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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS



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**Protecting Human Rights in the
European Union's External Relations**

Sara Poli (ed.)

CLEER PAPERS 2016/5

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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**PROTECTING HUMAN RIGHTS
IN THE EUROPEAN UNION'S EXTERNAL RELATIONS**

SARA POLI (ED.)

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CONTENTS

List of Contributors	5
Protecting Human Rights in the European Union's External Relations: Setting the Scene <i>Sara Poli</i>	7
Guaranteeing Respect for Human Rights in the EU's External Relations: What Role for Administrative Law? <i>Ilaria Vianello</i>	21
Human Rights Clauses in EU Agreements <i>Francesca Martines</i>	37
EU Guidelines on Human Rights as a Foreign Policy Instrument: An Assessment <i>Jan Wouters and Marta Hermez</i>	63
The Promotion of Social Rights and Labour Standards in the EU's External Trade Relations <i>Samantha Velluti</i>	83
The Promotion of Good Governance as an Autonomous Objective of the EU's External Relations <i>Sara Poli</i>	115
EUNAVFOR MED Operation Sophia: Fighting Smuggling of Migrants or Protecting Human Rights? <i>Efthymios Papastavridis</i>	139
Attribution of Conduct in the Framework of CSDP Missions: Reflections on a Recent Judgment by the Higher Administrative Court of Nordrhein-Westfalen <i>Emanuele Sommario</i>	155

HUMANS RIGHTS CLAUSES IN EU AGREEMENTS

Francesca Martines

I. INTRODUCTION

The inclusion of human rights clauses in European Union (EU) international agreements has long been a traditional feature¹ of human rights protection in the EU's external relations. It continues to attract the attention of scholars² due to the problematic issues involved, including the enforcement, scope, and function of the clauses.

In current practice, EU agreements containing³ human rights clauses follow a standard model.⁴ First, there is a reference in the Preamble of the agreement to the 'strong attachment' of the contracting parties to non-trade values, such as democratic principles, human rights, and the rule of law. Second, in the first part of the agreement, there is a provision that defines the respect for human rights and other non-trade values as an 'essential element' of the agreement. Third, a non-execution clause is included in the final part of most EU agreements, which stipulates how the EU is supposed react if an essential element of the agreement is violated.

¹ The Framework Agreement with Argentina of 1990 was the first to include a human rights clause. See Framework Agreement for Trade and Economic Cooperation between the European Economic Community and the Argentine Republic, OJ [1990] L 295, 26.10.1990. For a list of agreements containing human rights clauses, see European Union External Action Service, Inventory of Agreements Containing the Human Rights Clause, Doc EEAS/SG2, 12.12.2014.

² See, *inter alia*, E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhof 2003); L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005); *Idem*, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and other Trade Arrangements with Third Countries', European Parliament Directorate for External Relations (November 2008), available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET\(2008\)406991_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf)>; *Idem*, 'A Model Human Rights Clause for the EU's International Trade Agreements', German Institute for Human Rights (2014); N. Hachez, 'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?', Leuven Centre for Global Governance Studies, *Working Paper* No. 158 (April 2015); A. Egan and L. Pech, 'Respect for Human Rights as a General Objective of the EU's External Action', Leuven Centre for Global Governance Studies, *Working Paper* No. 161 (June 2015); N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood', 40 *European Law Review* 2015, 391-410.

³ This practice has been extended to several sector agreements. According to a document prepared by the Commission in 2011, all fisheries agreements shall include a human rights clause. See Commission Communication, Reform of the Common Fisheries Policy, COM (2011) 417 final, 13.7.2011, section 2.7.

⁴ In 1995, the Council decided to standardise the essential element clause and to include a non-execution clause in all Community Agreements with third countries. See EU Council Press Release, Doc 7481/95, 29.5.1995, cited by M. Jurine, 'Note on Human Rights Clauses in The EU's External Relations', Study requested by the Subcommittee on Human Rights of the European Parliament, Doc DV/576418EN, 27.7.2005, at 10.

It has been observed that the violations of the values mentioned in the essential element clause have only triggered the application of the clause in a limited number of cases, all involving very serious violations of democratic principles and human rights.⁵ This infrequent application might thus call into question the real impact of the clause on the human rights situations in EU partner countries.

However, the usefulness of the clause as a tool for the protection of human rights in the EU's external relations cannot be judged with exclusive reference to its enforcement record. On the one hand, the essential element clause and the non-execution clause establish a 'self-contained regime',⁶ allowing for the adoption of 'appropriate measures' to compel compliance. On the other hand, the essential element clause should also be evaluated *per se*, that is as an autonomous rule that can play a constructive role as a basis for political dialogue and for the adoption of positive measures.

This paper examines the added value of the clause following this interpretative approach and contributes to the discussion of several problematic issues related to the clauses and to their enforcement.

The paper is organised as follows. Section II examines the scope and features of the essential element clause. Section III analyses the structure and content of the non-execution clause. Section IV explores the (possible) application of the human rights clauses contained in the Cotonou Agreement as a consequence of the anti-homosexual legislation adopted by several African countries, which provides a test case for some of the questions posed in previous sections. Finally, conclusions are drawn in Section V on the usefulness of human rights clauses as a tool for the protection of human rights in EU foreign affairs.

II. THE HUMAN RIGHTS ESSENTIAL ELEMENT CLAUSE AND ITS MATERIAL SCOPE

Despite some differences as regards the material scope of the clause,⁷ the structure of the essential element provisions contained in EU Agreements follows a similar pattern. Taking as an example the Framework Cooperation Agreement between the EU and Philippines,⁸ Article 1 (General Principles)

⁵ For a complete list of cases, see the answer given by the Commission Vice-President Federica Mogherini on behalf of the Commission, on the 5th August 2015, to a Member of the European Parliament on the number of EU agreements, containing human rights clauses, suspended in response to human rights violations. Doc E-008626/2015, 5.8.2015. Available at <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008626&language=EN>>.

⁶ In that the agreement regulates the permissible responses to a breach of its provisions. On this point, see *infra* section III.

⁷ For example, reference to the rule of law is not always included. On this point, see *infra* note 14 and surrounding text.

⁸ Framework Agreement on Partnership and Cooperation between the European Union and its Member States, on the One Part, and the Republic of Philippines, on the Other Part. The agreement was signed in July 2012. Commission Communication, COM (2013) 925 final, 18.12.2013.

reads: 'Respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights, and other relevant international human rights instruments to which the Parties are contracting parties, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement'.

The clause refers to both non-binding and binding international law instruments. The former are the General Assembly Universal Declaration on Human Rights (as in the example above), or the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, or the Charter of Paris for a New Europe of 1990.⁹ According to an author, the reference to these instruments in the human rights clause makes them binding.¹⁰ It is submitted that this conclusion depends on the specific context.¹¹ However, these documents can be used as instruments for interpretation of the clause, since they provide details as regards, for example, the content of democratic principles and of minority rights. It can also be remarked that the above-mentioned instruments often contain principles that are enshrined in other (binding) international law instruments or that are principles of customary international law. As for binding human rights instruments, the clause refers to 'other relevant international human rights instruments to which both Parties are contracting parties'. This latter reference makes it clear that these 'other agreements' are the source of human rights obligations for the parties. It should be noted that this provision is drafted so that it covers legal instruments that the parties might ratify after the conclusion of the EU agreement.¹² This also means that the scope of the

⁹ These last two references are contained in agreements with Eastern countries, recently, with Moldova (Art. 2), Georgia (Art. 2), and Ukraine (Art. 2). The essential element clause of the Association agreements with these countries also includes a reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms of which they are contracting parties. It is also interesting to note that the Association Agreement with Ukraine includes 'Promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence' as an essential element. The Association Agreement with Georgia contains the same reference but does not qualify respect for those values as an essential element. The Association Agreement with Moldova does not contain such a reference at all. The text of the Agreement with Georgia is reported in OJ [2014] L 261/4, 30.8.2014. The text of the Agreement with Moldova is reported in OJ [2014] L 260/4, 30.8.2014. The text of the Agreement with Ukraine is reported in OJ [2014] L 161/3, 29.5.2014. The essential elements clause in the Stabilisation and Association Agreements with the Former Yugoslav Republic of Macedonia (a candidate country since 2003), OJ [2004] L 84/4, 20.3.2004, contains a reference to market economy. This is one of the Copenhagen criteria that candidate countries have to fulfil to join the EU.

¹⁰ C. Hillion, 'The Evolving System of European Union External Relations as Evidenced in the EU Partnerships with Russia and Ukraine', Leiden University (2005), at 87, available at <<https://openaccess.leidenuniv.nl/handle/1887/4338/>>. On the issue of the implications of the reference to non-legal documents in international treaties, see U. Fastenrath, 'The Legal Significance of CSCE/OSCE Documents', *OSCE Yearbook 1995/1996*, at 417.

¹¹ Hillion reaches his conclusions with reference to the Partnership and Cooperation Agreement with Russia and after an analysis of a Joint Declaration attached to the Agreement. *Supra*, note 10.

¹² For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Convention on the Rights of Persons with Disabilities, ratified by Vietnam after signing the Framework Agreement with the EU and its Member States is covered by the essential element clause.

clause may differ depending on the number of international law instruments for human rights protection binding the two contracting parties.

The problem with the application of the clause is not so much the scope of international obligations, but rather the understanding and conception of human rights and the issue of relativism.

It is clear that for the EU, human rights are indivisible and universal. Thus the reference to the General Assembly Universal Declaration on Human Rights is telling: the Declaration symbolises the principles of interrelation, universality, inter-independency and indivisibility of human rights. The underlined assumption is the existence of a universal legal regime of human rights, which seems not to give any space to cultural, ethnic or religious relativism.¹³

As for democracy and the rule of law,¹⁴ the essential elements clauses usually do not contain a definition¹⁵ of these values. In the EU, democracy and the rule of law are conceived as closely connected to each other and linked with human rights. In fact, EU documents usually refer to the three principles as if they constitute a single concept.¹⁶ If democracy goes hand in hand with political

¹³ For an example of the subordination of human rights to the dictates of Islamic law, see the Cairo Declaration proclaimed in 1990 by the Organisation of the Islamic Conferences. On this issue, see J.D. van der Vyver, 'Universality and Relativity of Human Rights: American Relativism', 4 *Buffalo Human Rights Law Review* 1998, at 62. On the possibility of adopting weak relativism, see C. Good, 'Human Rights and Relativism', 19 *Macalester Journal of Philosophy* 2010, 27-52. Available at <<http://digitalcommons.macalester.edu/philo/vol19/iss1/4>>.

¹⁴ There is not a uniform practice across all EU agreements as regards the reference to this value. The rule of law is, for example, mentioned in Art. 1 of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States on the One Part, and the Socialist Republic of Vietnam, on the Other Part, of 2012, available at <http://eeas.europa.eu/delegations/vietnam/eu_vietnam/political_relations/index_en.htm>. In the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States on the One Part, and the Republic of Indonesia, on the Other Part, the rule of law is not mentioned as one of the essential elements of the partnership (Art. 1.1 refers only to respect for democratic principles and fundamental human rights). A reference is contained in paragraph 4 of Art. 1, which reads: 'The Parties reaffirm their attachment to the principles of good governance, the rule of law, including the independence of the judiciary, and the fight against corruption'. OJ [2014] L 125/16, 26.4.2014. Respect for the rule of law is considered as an essential element in the Association Agreement between the EU and Ukraine (Art. 2), whereas in the Association Agreement with Moldova, respect for the rule of law is mentioned in para. 3 of Art. 1 (General Principles), but not as an essential element. The same model is applied in the Association Agreement with the Republic of Georgia. *Supra*, note 9.

¹⁵ Art. 9 of the Cotonou Agreement is more specific in defining democracy and the rule of law. 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, OJ [2000] L 317/3, 15.12.2000.

¹⁶ See, for instance, Regulation 235/2014 of the European Parliament and of the Council of 11 March 2014 Establishing a Financing Instrument for Democracy and Human Rights Worldwide, OJ [2014] L 77/85, 15.3.2014. The eleventh indent of the Preamble of the regulation reads: 'Democracy and human rights are inextricably linked and mutually reinforcing, as recalled in the Council Conclusions of 18 November 2009 on democracy support in the EU's external relations. The fundamental freedoms of thought, conscience and religion or belief, expression, assembly and association are the preconditions for political pluralism, democratic process and an open society, whereas democratic control, domestic accountability and the separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human rights.' See also Art. 1 (subject matter and objective) and the Annex to the Regulation, point 3 on actions in support of democracy. According to the EU: 'Deep

human rights,¹⁷ the rule of law can be considered as a further specification of democratic principles. Therefore, if one adopts a 'thick notion'¹⁸ of the rule of law,¹⁹ the respect for democratic principles also covers the respect for the rule of law.²⁰ In some EU Agreements, the connection between human rights and the rule of law is made explicit.²¹

One could distinguish, however, between the individual right 'to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors' (as established in Article 25 of the 1966 International Covenant on Civil and Political Rights) and the duty to respect democratic principles. However, since the parties to the EU agreements declare that they share common values and a commitment to human rights, this should inspire their internal organisations to respect the basic tenets of democracy and the rule of law. It should also be recalled that in EU practice, to date, the suspension of the agreement obligations or the adoption of punitive measures have been triggered only in cases of serious violations of the clause, such as coups d'états or the interruption of the democratic process, as in the case of flawed elections,²² that is in cases where there was a clear breach of democratic principles.

On the basis of these observations, it is here submitted that there is no real need to specify the scope and content of the values that are mentioned in the

and sustainable democracy includes judicial independence and democratic control over armed forces'; see European Neighbourhood Policy (ENP) – Fact Sheet (19 March 2013), available at <http://europa.eu/rapid/press-release_MEMO-13-236_en.htm>. It is submitted that the EU's understanding of democracy spelled out in unilateral instruments cannot but affect the EU's interpretation of this notion contained in human rights clauses.

¹⁷ The GA Universal Declaration of Human Rights provides for a tight link between democracy and human rights, see Art. 19 (freedom of opinion and expression); Art. 20 (freedom of association); Art. 21 (right to participate in the government and elections); Art. 28 (connecting human rights to a political order where they can be realised).

¹⁸ It has been convincingly demonstrated that the EU adopts a thick understanding of the rule of law and democracy. See the deep analysis made by L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action,' *CLEER Working Paper* No. 3 (2012). For an explanation of the 'thick' and 'thin' conception of rule of law, see N. Hachez and J. Wouters, 'Promoting the Rule of Law: A Benchmarks Approach', Leuven Centre for Global Governance Studies, *Working Paper* No. 105 (April 2013).

¹⁹ The rule of law is embedded in the GA Universal Declaration of Human Rights as well: see the Preamble, third indent, and Art. 29, para. 2.

²⁰ Commission Communication, Human Rights, Democracy and Development Cooperation Policy, SEC (1991) 61 final, 25.3.1991, at 6.

²¹ See Art. 1 of the Agreement between the EU and Korea, which reads: 'The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement' [emphasis added]. The text of the Framework Agreement with the Republic of Korea is available at <http://eeas.europa.eu/korea_south/index_en.htm>. For the provisional application of the Agreement, see COM (2009) 631 final, 18.11.2009.

²² C. Portela, 'Aid Suspensions as Coercive Tools? The European Union's Experience in the African-Caribbean-Pacific (ACP) Context', 3 *Review of European and Russian Affairs* 2007, 38-53, available at <http://ink.library.smu.edu.sg/soas_research/1758>.

essential element clause. These could (and should) be clarified or made explicit in the framework of political dialogue and during consultation with the parties according to the specific context and targeted situations.

The extension of the essential element clause to cover human trafficking is a clear example of the potential scope of the clause and of its interpretation.²³ The same could be argued for the violation of human rights in the case of criminalisation of same sex relations (as will be developed in the fourth section of this paper).

In some recently negotiated agreements, the number of non-trade values mentioned in the clause has been extended to cover international law principles and respect for the Charter of the UN,²⁴ and also to include development goals.²⁵ The structure of the clause remains unchanged since it reiterates the parties' obligations, which are legally based on other sources of international law.

Some recently negotiated agreements contain a new essential element clause, which is usually provided for in a separate article,²⁶ and which is aimed at countering the proliferation of weapons of mass destruction²⁷ (WMD) (see *infra* for further comments on this issue).

The essential element clause regarding the non-proliferation of weapons of mass destruction dates back²⁸ to the 'European Strategy against the proliferation of Weapons of Mass Destruction' and in particular to a Council Docu-

²³ According to the Commission Communication, 'trafficking in human beings will continue to be covered under the Human Rights Clauses in the EU's agreements with third countries, including the Free Trade Agreements,' Commission Communication, EU Strategy towards the Eradication of Trafficking in Human Beings 2012- 2016, COM (2012) 286 final, 19.6.2012, at 12.

²⁴ Art. 1 of the Framework Agreement with Vietnam. *Supra*, note 14.

²⁵ Art. 1.2 of the Framework Agreement with Vietnam. *Supra*, note 14.

²⁶ In the Association Agreement between the EU, its Member States and the Republic of Moldova (Art. 2.1), the Association Agreement with Georgia (Art. 2.1) and in the Association Agreement with Ukraine (Art. 2) the countering of proliferation of weapons of mass destruction, related materials and their delivery, is instead included in the essential element clause. *Supra* note 9.

²⁷ See, for example, Art. 4 ('Countering the Proliferation of Weapons of Mass Destruction') of the EU Korea Framework Agreement, *supra* note 21.

²⁸ Council of the European Union, EU Strategy against Weapons of Mass Destruction, Doc 15708/03 10.12.2003, at 13. Since 2003, the EU has developed a strategic framework to identify new threats to security and to define the common interests and objectives of the EU Foreign and Security Policy. WMD are one of the challenges identified by the European Security Strategy (12 December 2003). For an analysis of the origin of the strategy, see L. Grip, 'The EU Non-Proliferation Clause: A Preliminary Assessment', *SIPRI Background Paper* (November 2009), available at <http://books.sipri.org/product_info?c_product_id=394>. *Idem*, 'The European Union's Weapons of Mass Destruction Non-Proliferation Clause: A 10-Year Assessment', EU Non-Proliferation Consortium, *Non Proliferation Papers* No. 40 (April 2014), available at <<http://www.nonproliferation.eu/web/documents/nonproliferationpapers/linagrip53611327371e9.pdf>>.

ment²⁹ that provides for the introduction of such a clause in agreements with third countries.³⁰

The WMD clause³¹ is divided in two parts.³² In the first, the parties agree to cooperate in countering the proliferation of WMD and their means of delivery through compliance with existing treaty obligations.

This is a declaratory provision, replicating the model of the human rights clause. As an essential element of the agreement, it qualifies with respect to international law obligations to countering WMD proliferation, thus connecting it with the non-execution provision,³³ but it does not create additional obligations for the parties.³⁴

It is the second part of the clause that establishes a stronger commitment of the parties,³⁵ that is to 'take steps' for the signing, ratification or accession and full implementation of all other relevant international instruments. Finally, the clause refers to the cooperation of the parties through the 'establishment of an effective system of national export controls', by controlling the export as well as the transit of WMD-related goods, including a WMD end-use control on dual-use technologies and effective sanctions for breaches of export controls.³⁶

According to the Council, the second part of the clause can be considered essential on a case-by-case basis.³⁷ The WMD clause summarises the cornerstones of the non-proliferation strategy of the EU, i.e., the reinforcement of

²⁹ Council of the European Union, Fight against the Proliferation of Weapons of Mass Destruction – EU Policy as Regards the Non-Proliferation Element in the EU's Relationships with Third Countries, Doc 14997/03, 19.11.2003. In this document, the Council considers different hypotheses: the inclusion of the clause in future mixed agreements, the insertion of the clause on occasion of amending agreement in force, or the conclusion of a separate agreement linked to the overall agreement.

³⁰ The first EU agreement including a WMD clause was the EU Partnership and Cooperation Agreement (PCA), with the Republic of Tajikistan, signed in 2004, OJ [2009] L 350/1, 29.12.2009.

³¹ Council of the European Union, Note on the Implementation of the WMD Clause, Doc 5503/09, 19.1.2009.

³² All agreements containing a non-proliferation clause also refer in the Preamble to the parties' commitment towards non-proliferation of weapons of mass destruction.

³³ In cases of non-compliance by one of the parties to the agreement with the commitments under the non-proliferation clause, intensive consultations between the parties would take place similar to the procedure established in Art. 96 of the Cotonou Agreement. Council of the EU, Doc 14997/03, *supra* note 29, at 3.

³⁴ European Parliament, Note on EU Non-Proliferation Clauses Applied To Certain Agreements in the EU's Wider Relations with Third Countries, Doc DGExPo/B/PolDep/Note/2007_172, 21.9.2007.

³⁵ This might explain India's refusal to sign the agreement with the EU containing a non-proliferation clause. The opposition to the inclusion of non-trade issues in negotiations leading to a Free Trade Agreement between the EU and India has been the main roadblocks. See A. Jatkar, 'Human Rights in the EU-India FTA: Is it a Viable Option?', 1 *GREAT Insights Magazine* 2012, available at <<http://ecdpm.org/great-insights/trade-and-human-rights/human-rights-eu-india-fta-viable-option/>>. For an analysis of the evolving relationship between India and the EU, see B. Kienzle, 'Integrating without Quite Breaking the Rules: The EU and India's Acceptance within the Non-Proliferation Regime', EU Non-Proliferation Consortium, *Non-Proliferation Papers* No. 43 (February 2015), available at <<http://www.nonproliferation.eu/web/documents/nonproliferationpapers/integrating-without-quite-breaking-the-rules-the-e-44.pdf>>.

³⁶ The parties agree to establish a regular political dialogue that will accompany and consolidate these elements.

³⁷ As specified in Council of the EU, Doc 14997/03, *supra* note 29, at 4.

compliance and implementation of existing treaty obligations, the promotion of multilateral treaties, and export controls.

The integration of the EU's non-proliferation strategy within its external trade and cooperation policy raises several doubts. The structure of the human rights clause, which was conceived as an incentive for the protection of human rights and other values mostly in the EU partners' domestic legal order, does not seem an appropriate tool for the aims of an external policy strategy in a global context. Moreover, there is a serious risk of undermining the EU's credibility in the case of non-compliance. Another risk could result from the "inflation" of essential element clauses and the ensuing loss of importance of these instruments for the protection of human rights.

Another feature of the essential element clause is that it refers to the parties' commitment to conform to the above-mentioned values and rules 'in the conduct of their international policy'.³⁸ The exact reach of this reference – at least for human rights, democracy, and the rule of law – is not elaborated on further, but since the clause does not create new obligations it could be interpreted not only as restating each party's commitment to respect human rights by public authority action wherever it is exercised,³⁹ but also as complying with *international rule of law*.⁴⁰ This means for example that international disputes have to be settled by pacific means and that the parties have to ensure compliance with the decisions of the International Court of Justice or with other international judgments of the international court or tribunal in settling disputes to which they are parties.

The reference to international policies means that the EU's partners' external behaviour could also be evaluated and discussed within the framework of political dialogue and consultations, and could trigger the adoption of punitive measures.

Finally, the term 'essential' deserves attention. In early EU practice, respect for human rights was defined as the 'basis' of cooperation.⁴¹ This formula was

³⁸ L. Bartels mentions the case of Liberia where 'appropriate measures' were adopted as a consequence, *inter alia*, of Liberian assistance to the Front Revolutionnaire Uni of Sierra Leone, which has been accused of serious violations of human rights. See L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *European Journal of International Law* 2014, at 1080.

³⁹ Traditionally, the issue of extraterritorial application of human rights treaties has been discussed with reference to situations of military occupation, see, for example, M.J. Dennis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* 2005, at 119. On the question of extraterritorial application of human rights, see L. Bartels, *supra*, note 38, and E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect: A Reply to Lorand Bartels', 25 *European Journal of International Law* 2014, 1093-1099.

⁴⁰ Respect for international rule of law is reiterated in the Preamble of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Doc A/RES/25/2625, 24.10.1970; see also the UN Millennium Declaration, Resolution Adopted by the UN General Assembly, A/Res/55/2, 18.9.2000, para. 9, available at <<http://www.un.org/millennium/declaration/ares552e.htm>>.

⁴¹ See Framework Agreement for Trade and Economic Cooperation between the European Economic Community and the Republic of Argentina, *supra* note 1, Art. 1.

interpreted as providing a legal foundation for the suspension or termination of the agreement according to international customary law.⁴² The term 'essential' has the function of connecting the human rights clause with the non-execution clause, but it can be interpreted as expressing the idea that the non-trade values mentioned in the human rights clause are of primary concern for the EU and its partners: they constitute the fundamental element of the relationship and they are to be promoted by means of positive instruments. In other words, the essential element clause provides the legal basis for positive measures.⁴³

If respect for human rights and other values mentioned in the clause are essential elements of the agreement, the idea implied is that they are at the heart of the treaty, and that cooperation between the EU and its partner(s) is possible because the parties share these values,⁴⁴ and therefore protect and observe them.

Thus, one would expect that observance of political values mentioned in the clause should be a precondition to establishing cooperation and thus a criterion for the selection of partner countries.

An *ex-ante* evaluation of the human rights situation in the partner country would present the additional advantage of highlighting to European public opinion, and to European citizens, that the EU's external policy, in particular its trade policy and development cooperation policies, contributes to the protection of human rights and democracy, and that aid⁴⁵ is directed towards those countries that have a satisfactory record of compliance with these values.⁴⁶

The EU should also demonstrate its commitment to human rights by negotiating agreements only with countries that respect, or are said to respect, at least a minimum standard of protection. Should the EU engage with a contracting

⁴² Corresponding either to the customary law principle *inadimplenti non est adimplendum*, or to the *rebus sic stantibus* rule. For a comment see L. Bartels, *A Model Human Rights Clause*, *supra* note 2, at 12. See *infra*, para. III, for further comments.

⁴³ The preference for a positive approach and for promotion of dialogue with third countries was underlined by the Commission, which emphasised the importance of keeping channels of communication open even in difficult situations. See Commission Communication, Human Rights, Democracy and Development Cooperation Policy, *supra* note 20, at 6.

⁴⁴ When the clause is included in agreements with developing countries, respect for democratic principles (at times respect for the rule of law) and human rights is conceived as a prerequisite to economic and social development. See Commission Communication, Increasing the Impact of EU Development Policy: An Agenda for Change, COM (2011) 637 final, 13.10.2011, para. 2. For the up-to-date statement of the connection between rights and development, see Commission Staff Working Document, Rights-Based Approach Encompassing All Human Rights for EU Development Cooperation, SWD (2014) 152 final, 30.4.2014. It should be recalled that the European Court of Justice acknowledged the legality of human rights clauses in development cooperation agreements in CJEU, Case C-268/94, *Council v. Portugal* [1996] ECR I-6177. See B. De Witte, 'The EU and the International Legal Order: The Case of Human Rights', in P. Koutrakos and M. Evans (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing 2011), 127-147; E. Cannizzaro, 'The Scope of EU Foreign Power: Is the EC Competent to Conclude Agreements with Third Countries including Human Rights Clauses?', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International 2002), 297-320.

⁴⁵ The European Development Fund is financed by direct contributions from Member States.

⁴⁶ Council of the European Union, Increasing the Impact of EU Development Policy: An Agenda for Change, 3166th Foreign Affairs Council Meeting (14 May 2012), para. 2.

party that does not respect human rights, this could be interpreted as an implied endorsement of the political leadership of that country. Human rights clauses could also win the support of civil society for liberalising trade and establishing investment agreements.

In fact, considering that the ratification of the agreement might improve the situation due to EU pressure, the EU has adopted a realist approach⁴⁷ and does not scrutinise its partners strictly. This is proven by the ratification of EU agreements with countries whose human rights records are contentious.

However, the EU adopts a selective approach when it decides whether to provide financial aid to third countries.⁴⁸ Although the EU has more freedom in the selection process in the context of unilateral financial aid allocation, an *ex-ante* evaluation of the human rights situation in partner countries could in the future also affect the EU's approach to agreement negotiations, as suggested by the European Parliament.⁴⁹

The Parliament has urged the Commission 'not to propose free trade agreements and/or association agreements – even containing human rights clauses – to governments of countries where, according to reports by the Office of the High Commissioner for Human Rights of the United Nations, massive human rights violations' take place.⁵⁰ There are cases where the EU has suspended the conclusion of negotiated agreements⁵¹ or has delayed their entry into

⁴⁷ For example, the Council has given its assent to the provisional application of the agreement with Syria as it considered that the agreement could lead to improvements of human rights protection in the country. See Council of the European Union, Council Decision on the Signing, on Behalf of the European Community, and Provisional Application of Certain Provisions of the Euro-Mediterranean Agreement Establishing an Association between the European Community and its Member States, on the One Part, and the Syrian Arab Republic, on the Other Part, Doc 9921/09, 17.8.2009. However, as a consequence of extremely serious violations of human rights in 2011, the Council partially suspended the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic. See Decision 2011/523/EU of 2.9.2011, OJ [2011] L 228/19, 3.9.2011, amended by Decision 2012/123/CFSP, 27.2.2012, OJ [2012] L 54/18, 28.2.2012.

⁴⁸ See Council Conclusion, The Future Approach to EU Budget Support to Third Countries, 3166th Foreign Affairs Meeting (14 May 2012), paras. 7-8.

⁴⁹ The EU Parliament defined respect for human rights and civil liberties as a prerequisite for the conclusion of the agreement with Syria. See European Parliament, Resolution Containing the European Parliament's Recommendation to the Council on the Conclusion of a Euro-Mediterranean Association Agreement between the European Community and its Member States, of the One Part, and the Syrian Arab Republic, of the Other Part, Doc 2006/2150(INI) 26.10.06, para. J.2. The European Parliament in the same resolution suggested a number of specific reforms to the Syrian government to bring the situation in line with democracy and human rights.

⁵⁰ European Parliament, Report on the Evaluation of EU Sanctions as Part of The EU's Actions and Policies in the Area of Human Rights, Doc 2008/2031, 15.7.2008, para. 20.

⁵¹ The EU refused to sign an agreement negotiated with Pakistan as a consequence of the rise to power of General Musharraf (October 1999). The EU reviewed its policy towards Pakistan for security reasons after the attacks in the United States of 11 September 2001, as explained by U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge: Cambridge University Press 2008), at 219. According to EU Trade Commissioner Cecilia Malmström, 'The EU refuses to sign the Partnership and Cooperation Agreement finalized with Thailand in November 2013 unless the ruling military junta restores a "legitimate democratic process" and "upholds human rights and freedoms, remove censorship and releases all political detainees".' According to the Commission, future trade and investment policy should be based on 'fair and ethical trade and human rights'. See Martin Banks, 'EU's New Trade Policy Intensi-

force.⁵² In case the EU considers a situation to be improved, it can decide to proceed with the conclusion of the agreement.⁵³

The decision to conclude an agreement with a partner who is seriously infringing human rights is not only to be evaluated in terms of political opportunity, as it also raises issues of legality under international and European Union law. A recent case discussed before the General Court of the EU is illustrative in this respect.

The national liberation movement representing the people of Western Sahara, the 'Front populaire pour la libération de la sagaia-el-hamra et du rio de oro' known as 'Front Polisario', started an action⁵⁴ requesting the annulment of a decision that concluded an agreement between the EU and Morocco,⁵⁵ which was aimed at furthering reciprocal liberalisation on agricultural products, processed agricultural products, and fish and fishery products. The Agreement replaces some of the provisions of the Euro-Mediterranean agreement that had been concluded between the same parties.⁵⁶

fies Pressure on Thailand to Improve Human Rights', *EU Reporter*, 15 October 2015, available at <<https://www.eureporter.co/frontpage/2015/10/16/eus-new-trade-policy-intensifies-pressure-on-thailand-to-improve-human-rights/>>. The Fishing Protocol with Guinea-Bissau was negotiated and initialled in February 2012. After the military coup of 12 April 2012, the procedure for the conclusion of the protocol was suspended. On 16 October 2014, due to the restoration of democratic order, the provisional application of the protocol was approved by the Council. Decision 2014/782/EU, OJ [2014] L 328/1, 13.11.2014.

⁵² The entry into force of the Community Interim (Trade) Agreement with Russia was delayed due to Russia's invasion of Chechnya in 1995 and violations of human rights. European Commission, Press Release, Doc IP/96/696, 5.7.1996.

⁵³ The interim agreement with Russia was later ratified on the basis of supposed progress made as regards the conflict in Chechnya. The procedure for the conclusion of the Cooperation Agreement with Russia was also delayed, but then obtained the European Parliament's consent, motivated by the cease-fire.

⁵⁴ GC, Case T-512/12, *Front Populaire pour la Libération de la Sagaia-el-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union*, ECLI:EU:T:2015:953, available at <http://curia.europa.eu/jcms/jcms/_6/>.

⁵⁵ The Council of the European Union, Council Decision of 8 March 2012 on the Conclusion of an Agreement in the Form of an Exchange of Letters between the European Union and the Kingdom of Morocco Concerning Reciprocal Liberalisation Measures on Agricultural Products, Processed Agricultural Products, Fish and Fishery Products, the Replacement of Protocols 1, 2 and 3 and their Annexes and Amendments to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, Doc 2012/497/EU, OJ [2012] L 241/2, 7.9.2012. Morocco has been exercising control and *de facto* administering the territory of Western Sahara for 30 years. Western Sahara is listed among non-self-governing territories by the UN, while Morocco considers it an integral part of its territory. On the right to self-determination of Western Sahara, see S. Simon, 'Western Sahara', in C. Walter, A. von Ungern-Sternberg, and K. Abushov (eds.), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press 2014), 255-273. The issue of conclusion of an agreement with Morocco extending to the fishing zone off the coast of Western Sahara was discussed with reference to the Fisheries Partnership Agreement of 2007. See E. Milano, 'The New Fisheries Partnership between the European Community and the Kingdom of Morocco: Fishing too South?', 22 *Anuario Español de Derecho Internacional* 2007, 413-457.

⁵⁶ Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, OJ [2000] L 70/2, 18.3.2000.

On the question whether the EU could legitimately conclude an agreement with Morocco⁵⁷ extending its territorial scope to Western Sahara – and considering that Morocco's claim is not supported by international law – the Court ruled that there is 'nothing in the applicant's pleas and arguments to support the conclusion that it is absolutely forbidden by EU law or by international law to conclude with a third State an agreement that would likely be applied in a disputed territory' (para. 215). The Court's finding, however, does not seem totally convincing. The conclusion of the agreement – which extends *de facto* to Western Sahara – could be considered as implicit EU recognition of Morocco's (illegal) occupation of Western Sahara. It could be argued that this is a violation of international customary law requiring states (and international organisations) not to recognise situations arising from serious violations of international *jus cogens*.⁵⁸ Conclusion of an agreement in these circumstances threatens to consolidate the *status quo*. A more legally sound solution would be for the EU to conclude the agreement with Morocco, while excluding Western Sahara from the territorial scope of the agreement, as other states have done before.⁵⁹

Despite the above-mentioned finding on the conclusion of the agreement, the Court annulled the contested decision, holding that the EU Council had not examined 'carefully and impartially all the relevant elements to ensure that the production of products destined for export activities is not conducted at the expense of the population of the territory in question or implicate violations of fundamental rights'. On the obligation of the Council to proceed to an *ex ante* evaluation, it must be noted that the Court is making clear that it is not only a responsibility of Morocco to ensure that activities related to the natural resources of the country are undertaken to the benefit of the Sahrawi people, and, a point that the Court seems to miss, according to its will.⁶⁰ There is a responsibility of the EU itself to make sure that the application of the agreement does not violate human rights. The conclusion of the Court is important as it makes clear that the conclusion of an agreement cannot be appreciated solely in terms of political realism, and that the lack of a serious and deep *ex-ante* evaluation of the situation can be revised by the Court and have serious diplomatic (and legal) consequences.

As regards the human right clause (contained in the Euro-Mediterranean Agreement), the applicant claimed that the decision concluding the agreement

⁵⁷ For Morocco's competence to enter into agreements concerning Western Sahara's natural resources, see E. Milano, *supra*, note 55.

⁵⁸ See Art. 42 of the Draft Articles on the responsibility of international organisations, with commentaries. *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, 'No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.' See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, ICJ Reports 2004, para. 159.

⁵⁹ For example, the EFTA Free Trade Agreement with Morocco does not include Western Sahara. See Western Sahara Resource Watch, 'Norway: No Way for Western Sahara Free Trade' (12 May 2010), available at <<http://www.wsrw.org/a105x1411>>. The United States does not apply its FTA with Morocco to Western Sahara. See Congressional Record Proceeding and Debates of the 108th Congress Second Session, Vol. 150, Part 13 (22 July – 14 September 2004), 17273.

⁶⁰ See General Assembly Resolution No. 51/140 of 10.2.1997.

is contrary to those principles. The Court answered as follows: 'even assuming that certain clauses of the agreement, the conclusion of which was approved by the contested decision, conflict with the clauses of earlier agreements concluded between the European Union and the Kingdom of Morocco and relied on by the applicant, that does not constitute any illegality, since the European Union and the Kingdom of Morocco are free at any moment to alter agreements concluded between them by a new agreement, such as that concerned by the contested decision'. The reasoning is puzzling. The essential element clause cannot be amended or repealed by a more recent agreement, the provisions of which merely modify previous trade liberalisation conditions. The clause could certainly be amended or repealed by a subsequent agreement if this were clearly established, but even in this case the obligation to observe fundamental rights and international law would continue to bind the parties. According to the claimant, the conclusion of the new agreement extending to Western Sahara infringes the right to self-determination of the people of this territory and their right over natural resources (unless it is proved that Morocco manages those resources to the benefit of the Western Sahara people). If this claim is correct, the conclusion of the agreement amounts to violation of human rights and the principles of international law to which the clause refers. It is also clear that in these circumstances, the clause would function as a guiding principle for the parties not to conclude an agreement which violates the principles of international law to which the clause refers.

Going back to the negotiations, the EU's insistence on the inclusion of an essential elements clause in the agreement can have a positive and constructive effect during this process. It could make negotiations more difficult, but at least it would raise awareness among the partners regarding the EU's policy priorities and interests, and would highlight human rights issues.

The clause provides a legal basis for discussion and dialogue and makes it impossible for the parties to claim that human rights, democratic principles, the rule of law, and other non-trade values are domestic issues and thus fall within the exclusive jurisdiction of a state.⁶¹ In addition, within the framework of the institutionalised mechanism and procedures, recommendations may be provided regarding measures to be taken and directions to be followed.⁶²

Negotiations on human rights clauses can highlight and bring the issue of the protection of human rights to a country's public arena and stimulate a public

⁶¹ During the negotiation with Mexico, the reference in the essential element clause to international relations was problematic due to the traditional non-intervention doctrine of Mexico. See E. Fierro, *supra* note 2, at 303-304.

⁶² The case of Colombia and Peru is illustrative in this respect. The European Union signed a Trade Agreement with Colombia and Peru in June 2012, provisionally applied since August 2013. See OJ [2012] 354/3, 21.12.2012. As explicitly recognised by the European Parliament 'both Colombia and Peru have made enormous efforts in recent years to improve the general condition of their citizens' lives, including human and labour rights', however, 'despite these enormous efforts, in order fully to achieve the high standards set out and demanded by individual citizens, civil society organisations, the opposition parties and the government, there is still substantial work to be done'. The EP suggested a road map for legislative reforms in the field of human rights and in particular labour rights. European Parliament Resolution of 13 June 2012 on the EU Trade Agreement with Colombia and Peru, Doc 2012/2628 (RSP), 13.6.2012.

debate on, for example, the reasons underlying the EU partner's government's objection⁶³ to the clause when such a refusal is made public. Additionally, a public debate could delay or block the negotiations.⁶⁴

Important as the human rights clause is as a basis for positive measures, it cannot be denied that it is potentially reinforced by inclusion of the so-called non-execution clause in the agreement. This clause provides a connection between human rights violations and the possible suspension or termination of the agreement, as discussed in the next paragraph.

III. THE STRUCTURE AND CONTENT OF THE NON-EXECUTION CLAUSE

EU Agreements contain a 'non-execution clause'⁶⁵ which provides for the application⁶⁶ of 'appropriate measures' by either party⁶⁷ in the case of non-compliance with the agreement by the other contracting party. A consultation procedure is provided for before such measures can be adopted.⁶⁸

⁶³ The EU partners object to the inclusion of the human rights clause in trade agreements for various reasons. For example, Australia contended that human rights protection was better to be dealt with in a multilateral context. See E. Fierro, *supra* note 2, at 288-300. Third countries consider that the human rights clause impinges upon their sovereignty and that it could be misused. For example, Australia feared that trade unions could lobby the EU for action against Australia on the basis of the Universal Declaration of Human Rights' recognition of everybody's right to form and to join trade unions, available at <<http://www.hartford-hwp.com/archives/24/121.html>>. The inclusion of the clause in the Strategic Partnership Agreement is making rather difficult the negotiating process with Japan. Japan's opposition is founded on national pride and on the fear that the EU could exert pressure on the abolition of death penalty. On the other hand, the inclusion of a HRC could be accepted, or even requested, by a third country (especially new democracy) as a way of proving its commitments to human rights and democracy and as a means to increase its international reputation and to attract foreign investments.

⁶⁴ See also, for example, the case referred to *supra*, note 35.

⁶⁵ The expression used in the EU agreements to name the clause varies: 'fulfilment of obligations' or 'settlement mechanism' or 'non-execution of the agreement'.

⁶⁶ The parties enjoy a broad margin of discretion in deciding whether to invoke the clause and, in this case, which measures they consider appropriate. See GC (order), Case T-292/09, *Mugraby v. Council and Commission* [2011] ECR II-00255, para. 40, available at <http://curia.europa.eu/jcms/jcms/_6/>, described in Vianello's paper in this collection.

⁶⁷ Formally, the clause can be activated by EU partner(s) in the case of violation of the essential elements by the European Union and its Member States. The Commission underlined that discussions on human rights 'should be a two-way one, with the EU also agreeing to discuss human rights and democracy within its borders'. Commission Communication, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final, 8.5.2001, Section 3.1.1. The bilateral character of the clause makes it in principle easier for EU partners to accept it. The bilateral nature of the clause, moreover, distinguishes the EU policy from conditionality policy of other states. It is clear that the EU's developing partners do not have the economic and political strength to threaten the activation of the clause. One has to consider, however, that the clause has been negotiated for the inclusion in agreements with developed (and thus stronger) countries.

⁶⁸ As a general rule, the measures are notified to the other party and a consultation procedure is activated before the adoption of those measures. A Joint or Cooperation Committee set up by the agreement examines the situation and is provided with all information required. See, for example, Art. 45 of the EU Korea Framework Agreement, *supra* note 21.

However, in the case of 'special urgency', which consists of the 'violation of the essential elements of the agreement',⁶⁹ or in the case of a 'particularly serious and substantial violation of an essential element',⁷⁰ the other party is allowed to immediately⁷¹ adopt 'appropriate measures'. Additionally, some agreements provide for a consultation procedure, which has the effect of suspending the application of the measure for a short pre-established period of time.⁷² It is ultimately⁷³ in the power of each party to unilaterally qualify a situation as a violation, or as a serious violation of an essential element.

Although this part of the non-execution clause may seem to reproduce the structure of the international customary rule corresponding to *inadimplenti non est adimplendum* principle,⁷⁴ it is submitted that this is not the correct inter-

⁶⁹ As, for example, specified in the Joint Interpretative Declaration concerning Arts. 45 and 46 of the Framework Agreement with Korea, *supra* note 21. For the purpose of the correct interpretation and practical application of the agreement, the parties agree that the expression "cases of special urgency" in Art. 45 (4) means a material breach of this agreement by one of the parties. A material breach consists in 'either repudiation of this Agreement not sanctioned by the general rules of international law or a particularly serious and substantial violation of an essential element of the Agreement.'

⁷⁰ When referring to 'particularly serious and substantial violations' of an essential element, the agreement establishes a gravity threshold. As mentioned above, the practice to date shows that the EU has triggered the non-execution clause only for grave breaches of an essential element. The Strategic Partnership Agreement with Canada, for example, clarifies in Art. 28 that 'The Parties consider that, for a situation to constitute a "particularly serious and substantial violation" of Art. 2(1), its gravity and nature would have to be of an exceptional sort such as a *coup d'État* or grave crimes that threaten the peace, security and well-being of the international community.' The 'unlikely event' of the particularly serious and substantial violation of an essential element clause would lead to the termination of the relationship.

⁷¹ See, for example, Art. 122 of the Partnership Cooperation Agreement with Iraq. OJ [2012] L 204/50, 31.7.2012. In the early practice of the EEC, the so-called Baltic clause authorised immediate partial or total suspension of the agreement in case of serious breach of an essential element of the agreement. This clause was then replaced by the general non-execution clause (so-called Bulgarian clause). See Commission Communication, On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final, 23.5.1995, at 7.

⁷² For example 15 days, in the Partnership and Cooperation Agreement with Singapore, COM/2014/70 final, 17.2.2014. See also the Joint Declaration on Art. 57 of the Framework Agreement with Vietnam, *supra* note 14. The Framework Agreement with Korea, *supra* note 21, provides (Art. 46) for an arbitration procedure. The Cotonou Agreement provides for a consultation procedure if a Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in para. 2 of Art. 9. However, in case of a particularly serious and substantial violation of one of the essential elements, immediate reaction is allowed after notification to the other party.

⁷³ That is, even in the hypothesis of a consultation procedure established by the agreement.

⁷⁴ Whereby a material breach of an agreement can be invoked as a cause of suspension or extinction of a treaty. According to the International Court of Justice, Art. 60 of the Vienna Convention on the Law of the Treaties is declaratory of international customary law. See ICJ, Judgment on the *Gabčíkovo-Nagymaros Project* of 25.9.1997, ICJ Reports [1997] para. 99. See also Arbitral Tribunal *Rainbow Warrior Case*, *New Zealand v. France*, Judgment 30.4.1990, U.N.R.I.A.A., Vol. XX, at 251. See E. Fierro, *supra* note 2, at 221; N. Hachez, *supra* note 2, at 24. The Court of Justice also referred to the essential element clause as 'an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights,' (CJEU, Case C-268/94, *Council v. Portugal*, *supra* note 44, para. 27), but it is to be reminded that the human rights clause was not accompanied by a non-execution provision in the agreement examined by the CJEU.

pretation. In the case of a material breach of a treaty,⁷⁵ the above-mentioned international customary law allows the parties only to suspend or terminate the *same* agreement that has been breached, whereas the non-execution clause allows the parties to apply 'appropriate measures', leaving the hypothesis of a suspension of the agreement as a measure 'of last resort'.

Moreover, the *ratio* of the suspension (or termination) of the treaty authorised by the *inadimplenti non est adimplendum* principle is more to restore the balance between obligations disrupted by the violation⁷⁶ than to persuade the other party to put an end to the violation.⁷⁷ It is actually a typical function of the counter-measures, and the aim is to induce the state responsible for the violations to comply with its obligations of cessation of the violation and of reparation.⁷⁸ Thus, it would be more appropriate to consider that the non-execution clause sets up a 'self-contained' regime that is a *lex specialis* regulating the parties' response to a breach of the treaty.

In order to give the parties the greatest freedom, the notion of 'appropriate measures' is not clarified further. However, the agreements lay down general criteria for the measures that may be taken, such as proportionality⁷⁹ and compatibility with international law, that is the standards usually required by international customary law for countermeasures. The reference to measures that 'least disrupt the functioning of the agreement', usually applied as a formula, confirms that the suspension of the agreement is considered a measure of last resort.⁸⁰

The Commission has provided⁸¹ a list of possible measures, some of which do not qualify as countermeasures (they are not illegal in themselves) but rather

⁷⁵ That is a repudiation of the treaty or a violation of a provision 'essential to the accomplishment of the object or purpose of the treaty.' See Vienna Convention on the Law of the Treaties, Art. 60 3(a) and 3(b).

⁷⁶ 'Suspension of the operation of a treaty, in whole or in part, allows the injured state to reach a new equilibrium between its rights and obligations in respect to the defaulting state, being temporarily relieved of the duties under the treaty which remain without counterpart'. L.A. Sicilianos, 'The Relationship between Reprisals and Denunciation or Suspension of a Treaty', 4 *European Journal of International Law* 1993, at 345.

⁷⁷ It cannot be excluded that the suspension of a treaty is applied to obtain remedial release or to exert compulsion on the state author of the breach, as admitted by several authors. See B. Simma, 'Reflections on Article 60 of the Vienna Convention and Its Background in General International Law', 20 *Austrian Journal of Public Law* 1970, at 40.

⁷⁸ Art. 49 of the 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two. Although the prevalent idea in legal literature is of a multifunctional character of counter-measures, the primary aim of countermeasure is cessation of a continuing violation. See D. Alland, 'Counter-Measures of General Interests', 13 *European Journal of International Law* 2002, at 1226; L.A. Sicilianos, *Les Réactions Décentralisées à l'Illicite: Des Contre-Mesures à la Legitime Défense* (Paris: LGDJ 1990), at 58.

⁷⁹ As specified, for example, in the Framework Agreement between the EU, its Member States and Korea, 'proportionate to the failure to implement obligations under this Agreement.' *Supra* note 21.

⁸⁰ See, for example, the Framework Agreement between the EU, its Member States and Korea, Joint Interpretative Declaration concerning Arts. 45 and 46. *Supra* note 21.

⁸¹ See Commission Communication, On the Inclusion of Respect for Democratic Principles and Human Rights in EC Agreements with Third Countries, COM(95) 216 final, 23.5.1995, Annex II, at 17.

as retorsions, such as, for example, the postponements of new projects, or the refusal to follow up on a partner's initiative. Other measures really are counter-measures, such as the suspension of cooperation or of financial aid when this is provided for in the agreement. Measures can include the suspension of financing of budgetary support and support for projects,⁸² or the freezing of funds.⁸³

A very sensitive issue is whether the violation of the essential elements clause contained in a Framework Cooperation Agreement (FCA) could trigger the adoption of trade-related measures.

To overcome the difficulties in trade negotiations,⁸⁴ due to the refusal by some EU partners to accept the inclusion of human rights clauses in Free Trade Agreements and to establish a clearer ground for the possible adoption of trade-related measures,⁸⁵ since 2009,⁸⁶ the EU has been following the practice⁸⁷

⁸² The budget support from EDF might take up to 50% of national budgets. Thus sanctions might have serious consequences for the population, although contributions to operations of a humanitarian nature and projects in support to the population are usually not affected by the measures.

⁸³ The measures adopted as a consequence of the refusal of free elections by the government of Zimbabwe in 2002, covered visa bans. The measures were partially lifted in 2012 as a consequence of the creation of a process leading to free elections. See the reference available at <http://eeas.europa.eu/delegations/zimbabwe/eu_zimbabwe/political_relations/restrictive_measures/index_en.htm>. See also, for another example of 'appropriate measures,' those listed in Commission Communication, Proposal for a Council Decision Amending Decision 2001/131/EC Concluding the Consultation Procedure with Haiti under Art. 96 of the ACP-EC Partnership Agreement, COM (2004) 454 final, 29.6.2004.

⁸⁴ See L. Bartels, 'The European Parliament's Role in Relations to Human Rights in Trade and Investment Agreements', European Parliament Policy Department, EXPO/B/DROI/2012/09 (February 2014), at 7.

⁸⁵ It is interesting to note that the 2014 Association Agreements with Moldova, Ukraine and Georgia, establish that the appropriate measures the parties may adopt in the case of non-fulfilment of the agreement may not include suspensions of provisions contained in the Trade Title of the Agreement, but an exception is carved out in the case of violation of an essential element of the agreements. See, for example, Moldova Association Agreement, Art. 455.3.b, *supra*, note 9.

⁸⁶ See a partially derestricted document of the Council, Reflection Paper on Political Clauses in Agreements with third Countries, Doc 7008/09, 27.2.2009, which provides for a linkage between EU agreements and free trade agreements. It specifies that 'in order to have a comprehensive framework with third countries covering the main areas of cooperation including political cooperation the EU has a preference to enter into framework agreements prior to conclude sector agreements which in principle do not include political clauses'. Cited by L. Bartels, The European Parliament's Role, *supra* note 84, at 6. See the reference to the practice in the Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2014, Doc 10152/15, 22.6.2015. It is interesting to note that the Commission included the *passerelle* clause among the different tools and instruments (together with human rights clause, political dialogue, démarches, specific institutional structures created under the FTA allowing for a dialogue) for the promotion of human rights.

⁸⁷ This approach, for example, has been followed in East Asia but also with Canada. The Cotonou Agreement could be considered a model. This agreement defines the general relationships between the EU, its Member States and the ACP countries, leaving the definition of economic (free trade areas and investment) and development cooperation to Economic Partnership Agreement to be concluded between the EU and groups of countries engaged in a regional integrating process. M. Lerch, 'Environmental and Social Standards in the Economic Partnership with West Africa: A Comparison to other EPAs', European Parliament, Directorate General for External Policies, Doc PE 549.040 (April 2015).

of linking a Framework Cooperation Agreement⁸⁸ (FCA) – containing human rights clauses – to the corresponding⁸⁹ Free Trade Agreement (FTA),⁹⁰ – not containing human rights clauses. The linking (or *passerelle*) clause can also be included in the trade agreement.

In order to adopt trade-related measures and suspend the application of provisions contained in the FTA as a result of a violation of the essential element clause included in the FCA, it is advisable that various minimum conditions are satisfied. First, the FCA should contain a non-execution clause triggering the possible adoption of ‘appropriate measures’ in the case of violations of the essential element clause. Second, it should be very clearly stated that the trade agreement could be suspended as a consequence of the non-execution clause contained in the Framework agreement. This is the case for the *passerelle* clause included in the Economic Partnership Agreement with the Member States of CARIFORUM.⁹¹ Indeed, Article 241.2 establishes that ‘Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a Signatory CARIFORUM State of any measures, including trade-related measures under this Agreement, deemed appropriate, as provided for under Articles 11(b), 96 and 97 of the Cotonou Agreement and according to the procedures set by these Articles.’

In other cases, this link is not clear and one party could claim that a serious violation of the human rights clause in the framework agreement cannot be the basis for suspension of the trade agreement. An example of such a clause is Article 105 of the EPA with West African States, where it states: ‘Nothing in this Agreement may be interpreted as preventing the taking by the European Union Party or any of the West African States of any measure deemed appropriate concerning this Agreement in accordance with the relevant provisions of the Cotonou Agreement.’ In this case, there is no expressed reference to the essential element clause or to the non-execution clause of the Cotonou Agreement.

The model of linking two agreements has also been applied to other sector agreements, and in particular to fishery protocols, which traditionally did not include a human right clause. Thus, protocols ‘setting out the fishing opportunities and the financial contribution’ signed by several African countries with the EU have been connected to the essential element and non-execution clauses

⁸⁸ These framework and cooperation agreements aim ‘to bring together, under a single framework, a holistic and coherent vision of relations with a given partner and to identify policies and instruments that will be used to advance bilateral relations’, Commission Staff Working Document, Human Rights and Sustainable Development in the EU-Vietnam Relations with Specific Regard to the EU-Vietnam Free Trade Agreement, SWD (2016) 21 final, 26.1.2016, para. 2.2.1.

⁸⁹ See, for example, Art. 43.3 of the Partnership and Cooperation Agreement with the Republic of Singapore, *supra* note 72.

⁹⁰ For an example, see Art. 15.14., para. 2 of the FTA with Korea: ‘the present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. It constitutes a specific Agreement giving effect to the trade provisions within the meaning of the Framework Agreement.’ The Free Trade Agreement was signed in 2010 and was provisionally applied in the same year. OJ [2011] L 127/1, 14.5.2011.

⁹¹ Council Decision of 15 July 2008 on the Signature and Provisional Application of the Economic Partnership Agreement between the CARIFORUM States on One Hand and the European Community and its Member States on the Other. OJ [2008] L 289/1, 30.10.2008.

of the Cotonou Agreement. The provisions contained in the protocols setting up fishing opportunities establish the suspension of EU financial contributions, if the EU ascertains a breach of essential and fundamental elements of human rights as laid out by Article 9 of the Cotonou Agreement, or as a consequence of the activation of the consultation mechanisms laid down in Article 96 of the Cotonou Agreement, owing to a violation of one of the essential and fundamental⁹² elements of human rights and democratic principles as provided for in Article 9 of the Cotonou Agreement.⁹³

This technique, however, does not seem to have overcome the EU partners' objections. For instance, in Africa, the inclusion in some European Partnership Agreements of a provision connected to the Cotonou non-execution clause, let alone the inclusion of a complete human rights clause, has been one of the contentious issues that have delayed the conclusions of full European Partnership Agreements for several years.⁹⁴

In the end, the model described above could create more problems than it tries to solve. If the human rights and non-execution clauses are contained in a framework cooperation agreement that has not been ratified, the FTA (which does not contain an essential element clause and a non-execution clause) cannot be suspended until the ratification process of the FCA is concluded, which could delay the process, especially when the issue has been contentious and difficult for negotiators.

Moreover, the FTA is usually concluded for an indefinite period of time, whereas the FCA is concluded for a limited period.⁹⁵ Thus, after the expiry of the Cooperation agreement, the EU could, in the case of a breach of human rights by its partner state, suspend the FTA provisions as a countermeasure, according to the customary rule on state responsibility.

⁹² The Cotonou Agreement distinguishes between essential and fundamental elements of the agreement. Good governance, as defined in Art. 9.3 is considered a fundamental element of the agreement. Serious cases of corruption trigger the procedure provided for in Art. 97.

⁹³ Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Seychelles, *OJ* [2014] L 4/3, 9.1.2014 (Arts. 7 and 8.1.f). Similar provisions are contained in the protocol between the European Union and the Republic of Cape Verde (Arts. 7 and 8), *OJ* [2014] L 369/3, 24.12.2014, in the Protocol with Comoros (Arts. 8 and 9), *OJ* [2010] L 335/2, 18.12.2010, and in the Protocol with the Republic of Côte d'Ivoire (Arts. 8 and 9) *OJ* [2013] L170/2, 22.6.2013.

⁹⁴ See Art. 105 of the EPA signed in 2014 with West African States. The text of the agreement is available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153867.pdf>. See also the EPA with East African Community Partner States, Art. 136. The text of the agreement was finalised the 16th of October 2014, and is available at <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/>>. For the EPA with Southern Africa Development Community (negotiations were concluded on the 15th of July 2014), see Art. 110, text available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf>.

⁹⁵ The Cotonou Agreement will expire in 2020, the Framework Agreement with Vietnam is concluded for a period of five years (renewable).

IV. THE CASE OF ANTI-GAY LEGISLATION AND HUMAN RIGHTS CLAUSES

This section examines the adoption of anti-homosexuality legislation by several African countries and the reaction of EU institutions. This will enable the testing of some of the issues discussed in the first part of the paper. More specifically, the following will be assessed: the scope of the clause, that is whether the criminalisation of homosexuality constitutes human rights violations covered by the HR essential elements clause; how the violation of non-trade values could trigger the non-execution clause; and whether the issue of Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI) rights has affected EPA negotiations or could influence future negotiations for the renewal of the Cotonou Agreement.

Anti-homosexuality legislation is in force in several countries both in Asia and Africa.⁹⁶ In the 34 African countries where homosexuality is outlawed, sexual, consensual, and adult activities with people of the same sex are punishable by fines and/or imprisonment (up to 14 years) and in some cases even by death (Mauritania, Sudan, and Somalia).⁹⁷ Uganda⁹⁸ and Nigeria⁹⁹ have recently modified anti-gay legislation, making the punishment for consensual homosexual relationships more severe compared to the legislation previously in force.¹⁰⁰

⁹⁶ This is a highly sensitive issue in the African continent. Homosexuality is taboo in Africa and in much of the continent there exist strong anti-gay sentiments. See, for example, 'Nigeria Poll Suggests 87% of Population Support Anti-Gay Legislation', *BBC*, 30 June 2015, available at <<http://www.bbc.com/news/world-africa-33325899>>. Moreover, there seems to be a trend towards making those legislations more severe as the idea is spreading that homosexuality is against African values.

⁹⁷ See L. Paoli Itaboray and J. Zhu, 'State Sponsored Homophobia: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love', ILGA Annual Report 2014, available at <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf>.

⁹⁸ Uganda adopted a new anti-gay piece of legislation on 24 February 2014, which provides for life imprisonment (the original version of the bill provided for death penalty, while previous legislation punished consensual sexual gay relations with 14 years of imprisonment). Penalties are provided as well for persons or organisations which aid or abet same-sex sexual relationships. Ugandans, who engage in same-sex relations outside of Uganda, may be extradited for punishment back in the country. The Uganda Constitutional Court annulled the law in February 2014 on procedural grounds but a new bill is being proposed. See S. Houttuin, 'Gay Ugandans Face New Threat from Anti-Homosexuality Law', *The Guardian*, 6 January 2015, available at <<http://www.theguardian.com/world/2015/jan/06/-sp-gay-ugandans-face-new-threat-from-anti-homosexuality-law>>; P. Johnson, 'Making Unjust Law: The Parliament of Uganda and the Anti-Homosexuality Act', 67 *Parliamentary Affairs* 2015, at 709, 736.

⁹⁹ While in some Northern States Members of the Federal Republic of Nigeria (where the Sharia applies) homosexual activities are punished with death sentence, the Federal State approved on 7th January 2014 the 'Same Sex Marriage Prohibition Law', criminalising same-sex marriage (those involved can be sentenced to up to 14 years imprisonment). The bill qualifies as an offense the support of the same-sex marriages (for instance taking part as witness in a gay-marriage), and it provides for prison sentences of 10 years for persons belonging to a gay organisation. Besides Nigeria, other Members of the Economic Community of West Africa States (ECOWAS) criminalise homosexual sexual relations (Gambia, Ghana, Senegal, Sierra Leone, Togo).

¹⁰⁰ The adoption of the above-mentioned pieces of legislations has prompted severe reactions by the international community: the United States reduced its financial aid to Uganda, imposed visa restrictions and cancelled a regional military exercise. See 'US Cuts Aid to Uganda over Anti-

Does legislation of this type fall within the scope of the clause? Laws criminalising consensual same-sex relationships are considered violations of human rights by UN human rights bodies.¹⁰¹ Criminalisation implies the violation of the right to life, dignity, non-discrimination, security of person, and privacy. These rights are recognised in all human rights treaties to which these countries are parties. It seems irrefutable that the human rights clause covers these rights.¹⁰²

Although it seems that there is no need for an express reference to LGBTI rights in the essential element clause, the European Parliament asked to explicitly introduce a reference to the prohibition to discriminate on the basis of sexual orientation, for example, in a future revision of the Cotonou Agreement, and in particular in Article 8.4, which contains a reference to 'other grounds' of discrimination.¹⁰³

In 2015, the European Parliament called again for the inclusion in the future African, Caribbean, and Pacific Group of States (ACP)-EU agreement (the Cotonou Agreement expires in February 2020) of an 'explicit mention of

Gay Law', *Al Jazeera*, 24 June 2014, available at <www.aljazeera.com/news/Africa/2014/06>. The World Bank, Sweden, Norway, Denmark and the Netherlands had suspended or redirected aid from the government to ONG., See J. Gettleman, 'Uganda Anti-Gay Law Struck-Down by Court', *The New York Times*, 1 August 2014, available at <<http://www.nytimes.com/2014/08/02/world/africa.html>>.

¹⁰¹ UN General Assembly, Human Rights Council, 'Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity', *Report of the Office of the United Nations High Commissioner for Human Rights*, Doc A/HRC/29/23, 4.5.2015.

¹⁰² All the above-mentioned countries are contracting parties at least of the International Covenant of Political and Civil Rights. The African Charter on Human and People's Rights (binding all African Union States) does not prohibit discrimination based on sexual orientation but Art. 2 prohibits discrimination on several grounds (sex, birth, ethnical origin) and on 'other status'. The list is considered non-exhaustive and it is submitted that it covers sexual orientation. See O. Amato, 'Civil and Political Rights in the African Charter', in M. Ssenyonjo (ed.), *The African Regional Human Rights System* (Leiden: Martinus Nijhof 2012), at 34. In 2014, the African Commission on Human and Peoples' Rights adopted a Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014). The Resolution states that acts of violence, discrimination and other human rights abuses affecting LGBTI persons and human rights defenders in Africa violate State obligations under the African Charter on Human and People's Rights. Text available at <<http://www.achpr.org/sessions/55th/resolutions/275/>>. Although the Resolution does not target anti-gay legislations, it is considered an important step towards the recognition of rights of persons regardless of their sexual orientation. For an analysis of the African Charter with reference to this issue, see R. Murray and F. Viljoen, 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union', 29 *Human Rights Quarterly* 2007, 86-111. For an analysis of the discrimination based on sexual orientation in Africa, see A. Rudman, 'The Protection Against Discrimination Based on Sexual Orientation under the African Human Rights System', 15 *African Human Rights Law Journal* 2015, 1-27.

¹⁰³ See Resolution on the Draft Council Decision on the Conclusion of the Agreement Amending for the Second Time 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, as first amended in Luxembourg on 25 June 2005, Doc PE 480.585v02-00, 22.3.2013.

non-discrimination on grounds of sexual orientation or gender identity'.¹⁰⁴ The revision of Article 8.4 would have the advantage of not modifying the essential element clause, while providing an important interpretative tool for the application of the provision.

The ACP partners are not inclined to accept the proposed changes. African leaders defend their sovereign rights to legislate on the matter, referring to 'African moral values', culture, and traditions, claiming that homosexuality is 'inherently non-African' or against the African tradition, thus setting the question in the framework of the Africa-West relationship, neo-colonialism, and the like.¹⁰⁵

Moreover, the ACP Parliamentary Assembly – as a response to the proposed European Parliament Resolution – adopted a Declaration¹⁰⁶ that demonstrates that the initiative of the Parliament is considered an attempt to 'disregard the wishes of the majority of its (ACP) people in the name of democracy and as they perceive it'.¹⁰⁷ The Assembly also stresses that 'the right of a society to determine its own moral values and norms must be understood as a fundamental human right under the principle of sovereign protection'.¹⁰⁸ Finally, 'it calls upon the EU to respect the democratic processes of sovereign States and to refrain from taking action which could undermine the basis of its development partnership with the ACP Group including the attainment of the objectives of poverty eradication and sustainable development, and to desist from tying sexual orientation and homosexuality to development aid and cooperation'.¹⁰⁹

This reaction is a very clear demonstration that one of the most problematic issues raised by the application of the essential element clause concerns the different interpretations of human rights and relativism. There seems to be

¹⁰⁴ European Parliament, Resolution of 11 February 2015 on the Work of the ACP-EU Joint Parliamentary Assembly (JPA), 2014/2154(INI), 27.1.2015. In para. 15 of the Resolution, the EU Parliament 'Reiterates its deep concern over the adoption and discussion of legislation further criminalising homosexuality in some ACP countries; calls on the JPA to place this on the agenda for its debates; calls for reinforcement of the principle of non-negotiable human rights clauses and sanctions for failure to respect such clauses, inter alia with regard to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation or gender identity and against people living with HIV/AIDS.'

¹⁰⁵ See on the issue, D. Hornsby, 'The Tragedy of Uganda's Antigay Bill', *opencanada.org*, 2 March 2014, available at <<https://www.opencanada.org/features/the-tragedy-of-ugandas-anti-gay-bill>>. An article published online on 2 December 2014, 'Gambia Condemns EU on Anti-Gay Laws', reports a speech of the Gambian Foreign Minister Bala Garba Jahumpa, who warned that 'Gambia's government will not tolerate any negotiation on the issue of homosexuality with the EU or any international block or nation'; available at <<http://www.liberianews.net/index.php/sid/228132703>>. In August 2014, the Gambian Assembly passed a bill tightening the already severe anti LGBTI legislation and providing for life imprisonment for some homosexual acts. This article is available at <<http://www.lgbt-ep.eu/press-releases/gambian-national-assembly-passes-severe-anti-lgbt-bill/>>.

¹⁰⁶ Declaration of the ACP Parliamentary Assembly on Recent Proposals Adopted by the European Parliament with Regard to Uganda and Nigeria, The Parliamentary Assembly of Africa Caribbean and Pacific States, Meeting at its 35th Session in Strasbourg (14-19 March 2014), available at <<http://www.acp.int/content/declaration-acp-parliamentary-assembly-recent-proposals-adopted-european-parliament-regard-u>>.

¹⁰⁷ Ibid., Preamble, Letter I.

¹⁰⁸ Ibid., Preamble, Letter G.

¹⁰⁹ Ibid., para. 6.

no space for a discourse on the relativism of human rights with respect to the pieces of legislation at stake, which provide for imprisonment and even death penalty for consensual same sex relations. The principle of the universality of human rights cannot be derogated on the grounds of moral or cultural diversity.

One possible solution requires first engaging the countries concerned in a close and intensive dialogue so as to exercise an influence on them. For the time being, according to the EU, political dialogue under Article 8 covers human rights situations of LGBTI persons¹¹⁰ and is the best instrument for the EU to engage in a dialogue with its partners.

In practice, discrimination based on sexual orientation is being discussed in the framework of informal human rights dialogue¹¹¹ and during official visits and in meetings of EU local working groups.¹¹²

Should the EU wish to invoke the non-execution clause of the Cotonou Agreement, it would have to qualify the criminalisation of the same-sex consensual sexual relations as a breach of the essential element clause.

In a resolution dealing with Uganda's and Nigeria's legislation,¹¹³ the European Parliament required the immediate adoption of 'appropriate measures' under Article 96 without holding Article 8 consultations, as the EP considers this case to be of 'special urgency'.

Although the European Parliament has requested the Commission to suspend aid or to redirect financial support and even to consider the adoption of targeted sanctions,¹¹⁴ a request was also made to the Commission to strengthen the dialogue with the countries concerned. This demonstrates that although the European Parliament clearly considers anti-gay legislation as a serious viola-

¹¹⁰ Council of the European Union, Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI), Foreign Affairs Council Meeting, Luxembourg (24 June 2013). para. B. 31.7 of the document explicitly refers to dialogue under Art. 8 of the Cotonou Agreement.

¹¹¹ See J. Bossuyt et al., 'Political Dialogue on Human Rights under Article 8 of the Cotonou Agreement', Study requested by the European Parliament's Development Cooperation Committee, Doc EXPO/B/DEVE/2013/31 (June 2014). See, in particular, the reference to dialogue with Cameroon and Uganda, at 17 and 27.

¹¹² See for Nigeria, EU Annual Report on Human Rights and Democracy in the World in 2012, Doc 9431/13, 21.5.2013, at 131; for Uganda, the issue was raised during high level meetings, *Ibid.*, at 157. In 2014, besides engaging in dialogue with some countries over the issue of anti-gay legislation, statements were issued by the EU calling countries such as Uganda, Nigeria to repeal anti-homosexual legislation. See EU Annual Report on Human Rights and Democracy in the World in 2014, Doc 10152/15, 22.6.2015, at 76. The EU prefers the use of diplomatic tools, demarches and political dialogue: 'The EU continued to advocate the promotion and protection of human rights for LGBTI persons through human rights dialogues, quiet diplomacy, EIDHR support to LGBTI human rights defenders and to NGOs implementing projects to fight discrimination against LGBTI persons, and discussions on ways to improve the situation of LGBTI persons with like-minded partners and civil society organisations', *Ibid.*, at 76.

¹¹³ European Parliament, Resolution of 13 March 2014 on Launching Consultations to Suspend Uganda and Nigeria from the Cotonou Agreement in View of Recent Legislation Further Criminalising Homosexuality, Doc 2014/2634(RSP), 13.3.2014. Para. 4 of the resolution declares: 'Governments of Uganda and Nigeria failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law, referred to in Art. 9(2) of the Cotonou Agreement'.

¹¹⁴ *Ibid.*, paras. 7 and 10.

tion of human rights, dialogue on the topic is still considered useful. However, to date, the European Parliament's requests have not been taken up.

The issue of anti-gay legislation was apparently discussed in the framework of political dialogue with Uganda, as reported by the EEAS website,¹¹⁵ but to date, this has not led to any changes. The EU is aware that the issue is very sensitive for its partners.¹¹⁶

In the hypothesis of serious violations of human rights or democratic principles by the parties to an Economic Partnership Agreement, trade-related measures could be adopted provided that a *passerelle* clause is contained in the EPA that clearly links this Agreement to the Cotonou human rights clause.¹¹⁷

A further noteworthy issue raised by the anti-gay legislation is whether the clash of the EU and the concerned third countries' values is likely to affect the conclusion of EPAs.

We have not been able to find any reference to a discussion of the issue during EPA negotiations. However, in February 2014, the EPA with ECOWAS was concluded and the EPA with Eastern African Countries (EAC, of which Uganda is a member state) was initialled. In October 2014, the EU concluded the European Partnership Agreement with EAC (Uganda, Burundi, Kenya, Rwanda and Tanzania).¹¹⁸ These actions and developments confirm that the EU prefers inclusion to sanctions.

It is also possible that the Cotonou Agreement, which will be revised by 2020, will be affected by the adoption of anti-gay legislation by some of the ACP countries. This issue is on the agenda of the European Union and of its member states.¹¹⁹ Negotiations and a preliminary dialogue should offer the

¹¹⁵ Available at <http://eeas.europa.eu/uganda/index_en.htm>.

¹¹⁶ ACP, Declaration of the 21st Session of the ACP Parliamentary Assembly on the Peaceful Co-Existence of Religions and the Importance Given to the Phenomenon of Homosexuality in the ACP-EU Partnership (28 September 2010), available at <<http://www.lgbt-ep.eu/>>. The ACP Parliamentary Assembly asked for 'due respect for the cultural differences and social diversity of the two Parties'.

¹¹⁷ Some EPAs explicitly refer to Art. 96 of Cotonou. See, for example, EU-Cariforum, Art. 241.2; EU – Eastern and Southern Africa (Interim EPA of 2012), Art. 65.1. Other agreements make a more general reference to the possible adoption of measures in accordance with provisions of the Cotonou Agreement: EU-Western Africa EPA, Art.105; EU-East Africa Community (EAC) EPA, 2014, Art. 136. The Interim EU-EAC EPA (initialled in 2007 but not yet signed) refers in the Preamble to principles of the Cotonou Agreement, specifies to be 'built on the *acquis* of Cotonou' (Art. 3) and contains a *passerelle* clause (Art. 49).

¹¹⁸ The Burundi Penal Code punishes sexual relations with persons of the same sex with imprisonment up to three months and a fine. In Kenya (162 Section of the Penal Code revised in 2006), same-sex sexual practices are punished with 14 years of imprisonment, up to 21 in aggravated circumstances. A debate was held in Rwanda on the adoption of an anti-gay legislation in 2009 similar to the Uganda's legislation. Mainland Tanzania 1945 Penal Code was revised by the Sexual Offences Special Provisions Act in 1998, section 154, which provides for gay sexual relationships imprisonment for 30 years. E. Muga, 'Dar Plans to Introduce Tougher Anti-Gay Bill', *The East African*, 29 March 2014, available at <<http://www.theeastafrican.co.ke/news/Dar-plans-to-introduce-tougher-anti-gay-Bill-/-/2558/2262374/-/liq7xix/-/index>>.

¹¹⁹ Cf. T. Tindemans and D. Brems, 'Post Cotonou: Preliminary Positions of EU Member States', *ECDPM Briefing Note 87* (February 2016), available at <www.ecdpm.org/bn87>. The relevance of the issue has been underlined by the participants to several Round Tables organised by the Office for Economic Policy and Regional Development (ERPD) to discuss the future of the ACP and EU relations. See European Commission, ACP-EU Relations after 2020: Issues for the

EU the opportunity to clarify its critical position on the adoption of the laws concerned and to provide the contracting party with more specific benchmarks.

V. CONCLUDING REMARKS

Human rights clauses are tools of the EU's foreign policy, which EU partners reluctantly accept, and which are rarely enforced. In principle this could lead to the conclusion that the EU should drop these clauses altogether. In practice, however, it is clear that these clauses are here to stay.

These clauses have thus become an identity-creating feature of EU external policy.¹²⁰ The rationale of the human rights clause, in other words, lies in the self-representation of the EU as a global actor that defines its role and its foreign policy as a human rights and democracy promoter, its foreign relations being guided – according to the EU Treaty – by the same ‘principles that have inspired its own creation’.¹²¹

By incorporating human rights provisions in the agreements it concludes, the EU proposes its own and distinct model as a human rights promoter in foreign policy, highlighted by some of the specific features that have been underlined in this paper: the notion of the indivisibility of human rights,¹²² the bilateral nature of the clause, and the setting up of preventive mechanisms for dialogue and cooperation as a means to influence the partners' behaviour.

However, the flagship function of the clauses does not seem sufficient. The EU could try to make the best use of the non-trade value clauses by reinforcing the use of the essential element clause as a legal basis for positive measures. The added value of the essential element clause is that it creates the opportunity for diplomatic discussions and dialogue with the states concerned.

Human rights clauses also conceptualise the traditional political conditionality, linking aid and benefits derived from the agreement to observe civil and political human rights, and can also be interpreted as extending to second generation human rights. Rewards in terms of trade and economic financial benefit are increasingly linked to different political objectives, such as the elimination of weapons of mass destruction, sustainable development, and environmental protection. The extension of the essential element clause model to other forms

EU in Consultation Phase 1. Final Report, Doc 2014/353799, 10.7.2015, at 8 and 28, available at <http://ec.europa.eu/europeaid/sites/devco/files/eprd-acp-eu-post-cotonou-final-report_en.pdf>.

¹²⁰ Even if Art. 3.5 and Art. 21 TEU do not create a legal obligation to include a human rights clause in EU agreements, they compel the Union to promote its values in its international relationships. As underlined above, human rights clauses are one of the EU's human rights policy instruments.

¹²¹ Art. 21 TEU. This connection has been explicitly mentioned, for example in the third indent of the Preamble of the Association Agreement with Moldova which reads: ‘Recognising that the common values on which the EU is built – namely democracy, respect for human rights and fundamental freedoms, and the rule of law – lie also at the heart of political association and economic integration as envisaged in this Agreement’, *supra*, note 9.

¹²² For instance, the US promotes mainly labor rights. See for an analysis of a different approach, S.A. Aaronson, ‘Human Rights’, in J.P. Chauffour and J.C. Maur (eds.), *Preferential Trade Agreements Policies for Development: A Handbook* (Washington: The World Bank 2011), 429-452.

of conditionality has some inherent danger, however, from the perspective of non-application of the clause, although it could have some potential for dialogue.

The inclusion of human rights clauses in EU agreements can reinforce the existing political dialogue, even before an agreement is entered into force.¹²³ Negotiations and consultations are the right means to define benchmarks and to set up a road map to restore the respect for human rights. For example, the future negotiations for the renewal of the Cotonou Agreement could be an opportunity to clarify the scope of human rights protection as regards rights to LGBTI people, and for the EU to formulate what measures (positive and negative) it may be ready to apply in the case of (continuous) serious violations of these rights.

As for dialogue, in the framework of the non-execution clause, it is clear that the possibility of adopting 'appropriate measures', in the various forms they may take, can give teeth to unproductive consultation. At the same time, however, it is important to not be naive and to realise that dialogue is not a panacea, and that some results must be based on the interest and goodwill of the other parties.

Whether the EU is successful in exerting pressure on third countries clearly depends on the specific context.

In the case of failure, the non-execution clause could be used as a tool of negative conditionality, which might involve a rethinking of the content and structure of the measures.

This of course will only happen if the EU is ready to adopt appropriate measures not only in the case of coups d'état, but also in the case of serious violations of human rights. In this hypothesis, consultations would lose their *raison d'être*, and the clause would merely become a tool certifying the impossibility, at least for the time being, of continuation of the relationship.

¹²³ See Commission Staff Working Document, *supra* note 81, at 5, also for an illustration of the issues included in the EU-Vietnam Human rights dialogue agenda.