately, however, the interim EPAs, especially, do not contain such clauses.

Prior to the entry into force of the Treaty of Lisbon, the absence of a specific legal basis created some difficulties as well: did the EU have a competence to include such a clause, and if so, what articles in the Treaties should this competence be based on? Although this issue was, to a degree, addressed by the Court of Justice in *Portugal v Council*, the introduction of Articles 3(5) and 21 TEU definitively settled the matter. Legally speaking, although the EU must indeed pursue the objectives laid down in Articles 3(5) and 21 TEU, when and how the EU chooses to do so largely lies within the EU's discretion: the EU is not under an obligation to include human rights clauses, either under EU law, or under general international law. Conversely, the EU must certainly respect the limits posed by EU law and international law when implementing and enforcing human rights clauses. Apart from legal considerations, some other requirements that these human rights clauses should meet have been discussed. In particular, the selectivity and (in)consistency of the inclusion and activation of these clauses has been criticised, prominently also by the European Parliament. If, for example, sectoral trade agreements do not contain a human rights clause, or if the human rights clause is only activated in response to certain countries, the EU risks being perceived as an inconsistent external actor, which might in turn jeopardise its credibility as a promoter of human rights. Importantly, the EU has recognised that there may be flaws in the implementation and enforcement of the human rights clauses, and several measures designed to combat selectivity and inconsistency have been introduced in the last few years. Considering that these measures are only a few years old, with some still requiring further development and implementation, it is too early to definitively assess whether these measures were, are and will be successful or not. At the least, the introduction of these measures indicates that the EU institutions take their Treaty-imposed obligation of 'ensur[ing] consistency between the different areas of its external action' of Article 21(3) TEU seriously.

In its external relations, the EU has made it clear that it seeks to be a normative international actor, focusing – among other things – on the protection of human rights worldwide. What is important, however, is that all the human rights tools at the EU's disposal, whether human rights clauses or sanctions, are shaped, implemented and enforced indiscriminately and consistently. As it stands, some flaws in the EU's implementation and enforcement action can be identified, some stemming from the EU legal framework, others arising in the EU's external action practice, potentially harming the EU's credibility. The EU seems to be aware of (some of) the shortfalls in its human rights policy and practice, and has made efforts to remedy them. Whether these efforts will be successful, in the short run and in the long run, remains to be seen.

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Declarations and conflict of interests

The authors declare no conflict of interest linked to this article.