

**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES**  
**POLICY DEPARTMENT**



**Human rights  
provisions  
in Economic Partnership  
Agreements  
in light of the expiry of  
the Cotonou Agreement  
in 2020**

**DEVE INTA**



## STUDY

# Human rights provisions in Economic Partnership Agreements in light of the expiry of the Cotonou Agreement in 2020

### ABSTRACT

The study considers the options for suspending obligations under the EU-ACP Economic Partnership Agreements (EPAs) in connection with violations of human rights, democratic principles or the rule of law following the expiry of the Cotonou Agreement in 2020. It outlines the functioning of the human rights clause in the Cotonou Agreement, before considering the possibilities for suspending the EPAs under their own provisions, or for other reasons in international law, such as countermeasures. Next, it discusses how any post-2020 arrangements can best continue the existing mechanisms for human rights conditionality set out in the Cotonou Agreement. In connection with this, this study proposes certain suggestions for improving future versions of human rights clauses, and considers whether there are legal obstacles to the invocation of this clause under general international law, principally under WTO law. The study concludes with a set of comments and recommendations.

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## List of abbreviations

ACP	African, Caribbean and Pacific Group of States
CA	Cotonou Agreement
CAFTA	Central American Free Trade Agreement
CARIFORM	Caribbean Forum
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
EAC	Eastern African Community
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ILO	International Labour Organisation
NAFTA	North American Free Trade Agreement
SADC	South African Development Community
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

## Executive Summary

When the Cotonou Agreement expires in 2020, so will its sophisticated mechanism for addressing its parties' respect for human rights, democratic principles and the rule of law. This mechanism consists of i) a substantive 'essential elements' clause establishing these standards as 'essential elements' of the agreement, ii) a set of procedural mechanisms in the form of ongoing and, where necessary, 'intensive' political dialogue, involving a variety of parties, iii) bilateral 'consultations' between the EU and any given ACP State, and, iv) if these procedures prove unsuccessful (or in cases of 'special urgency'), the right to adopt 'appropriate measures' in relation to the party that has violated the essential elements of the agreement. Importantly, these measures can involve the suspension of obligations outside of the Cotonou Agreement, such as those under the ACP-EU Economic Partnership Agreements (EPAs). This study looks at the options for suspending these agreements after the expiry of the Cotonou Agreement, and makes certain observations and recommendations on how to ensure that, after 2020, the EPAs will continue to be governed by a robust human rights clause (or clauses).

After an introduction, Section 2 of this study outlines the human rights clause in the Cotonou Agreement, with special attention to its sophisticated procedural mechanisms. Section 3 then considers the possibilities for suspending the EPAs after the expiry of the Cotonou Agreement. It first considers provisions, found in all EPAs (except for the interim EPAs with Central Africa, Ghana and Côte d'Ivoire) making the 'essential elements' of the Cotonou Agreement a basis of the agreement. It concludes that these provisions remain legally effective even after the expiry of the Cotonou Agreement. However, this section also concludes that references in the EPAs to 'appropriate measures' under the Cotonou Agreement depend on the continuing validity of the Cotonou Agreement, and do not survive its expiry.

Section 4 explores the implications of these conclusions. It explains, first, how an EPA with such a 'basis' clause may validly be terminated under customary international treaty law, on the grounds of material breach due to an implied repudiation of the agreement. Section 5 considers whether there are any additional bases, under international law, for suspending EPAs, and concludes that there are none of any value. It also notes that provisions of EU law on restrictive measures are relevant for the EU, but irrelevant to the legality of any suspension of EPAs under international law. For those EPAs that can be suspended (i.e. all except those with Central Africa, Ghana and Côte d'Ivoire), it is possible to adopt, on an *ad hoc* basis, political dialogue and consultation procedures, such as those that are mandated in the Cotonou Agreement. However, unlike in the Cotonou Agreement, there is no obligation to follow any given procedure before suspending the agreement.

Sections 6 and 7 look proactively at the options for ensuring the continuation of the procedural mechanisms, especially concerning political dialogue and consultations, established in the Cotonou Agreement after the expiry of that agreement. Section 6 discusses various proposed post-2020 options, and what this means for human rights clauses. It notes that what is important, in this context, is the relationship between any successor agreement (or agreements), both among each other and, importantly, between these agreements and the EPAs. This situation is simplified, in practice, because 'appropriate measures' under a human rights clause can apply to other agreements. Further, the human rights clause in the Cotonou Agreement can be replicated in a successor agreement (or agreements) almost verbatim, with minor adjustments to the institutions listed in the various parts of that clause. The main issue, in fact, is ensuring that there is no duplication of human right clauses, while at the same time ensuring that any new human rights clauses do not expire in a manner that leaves the EPAs (and possibly other agreements) exposed, as they are at present. Three options are canvassed: an express statement that the clause does not expire, a 'guillotine' clause that links the framework agreement to the EPA, and a duplication of provisions separated by a 'fork in the road' provision requiring the parties to elect one procedure. It is suggested that each option would be effective.

Section 7 turns to the wording of a replacement human rights clause (or clauses), and makes several main points. First, it considers it essential not to follow recent versions of human rights clauses, such as that in Article 28(7) of the Canada-EU Strategic Partnership Agreement, which are effectively redundant. Second, it notes that while the Cotonou Agreement's essential elements clause is very comprehensive, it does not necessarily cover certain rights recently recognised in the EU, such as those pertaining to sexual orientation and gender identity. It notes that these may need to be negotiated specifically, in order to avoid any ambiguity as to whether they are covered. This section also notes the EU's external human rights obligations under Articles 3(5) and 21(3)(1) of the Treaty on European Union, and recommends that, in order to give effect to these obligations, the standard human rights clause be amended so as to permit consultations and 'appropriate measures' to be initiated proactively, without having to wait for a violation of human rights by either party. It also recommends that consideration should be given to ensuring that the human rights impacts of the EPAs, and the parties' compliance with human rights, are appropriately monitored by the organs established under those agreements, including, where appropriate, organs representing civil society. It also recommends that consideration be given to a complaints mechanism whereby civil society can initiate a procedure leading to dialogue, consultations and potentially the adoption of appropriate measures under a human rights clause, perhaps modelled on provisions in the Trade Barriers Regulation.

Section 8 investigates an overarching question, which is whether WTO law imposes any constraints on the adoption of appropriate measures in the form of trade restrictions. It concludes that, according to recent developments in WTO jurisprudence, and in particular the WTO Appellate Body Report in *EC – Seal Products*, it can be taken for granted that human rights, democratic principles and the rule of law fall under the heading of 'public morals' justifying the adoption of necessary trade restrictive measures. However, this section also cautions that any such restrictive measures must be non-discriminatory, unless that discrimination can also be justified, whether on human right grounds or otherwise. In short, WTO law does not impose any restrictions on well-designed trade restrictive (or even discriminatory) measures that are necessary to protect human rights, democratic principles or the rule of law.

Section 9 considers certain issues relating to the implementation of the recommendations made in this study. Section 10 sets out a list of comments and recommendations, the latter reflected in this summary.



# 1 Introduction

Since the early 1990s, the European Union (EU) has had a policy of ensuring that its trade and cooperation agreements, and more recently other agreements, are governed by ‘human rights clauses’<sup>1</sup>. These ‘clauses’ are in fact compound clauses comprised of two operative provisions. The first is an ‘essential elements’ clause, which states that the agreement is based on human rights, democratic principles and the rule of law, and that these principles constitute an essential element of the agreement. The second is an ‘appropriate measures clause’ (sometimes called ‘non-execution clause’), which states that either party may adopt ‘appropriate measures’ in the event that the other party fails to comply with the essential elements of the agreement. Some agreements, including most predominantly the Cotonou Agreement, contain further interpretations and procedural conditions. But all of these clauses have the same ultimate function, which is to permit either party to suspend obligations under that agreement – or, importantly, other obligations – if the other party violates human rights, democratic principles or the rule of law, as specified in the agreement.

The EU’s early practice was to include human rights clauses within the text of its trade and cooperation agreements. Indeed, the inclusion of a human rights clause in the Cotonou Agreement followed this practice<sup>2</sup>, inasmuch as this clause applied to the (now expired) trade obligations in that Agreement. More recently, however, the EU has adopted a two track approach<sup>3</sup>, according to which, at least in certain cases, a human rights clause is included in a framework agreement, but that clause applies not only to the framework agreement but also to other agreements concluded between the same parties. This is possible because, inherently, ‘appropriate measures’, like countermeasures under customary international law, can involve the suspension of obligations owed by one party to another regardless of their source<sup>4</sup>.

It is in this light that one can appreciate the somewhat complex relationship between the human rights clause in the Cotonou Agreement and the obligations set out in the Economic Partnership Agreements (EPAs) between the EU and certain states of the African, Caribbean and Pacific Group of States (ACP)<sup>5</sup>. In the first place, ‘appropriate measures’ under the Cotonou Agreement permit the suspension of obligations under the EPAs. In addition, however, the EPAs contain human rights clauses of their own which refer both to the ‘essential elements’ of the Cotonou Agreement and to ‘appropriate measures’ adopted under the Cotonou Agreement in the event of violations of those essential elements. Because ‘appropriate measures’ under the Cotonou Agreement in any case permit the suspension of agreements between the same parties, so long as the Cotonou Agreement continues in force, the references in the EPAs to the Cotonou

<sup>1</sup> European Commission, Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95) 216, 23.5.1995, discussed in Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements*, Oxford University Press, Oxford, 2005.

<sup>2</sup> Articles 9(2) and 96 of the Cotonou Agreement, concerning human rights, democratic principles and the rule of law, Article 9(3)(2) states that good governance is a ‘fundamental element’ of the agreement, and Article 97(3) provides for the adoption of ‘appropriate measures’ in the event of serious cases of corruption when the EU is a significant partner in terms of financial support (Article 97(1)). Article 11b(1)(3) also states that cooperation on nuclear non-proliferation is an ‘essential element’ of the agreement and Article 11b(6) provides that, following a procedure, ‘appropriate measures’ may be taken ‘in the event that a Party [...] considers that the other Party has failed to fulfil an obligation stemming from [Article 11b]. This study does not discuss these provisions of the Cotonou Agreement.

<sup>3</sup> Council of the EU, ‘Reflection Paper on Political Clauses in Agreements with Third Countries’, Doc 7008/09, 27 February 2009 (partially derestricted). There are also now several examples of human rights clauses in recent framework agreements that are relatively watered down. The legal effect of the human rights clause in the agreement with Canada is essentially redundant and that in the agreement with Australia is at best ambiguous.

<sup>4</sup> Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements*, Oxford University Press, Oxford, 2005, pp. 119-120.

<sup>5</sup> These are the full EPAs with Cariforum, SADC, EAC, and West Africa, and interim/stepping stone EPAs with the Pacific, Ghana, Central Africa, and ESA. See table below.

Agreement are legally unimportant. However, these provisions become of critical importance once the Cotonou Agreement expires in 2020.

It is this situation that is the background for this study, which concerns the possibilities for suspending obligations under the EPAs after 2020. The study addresses this situation as follows. Section 2 outlines, briefly, the human rights clause in the Cotonou Agreement. Section 3 considers whether the EPAs will be able to be suspended in the event of violations of human rights, democratic principles or the rule of law when the Cotonou Agreement expires. This involves an analysis of the provisions in the EPAs on human rights conditionality, including their references to the Cotonou Agreement, as well as of general international law on countermeasures. Section 4 sets this in the context of international law, in particular on the law of treaties and section 5 considers whether there is any other basis for reacting to human rights violations. Section 6 looks at how, structurally, any post-2020 arrangements can best continue the existing mechanisms for human rights conditionality currently set out in the Cotonou Agreement. In connection with this, Section 7 proposes certain suggestions for improving future versions of human rights clauses, while Section 8 considers whether there are legal obstacles to the invocation of this clause under general international law, principally under WTO law. Section 9 briefly looks at certain issues relating to the implementation of the recommendations made in this study. Section 10 concludes with a set of comments and recommendations.

## 2 Human rights conditionality in the Cotonou Agreement

### 2.1 Outline

The 'human rights clause' in the Cotonou Agreement (CA) has two substantive parts, and two procedural parts. The first substantive part is an 'essential elements' clause in Article 9(2)(4), which states that respect for human rights, democratic principles and the rule of law is both a basis of the agreement and an essential element of the agreement. Next are two procedural conditions, involving a process of 'political dialogue' between the ACP and the EU, described in Article 8 and Annex VII, and a process of bilateral 'consultations' between the respective ACP State and the EU, set out in Article 96(2)(a)(i)-(iii). Finally, if these steps have been unsuccessful, Article 96(2)(a)(iv) authorises the non-violating state to adopt unilateral 'appropriate measures' in the event that consultations are unsuccessful. Article 96(2)(a)(iv) also provides for a fast track procedure in cases of 'special urgency'.

### 2.2 Essential elements clause (Article 9 CA)

Article 9(2)(4) of the Cotonou Agreement states as follows:

'Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.'

This provision has two distinct legal effects. First, the statement that respect for the three values mentioned 'shall underpin' the policies of the parties means that the parties are obliged to refrain from adopting policies contrary to respect for those values. Second, the statement that respect for these values 'constitute [...] the essential elements of this Agreement'<sup>6</sup> establishes the conditions for the other operative provisions of the Cotonou Agreement's human rights clause.

<sup>6</sup> The subject of the sentence, 'respect', is in the singular, while its verbs 'underpin' and 'constitute' are in the plural, as is the object of the sentence, 'elements'. This is grammatically infelicitous.

In terms of the standards, the key reference is to the Universal Declaration on Human Rights<sup>7</sup>. In many respects, the Universal Declaration reflects customary international law, and to this extent is already binding on all states and international actors. However, by incorporating the Universal Declaration into a treaty provision, Article 9(2)(4) of the Cotonou Agreement essentially makes the entirety of the Declaration binding as a matter of treaty law<sup>8</sup>.

This is significant, as the Universal Declaration is very comprehensive. It contains obligations covering civil, political, economic, social and cultural rights. It specifically includes rights concerning non-discrimination on grounds of race, sex and religion, as well as the right to life, liberty and security of the person, freedom from arbitrary arrest and torture, access to justice and a fair trial, privacy, rights to work, leisure and social security, the right to education and rights of political participation. At times, there have been suggestions that the bare reference to the Universal Declaration in a human rights clause means that it is vague, and in need of supplementing with references to specific rights. This view is entirely unfounded.

However, it is true that the Universal Declaration does not mention some newer rights, such as rights concerning sexual orientation or gender identity. Whether such rights are accepted by all ACP states may be doubted<sup>9</sup>. There may be some scope for negotiating on such issues.

## 2.3 Political dialogue (Article 8 CA and Annex VII CA)

Article 8 of the Cotonou Agreement establishes two forms of political dialogue between the EU, one or more ACP states and, where appropriate, other actors, including the ACP Group, the African Union and non-state actors. The first of these forms of political dialogue is an ongoing process, while the second is a structured 'intensive' political dialogue that is a precondition to the initiation of consultations under Article 96 in the event of violations of the essential elements of the agreement.

### 2.3.1 Political dialogue

Political dialogue is described in Article 8(1), which states as follows:

'The Parties shall regularly engage in a comprehensive, balanced and deep political dialogue leading to commitments on both sides.'

Such dialogue is to cover, among other things, the essential elements of the Cotonou Agreement<sup>10</sup>.

Depending on need, and with a degree of flexibility, this form of political dialogue may involve state and non-state actors, including parliaments and the Joint ACP-EU Parliamentary Assembly, as well as ACP regional organisations and the African Union<sup>11</sup>. The Guidelines for ACP-EU Political dialogue (Article 8 and Annex VII) adopted by the ACP-EU Council of Ministers<sup>12</sup>, which are to be '[borne] in mind' by the parties to the Cotonou Agreement<sup>13</sup>, note that 'Article 8 and Annex VII [...] reflect the normal state of relationship

<sup>7</sup> United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948.

<sup>8</sup> Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford, 2005, pp. 89-92.

<sup>9</sup> See, e.g., United Nations African Group, Explanatory Note on Draft Resolution A/C.3/71/L.46 on the Report of the Human Rights Council, 15 November 2016, stating on behalf of the African Group that 'there is no international agreement on the definition of the concept of "sexual orientation and gender identity". These notions are not enshrined in any international human rights treaty, and cannot be fairly implied from them'.

<sup>10</sup> Articles 8(4) and 96(4)(i) of the Cotonou Agreement.

<sup>11</sup> Article 8(5), (6) and (7) of the Cotonou Agreement.

<sup>12</sup> ACP-EU Council of Ministers, Guidelines for the ACP-EU Political Dialogue (Article 8 and Annex VII of the Cotonou Agreement), ACP Doc ACP/29/013/02 Rev.5, Brussels, 20 April 2009.

<sup>13</sup> Article 1(2) of Annex VII of the Cotonou Agreement.

between the ACP Group and EU [and] contain the main provisions that constitute the criteria and basis for political dialogue between the ACP Group and the EU'<sup>14</sup>.

### 2.3.2 'Intensified' political dialogue prior to Article 96 consultations

When 'consultations' under Article 96 are envisaged, Article 8(8) states that:

'Where appropriate, and in order to prevent situations arising in which one Party might deem it necessary to have recourse to the consultation procedure foreseen in Article 96, dialogue covering the essential elements shall be systematic and formalised in accordance with the modalities set out in Annex VII.'

This form of systematic and formal 'intensified political dialogue' still involves more than the EU and the ACP State at issue: it is to include the ACP Group and the ACP Secretariat<sup>15</sup>, and, where appropriate, other actors too<sup>16</sup>. It is also mandatory if consultations under Article 96 are to be commenced<sup>17</sup>, unless 'there is persistent lack of compliance with commitments taken by one of the Parties during an earlier dialogue, or [...] a failure to engage in dialogue in good faith'<sup>18</sup>.

During this intensified political dialogue, 'the Parties may agree on joint agendas and priorities' and 'may jointly develop and agree specific benchmarks or targets with regard to human rights, democratic principles and the rule of law within the parameters of internationally agreed standards and norms, taking into account special circumstances of the ACP State concerned'<sup>19</sup>.

A recent Joint Staff Working Document authored by the European Commission and the High Representative for Foreign Affairs and Security Policy has commented that '[i]n practice, these provisions have been used only in two cases so far, very recently, and there is not enough evidence to assess its implementation or effectiveness'<sup>20</sup>.

<sup>14</sup> Guidelines for the ACP-EU Political Dialogue, (Article 8 and Annex VII of the Cotonou Agreement), ACP Doc ACP/29/013/02 Rev.5, Brussels, 20 April 2009, para 3. Articles 5 and 8 of the Resolution of the ACP-EU Joint Parliamentary Assembly of 5 November 2004 on the ACP-EU political dialogue (Article 8 of the Cotonou Agreement), OJ C 80, 1.4.2005, p. 17, state that 'political dialogue should not be seen merely as a prelude to consultations [...] but should primarily be used to build up long-term, sustainable and deeper relations between all participants' and it has a 'preventive nature [...] which will foster mutual trust before a crisis breaks out and consultations are required [...]'.  
<sup>15</sup> Article 3(4) of Annex VII of the Cotonou Agreement.

<sup>16</sup> The Guidelines for the ACP-EU Political Dialogue state that '[t]he actors of political dialogue include: national governments and institutions; ACP Group, ACP and EU institutions, regional and sub-regional organisations; and non-State actors'.

<sup>17</sup> Article 96(2)(a) and Articles 1(1) and 2(3) of Annex VII of the Cotonou Agreement. See also paragraph 1 of the Annex to the Internal Agreement on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement OJ L 317, 15.12.2000, p. 376, as amended in OJ L 247, 9.9.2006, p. 48.

<sup>18</sup> Article 3(4) of Annex VII of the Cotonou Agreement.

<sup>19</sup> Article 2(1) and (2) of Annex VII of the Cotonou Agreement. Article 2(2) specifies that '[b]enchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.'

<sup>20</sup> European Commission and High Representative for Foreign Affairs and Security Policy, Joint Staff Working Document, Evaluation of the Cotonou Partnership Agreement, SWD(2016) 250 final, 15.7.2016, p. 38. See also Jean Bossuyt, Camilla Rocca and Brecht Lein, 'Political Dialogue on Human Rights under Article 8 of the Cotonou Agreement', Study for the European Parliament, EXPO/B/DEVE/2013/31, July 2014.

### 2.3.3 Political dialogue during consultations and the adoption of appropriate measures

Both the Cotonou Agreement and the Guidelines on Political Dialogue stress that political dialogue is to continue during consultations and, 'to normalise the relationship', during the adoption of appropriate measures<sup>21</sup>. It is not specified whether this form of continuing political dialogue is to be of the normal or intensive variety, but recent practice indicates that it is essentially bilateral<sup>22</sup>.

## 2.4 Consultations (Article 96 CA)

'Consultations' under Article 96 represent a distinct process, and may be initiated '[i]f a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2)'<sup>23</sup>. In that event, the party invoking Article 96 must 'supply the other Party and the [ACP-EU] Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties' and must also invite that other Party to 'consultations'<sup>24</sup>. Consultations are to commence within 30 days of the invitation<sup>25</sup>, a period which 'the Parties shall use [...] for effective preparation [...], as well as for deeper consultations within the ACP Group and among the [EU] and its Member States'<sup>26</sup>. They are to take a structured form<sup>27</sup>, and to be completed within a further 120 days<sup>28</sup>. The role of the ACP-EU Council in these consultations is not mentioned, but it may have a role in accompanying political dialogue.

## 2.5 Appropriate measures (Article 96 CA)

If consultations do not lead to an agreed solution, or are refused, the party invoking Article 96 may adopt 'appropriate measures'. An Internal Agreement between the EU Member States sets out additional procedures, for example stating that measures are ordinarily to be adopted by qualified majority vote, but by unanimity in the event of a full suspension of the Cotonou Agreement<sup>29</sup>.

Past appropriate measures have taken the form of the non-renewal of development aid programs, the redirection of development aid from government recipients to civil society, and the suspension of budget support<sup>30</sup>. However, formally speaking, the only conditions are that appropriate measures must be 'taken

<sup>21</sup> Articles 2(5) and 3(4) of Annex VII of the Cotonou Agreement and Guidelines for the ACP-EU Political Dialogue (Article 8 and Annex VII of the Cotonou Agreement), ACP Doc ACP/29/013/02 Rev.5, Brussels, 20 April 2009, para 19. See also Council Secretariat/Commission non-paper: Guidance for conducting article 8 political dialogue with ACP countries, Document No 17384/09, 11 January 2010 (partially derestricted).

<sup>22</sup> For example, the letter to Burundi notifying the closing of consultations and the adoption of appropriate measures stated that '[d]uring this period, a dialogue will be conducted with the Government of Burundi in order to support the process of returning to compliance with the essential elements of the ACP-EU Partnership Agreement'. See Council Decision (EU) 2016/394 of 14 March 2016 concerning the conclusion of consultations with the Republic of Burundi under Article 96 OJ L 73, 18.3.2016, p. 90.

<sup>23</sup> Article 96(2)(a)(i) of the Cotonou Agreement.

<sup>24</sup> Article 96(2)(a)(i) of the Cotonou Agreement.

<sup>25</sup> Article 96(2)(a)(iii) of the Cotonou Agreement.

<sup>26</sup> Article 3(3) of Annex VII of the Cotonou Agreement.

<sup>27</sup> Article 3(5) of Annex VII of the Cotonou Agreement. This provision also states that 'the [ACP-EU] Council of Ministers may develop further modalities to this end [i.e. 'structured and continuous consultations']'. This has not yet occurred.

<sup>28</sup> Article 96(2)(a)(iii) of the Cotonou Agreement.

<sup>29</sup> Paragraphs 2(ii) and 3(i) of the Internal Agreement on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement OJ L 317, 15.12.2000.

<sup>30</sup> See table (Article 96 Consultation procedures (2000-2015)) in European Commission and High Representative for Foreign Affairs and Security Policy, Joint Staff Working Document, Evaluation of the Cotonou Partnership Agreement, SWD(2016) 250 final, 15.7.2016, pp. 38-39. For a recent example, see Council Decision (EU) 2016/394 of 14 March 2016 concerning the conclusion of consultations with the Republic of Burundi under Article 96 OJ L 73, 18.3.2016, p. 90.

in accordance with international law, and proportional to the violation,' and 'shall be revoked as soon as the reasons for taking them no longer prevail'<sup>31</sup>.

Importantly, this means that 'appropriate measures' under the Cotonou Agreement may take any form, including, importantly, the suspension of obligations other than those contained in the Cotonou Agreement, such as obligations in regional agreements or EPAs between the same parties. This possibility is also recognised in some of the EPAs themselves, as discussed below, but it would apply even if it were not.

## 2.6 Cases of special urgency (Article 96(2)(b) CA)

In most cases, as mentioned, the first step (political dialogue) and second step (consultations) must be followed sequentially prior to the adoption of 'appropriate measures'. However, there is a short-cut in cases of 'special urgency', which are defined as 'exceptional cases of particularly serious and flagrant violation of one of the essential elements [...] that require an immediate reaction'<sup>32</sup>. In such cases, 'appropriate measures' may be adopted immediately. All that is required, procedurally, is that '[t]he Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so'<sup>33</sup>.

This is not to say that a case of 'special urgency' precludes simultaneous consultations or political dialogue. Indeed, the 'party concerned' may request consultations simultaneously with (or after) the adoption of appropriate measures<sup>34</sup>. In 2010, for example, the European Commission deemed a military mutiny in Guinea-Bissau a case of 'special urgency' and simultaneously initiated consultations and adopted 'precautionary measures' pending the outcome of those consultations<sup>35</sup>. However, this is optional.

## 3 Human rights conditionality in the EPAs

### 3.1 Introduction

The EPAs and interim EPAs refer to different parts of the human rights clause in the Cotonou Agreement<sup>36</sup>. All, except for the Central Africa EPA, make reference to the 'essential elements' of the Cotonou Agreement, with some variation in wording. In addition, all of the EPAs and interim EPAs refer to 'appropriate measures' under the Cotonou Agreement. These references have different legal effects.

<sup>31</sup> Article 96(2)(c)(1) and Article 96(2)(a)(4) of the Cotonou Agreement.

<sup>32</sup> Article 96(2)(b)(i) of the Cotonou Agreement.

<sup>33</sup> Article 96(2)(b)(ii) of the Cotonou Agreement. Confusingly, Article 96(2)(c)(ii) states that '[i]f measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers' without the rider, in the preceding paragraph, that the party adopting the measures may not have time to do so. Additional confusion is evident in Articles 1(1) and 2(4) of Annex VII of the Cotonou Agreement, where exceptions are made for cases of 'special urgency' in relation to political dialogue, even though in such cases the obligation to conduct political dialogue is in any case suspended.

<sup>34</sup> Article 96(2)(c)(iii) of the Cotonou Agreement. It is not clear, from the text, whether the 'party concerned' is the party that has adopted appropriate measures or the party that is subject to appropriate measures.

<sup>35</sup> Communication from the Commission to the Council on the opening of consultations with Guinea Bissau under Article 96 of the revised Cotonou Agreement, COM(2010) 766 final, 20.12.2010.

<sup>36</sup> The SADC and Cariforum agreements (and the Ghana agreement) refer to the 'Cotonou Agreement' as revised in 2005, the EAC agreement refers to the 'Cotonou Agreement' as signed in 2000 and revised in 2005 and 2010, and the West Africa agreement refers to the Cotonou Agreement as signed in 2000 'as most recently amended'. Only the EAC and West Africa agreements therefore refer expressly to the Cotonou Agreement that is currently applicable; the others would only do so to the extent that the references to the 'Cotonou Agreement' are taken, dynamically, to be references to the Cotonou Agreement as further amended. In this context, nothing turns on this, as the human rights clause was not amended in 2010.



## 3.2 Respect for human rights as a 'basis' of the EPAs

The EPAs and interim EPAs refer to human rights, democratic principles and the rule of law in quite different ways.

The South African Development Community (SADC) and Caribbean Forum (Cariforum) EPAs and the Pacific Interim EPA state that 'this Agreement is based on the [...] [e]ssential [...] [e]lements of the Cotonou Agreement, as set out in Article [...] 9 [...] of the Cotonou Agreement.' The West Africa EPA states, to similar effect, that '[t]he EPA is based on the principles and essential points of the Cotonou Agreement, as set out in Article [...] 9 [...] of the said Agreement.' The Eastern African Community (EAC) EPA states, differently, that '[t]his Agreement is based on the following principles: [...] building on the *acquis* of the Cotonou Agreement'.

In this connection, it is relevant that the parties to these agreements knew that the Cotonou Agreement was due to expire. This indicates that the references to the principles set out in the Cotonou Agreement, and to the Cotonou *acquis*, have a separate existence from the Cotonou Agreement itself. It would have made no sense for the basis of an agreement to become legally redundant while the agreement itself remained on foot.

This conclusion is also reinforced by the language used in the SADC, Cariforum and West Africa EPAs, and the Pacific interim EPA. These are expressed to be based on the principles and essential elements 'as set out' in the relevant provisions of the Cotonou Agreement. The result is that these agreements are based on the principles of respect for human rights, democratic principles and the rule of law, with attached legal consequences, even after the expiry of the Cotonou Agreement<sup>37</sup>.

The statement that the EAC EPA is based on the principle of building on the '*acquis* of the Cotonou Agreement' is more ambiguous, as is the statement that the 'principles' of the ESA Interim EPA are 'building on the *acquis* of the Cotonou Agreement'. However, to build on an *acquis* presupposes that this *acquis* has legal effect. In addition, both agreements contain a preambular recital stating that the parties '[reaffirm] that the EPA shall be consistent with the objectives and principles of the Cotonou Agreement [...]'. These considerations support the conclusion that these agreements are also based on the respect for human rights, democratic principles and the rule of law, with attached legal consequences, even after the expiry of the Cotonou Agreement.

It is doubtful however whether the same can be said for the Interim EPAs with Central Africa, Ghana and Côte d'Ivoire. The Central Africa agreement contains no references at all to the essential elements of the Cotonou Agreement, or to human rights, democratic principles or the rule of law, even in a recital. The two other agreements only 'reaffirm [...] the [parties'] commitment to the respect of human rights, to democratic principles and to the rule of law, which constitute the essential elements of the Cotonou Agreement'. Reaffirmations of commitments do not necessarily equate to independent commitments. These three agreements are therefore less likely to be subject to human rights conditionality after the expiry of the Cotonou Agreement.

<sup>37</sup> One might compare the 1979 GATT Enabling Clause (now a part of the GATT 1994), which continued, on a permanent basis, the preferential tariff treatment 'described in' a 1971 GATT waiver decision. As in this case, the 1971 instrument was due to (and did) expire in 1981. Indeed, the 1979 instrument went even further than this, insofar as it gave legal effect to conditions that were 'described' in the preamble of the 1971 instrument, even though, being contained merely in a preamble, these conditions did not have any legal effect under the 1971 instrument itself. See Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, para 145.

### 3.3 References to ‘appropriate measures’ under the Cotonou Agreement

The EPAs and interim EPAs also refer to ‘appropriate measures’ adopted under the Cotonou Agreement, albeit in different ways. The SADC, Cariforum and West Africa EPAs state (with non-material differences in wording) that:

‘Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of appropriate measures pursuant to the Cotonou Agreement.’

Unlike the EPA provisions referring to the ‘principles’ or ‘essential elements’ of the Cotonou Agreement, these provisions refer to measures that are adopted pursuant to the mechanisms established in the Cotonou Agreement, as described above. This indicates that these measures must have been adopted under the Cotonou Agreement, which by implication depends upon the Cotonou Agreement having legal effect. As such, these provisions become redundant upon the expiry of the Cotonou Agreement.

One might ask whether, alternatively, these provisions incorporate by reference the entire procedure established in the Cotonou Agreement for the adoption of appropriate measures. It is, after all, not unprecedented for treaties that otherwise lack legal force to gain such force when incorporated into another treaty by reference<sup>38</sup>. But it is one thing for an obligation to be incorporated by reference; it is quite another for this to be done for an entire procedure. Moreover, the relevant procedure in the Cotonou Agreement is elaborate, and, as noted, requires notification of appropriate measures to institutions (the ACP-EU Council of Ministers) established under the Cotonou Agreement that will no longer exist upon its expiry. For this reason, when it is no longer possible to adopt appropriate measures under the Cotonou Agreement these clauses will cease to have any operative effect.

The equivalent provision in the EAC EPA lacks legal effect for an additional different reason. It states that:

‘Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of any appropriate measures consistent with this Agreement and pursuant to the Cotonou Agreement.’

The qualifier in this clause that such measures must be ‘consistent with this Agreement’ is significant. By conditioning the legality of measures under this clause on their legality under the remainder of the agreement, this effectively nullifies its legal value. This is a common feature of treaty drafting, usually deployed to enable a party that pushes unsuccessfully for a particular provision to save face.

### 3.4 Conclusion

The conclusions to be drawn from this analysis are that the mechanisms established in Articles 8, 9 and Annex VII of Cotonou Agreement for the adoption of appropriate measures in the event of violations of Article 9(2)(4) of that agreement will not apply to the EPAs and interim EPAs following the expiry of the that agreement in 2020, despite the references to such ‘appropriate measures’ in each of these EPAs and Interim EPAs. On the other hand, the SADC, Cariforum and West African EPAs and the Pacific Interim EPA are ‘based’ on respect for human rights, democratic principles and the rule of law, independently of the

<sup>38</sup> For example the 1979 GATT Enabling Clause, see Appellate Body Report, *EC – Tariff Preferences*, para 145. Another example is Article 35 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires WTO Members to act ‘in accordance with’ certain provisions of a treaty (IPIC) even though IPIC has not entered into force: see Antony Taubman et al (eds.), *A Handbook on the WTO TRIPS Agreement*, Cambridge University Press, Cambridge, 2012, p. 121. The editors were all officials in the WTO TRIPS Division.



continuation of the Cotonou Agreement. The same can be said, albeit with slightly less certainty, of the EAC EPA and the ESA Interim EPA. The implications of this result will be discussed in the next section.

The Interim EPAs with Central Africa, Ghana and Côte d'Ivoire, however, will not be subject to any form of human rights conditionality under a human rights clause after the expiry of the Cotonou Agreement in 2020.

**Table 1: Full EPA references to human rights clause in the Cotonou Agreement**

Full EPAs	Cotonou expiry	Principles	Appropriate measures
<b>SADC<sup>39</sup> (2016)</b>	<b>Art 116(3)</b>	<b>Article 2(1)</b>	<b>Article 110(2)</b>
	The Parties agree that this Agreement may need to be reviewed in light of further developments in international economic relations and in the light of the expiration of the Cotonou Agreement.	This Agreement is based on the Fundamental Principles, as well as the Essential and Fundamental Elements, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement.	Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of appropriate measures pursuant to the Cotonou Agreement.
<b>EAC<sup>40</sup> (2015)</b>	<b>Article 142(3)</b>	<b>Article 4</b>	<b>Article 136</b>
	Notwithstanding the provisions of paragraph 1, the parties agree that this Agreement may be reviewed in light of the expiration of the Cotonou Agreement.	<p>This Agreement is based on the following principles: (a) building on the acquis of the Cotonou Agreement [...]</p> <p><b>Recital 8</b></p> <p>REAFFIRMING also that the Economic Partnership Agreement (EPA) shall be consistent with the objectives and principles of the Cotonou Agreement [...]</p>	Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of any appropriate measures consistent with this Agreement and pursuant to the Cotonou Agreement.

<sup>39</sup> Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ L 250, 16.9.2016, p. 3, provisionally applied as of 10 October 2016, OJ L 274, 11.10.2016, p. 1.

<sup>40</sup> Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Union and its Member States, of the other part, text available in Annex to the Proposal for a Council Decision on the signing and provisional application of the Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Union and its Member States, of the other part, COM(2016) 63 final, 11.2.2016; signature and provisional application approved by the Council on 20 June 2016, Council Doc 10495/16, 20 June 2016, not yet provisionally applied or in force.

Full EPAs (cont.)	Cotonou expiry	Principles	Appropriate measures
<b>West Africa<sup>41</sup> (2014)</b>	<b>Article 111(3)</b>	<b>Art 2(1)</b>	<b>Art 105(1)</b>
	[T]he Parties may consider reviewing this Agreement as required, in particular on expiry of the Cotonou Agreement.	The EPA is based on the principles and essential points of the Cotonou Agreement, as set out in Articles 2, 9, 19 and 35 of the said Agreement.	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.
<b>Cariforum<sup>42</sup> (2008)</b>	<b>Article 246(3)</b>	<b>Article 2(1)</b>	<b>Article 241(2)</b>
	The Parties agree that this Agreement may need to be reviewed in the light of the expiration of the Cotonou Agreement.	<p>This Agreement is based on the Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement.</p> <p><b>Recital 3</b></p> <p>REAFFIRMING their commitment to the respect for human rights, democratic principles and the rule of law, which constitute the essential elements of the Cotonou Agreement [...]</p>	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.

Source: Author

<sup>41</sup> Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic And Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part, initialled 30 June 2014, not yet signed, provisionally applied or in force.

<sup>42</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30.10.2008, p. 3, provisionally applied as of 29 December 2008, OJ L 352, 31.12.2008, p. 62.

**Table 2: Interim EPA references to human rights clause in the Cotonou Agreement**

Interim/ Stepping stone EPAs	Principles	Appropriate measures
<b>Pacific<sup>43</sup> (Interim, 2009)</b>	<b>Article 2(1)</b>  This Agreement is based on the Fundamental Principles as well as the Essential and Fundamental Elements set out in Articles 2 and 9 of the Cotonou Agreement.  <b>Recital 8</b>  REAFFIRMING their commitment to the respect for human rights, democratic principles, the rule of law and to good governance, which constitute essential and fundamental elements of the Cotonou Agreement	<b>Article 73(2)</b>  Nothing in this Agreement shall be construed so as to prevent the application of all provisions of the Cotonou Agreement outside Title II of Part 3 [development cooperation] and according to the procedures set by the said Agreement.
<b>ESA<sup>44</sup> (interim, 2012, signed 2009)</b>	<b>Article 4(a)</b>  The principles of this Agreement on the basis of which further negotiations between the Parties shall be held with a view to reaching a comprehensive EPA are the following: [...] building on the acquis of the Cotonou Agreement  <b>Recital 7</b>  REAFFIRMING also that the EPA shall be consistent with the objectives and principles of the Cotonou Agreement [...]	<b>Article 65(1)</b>  Nothing in this Agreement shall prejudice the application of measures deemed appropriate as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement and according to procedures set by these Articles.

<sup>43</sup> Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, OJ L 272, 16.10.2009, p. 1, provisionally applied between the EU and Fiji as of 28 July 2014, OJ L 228, 3.7.2014, p. 2.

<sup>44</sup> Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, OJ L 111, 24.4.2012, p. 1, provisionally applied as of 14 May 2012, OJ L 125, 12.5.2012, p. 1.

<b>Central Africa<sup>45</sup> (interim, 2008)</b>	[None]	<b>Article 106(2)</b>
		Nothing in this Agreement shall be construed so as to prevent the adoption by the European Community or by one of the signatory Central African States of any measures, including trade measures, deemed appropriate as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement.
<b>Ghana<sup>46</sup> (stepping stone, signed 2016, initialled 2007)</b>	<b>Recital 7</b>	<b>Article 80(2)</b>
	REAFFIRMING their commitment to the respect of human rights, to democratic principles and to the rule of law, which constitute the essential elements of the Cotonou Agreement [...]	Nothing in this Agreement shall be construed so as to prevent the adoption by the European Community or by Ghana of any measures, including trade and trade-related measures, deemed appropriate as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement.
<b>Côte d'Ivoire<sup>47</sup> (stepping stone, 2016, signed 2008)</b>	<b>Recital 7</b>	<b>Article 80(2)</b>
	REAFFIRMING their commitment to the respect of human rights, to democratic principles and to the rule of law, which constitute the essential elements of the Cotonou Agreement [...]	This Agreement shall not be construed as preventing the adoption by the European Community or by Côte d'Ivoire of measures, including trade measures, deemed appropriate and provided for in Articles 11b, 96 and 97 of the Cotonou Agreement.

Source: Author

<sup>45</sup> Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, OJ L 57, 28.2.2009, p. 2, provisionally applied between the EU and Cameroon as of 4 August 2014, OJ L 254, 28.8.2014, p. 1.

<sup>46</sup> Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, OJ L 287, 21.10.2016, p. 3, provisionally applied as of 15 December 2016, OJ L 340, 15.12.2016, p. 1.

<sup>47</sup> Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, OJ L 59, 3.3.2009, p. 3, provisionally applied as of 3 September 2016, OJ L 272, 7.10.2016, p. 1.

## 4 Legal and operational aspects of EPA 'basis' clauses

As noted above, the standard human rights clause, such as the human rights clause in the Cotonou Agreement, functions by stating in one provision that respect for human rights, democratic principles and the rule of law is a basis and an essential element of the agreement, and then stating in another provision (a 'non-execution' clause) that if one party violates these principles, the other party may adopt 'appropriate measures'. This is different for the type of 'basis' clauses that, on the above analysis, are found in the EPAs and some of the interim EPAs. This section analyses their legal effects, and in particular the way that they are operative under international treaty law.

### 4.1 Treaty law

The absence of a 'non-execution' clause does not deprive the 'basis' clauses of legal effect. Customary international law continues to apply to acts that contradict the 'basis' or 'essential elements' of an agreement. Indeed, the EU's first effective human rights clauses were in this form. The 1990 European Economic Community (EEC)-Argentina Cooperation Agreement contained a 'basis' clause stating:

'Cooperation ties between the Community and Argentina and this agreement in its entirety are based on the respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Argentina'<sup>48</sup>.

The original intention of this clause was to establish a trigger for the suspension of the agreement under treaty law, on the grounds that a failure of one of the parties to respect the principles set out in the clause would amount to a 'fundamental change of circumstance' entitling the other party to terminate the agreement<sup>49</sup>. This possibility is set out in Article 62(1) of the Vienna Convention of the Law of Treaties (VCLT) as follows:

'A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.'

However, this doctrine was less applicable to 'basis' clauses than was initially thought. First, the only available remedy is the termination of the treaty, which goes much further than would usually be desired. Second, it is not entirely certain that a failure to respect human rights would necessarily 'radically [...] transform the extent of obligations still to be performed under the treaty'. The test is whether those obligations have become excessively burdensome to one of the parties<sup>50</sup>. Moreover, if human rights violations do not provide a basis for the termination of human rights treaties on these grounds, which they

<sup>48</sup> Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, OJ L 295, 26.10.1990, p. 67. Identical or similar basis clauses were also used in agreements with Chile, Uruguay, Paraguay, Macao and Mongolia over the next three years. See, further, Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford, 2005, p. 17.

<sup>49</sup> Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (Kluwer, 2000) at 49; cf. Pieter Jan Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy' in Marc Maresceau (ed), *The European Community's Commercial Policy After 1992: The Legal Dimension* (Martinus Nijhoff, 1993).

<sup>50</sup> Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Vienna: Springer, 2012), 1089.

do not, it is difficult to see how they can provide a basis for the termination of treaties not primarily concerned with human rights obligations. Finally, it is questionable whether a circumstance that is, necessarily, described in a treaty provision can ever be 'unforeseen'. It might be objected that, precisely because a clause states that a certain state of affairs is the basis of an agreement, the opposite is unforeseen. But if this were true, there would be no reason to include such a clause in the treaty in the first place. It was considerations like these that led the EU to add the phrase 'and constitute an essential element of the agreement' to its early basis clauses<sup>51</sup>.

There is however another ground on which a mere 'basis' clause can trigger action under the Vienna Convention. If one party violates a principle set out in that clause, which can, without too much difficulty, be seen as an act constituting a repudiation of the agreement within the meaning of Article 60(3)(a) of the Vienna Convention:

'1. A material breach of a bilateral treaty<sup>[52]</sup> by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. [...]

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention'

Under Article 60(3)(a), it is not necessary that a party must have breached a provision of that agreement, still less one that is essential to the object and purpose of a treaty. It is sufficient that it acts in a manner that constitutes a repudiation of its basis. In the *Namibia* Advisory Opinion, the International Court of Justice (ICJ) stated that in a United Nations (UN) General Assembly resolution determining that South Africa had "'in fact, disavowed [a] Mandate", the General Assembly declared in fact that it had repudiated it.' Thus, a party to a treaty that undermines the basis of that treaty can be considered to have, by implication, repudiated the treaty<sup>53</sup>.

## 4.2 The operation of a 'basis clause' in practice

Almost all applications of human rights clauses to date have been in the form of 'appropriate measures', but there is one example of the suspension of an EU agreement on the grounds that one of the parties acted contrary to the basis of the agreement. This was in 2011, when the EU partially suspended the 1977 EEC-Syria Cooperation Agreement on the grounds that Syria's human rights violations had undermined the 'basis' of the agreement. The Decision suspending the agreement stated that:

'the application of the Cooperation Agreement should be partially suspended until the Syrian authorities put an end to the systematic violations of human rights and can again be

<sup>51</sup> This additional phrase was supposed to allow the clause to trigger Article 60(3)(b) of the Vienna Convention, which provides for the suspension or termination of the agreement on grounds of 'material breach', this being a 'violation of a provision essential to the accomplishment of the object or purpose of the treaty'.

<sup>52</sup> The EPAs are, relevantly, bilateral, between the EU and the individual EPA parties. See, e.g., Article 104(2) of the SADC-EU EPA, stating that '[t]he term "Party" shall refer to the SADC EPA States individually on the one part or the EU on the other part as the case may be'. Article 104(1) states that the 'EU' means 'the EU or its Member States or the EU and its Member States, within their respective areas of competence [...]'. Article 98(1) of the Cotonou Agreement is to similar effect.

<sup>53</sup> See, further, Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford, 2005, at pp.104-6.

considered as being in compliance with general international law and the principles which form the basis of the Cooperation Agreement<sup>54</sup>.

The Decision suspended Articles 12, 14 and 15 of the Cooperation Agreement, which provided for the elimination of quantitative restrictions and measures of equivalent effect, and for maximum duties on certain petroleum based products. This was necessary for the adoption of the restrictive measures, which took the form of a decision in the context of the Common Foreign and Security Policy (CFSP), followed by a Council Regulation bringing this into effect<sup>55</sup>. The measures adopted include a wide range of restrictions on goods, services, capital movements, among others<sup>56</sup>. Similar measures, or any subset of these, could be envisaged under the EPA. In addition, to the extent that the EPAs provide for financial or technical assistance, that could also be suspended under a basis clause (to the extent that such assistance is obligatory and that this is therefore necessary; otherwise, this could be suspended in any case).

Unlike the Syrian case, the EPAs are designed to promote regional integration. As noted above, they are formally bilateral as between the EU (and its Member States) on the one side, and each respective EPA party on the other. This means that any suspension of the agreement must be limited to the party that has repudiated the agreement. Nonetheless, it is necessary to consider the spillover effects of such a suspension on the other parties to the agreement.

It is undoubtedly the case that trade restrictions on one party to an EPA will have indirect effects on the other parties to that EPA. For example, restrictions on imports of finished products from EPA Party X, due to that party's human rights record, will have a negative effect on any component products or services that are used in the production of that product. If those component products or services originate in EPA Party Y, the exporters of those component products or services will lose their market and will suffer economic damage. In addition, the finished products subject of the restrictive measures will not be able to be exported to the EU, and will remain in the region, adding competitive pressure on like products produced in the region. There may also be positive effects, of course, insofar as products and services affected by

<sup>54</sup> Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic OJ L 228, 3.9.2011, p. 19. There was no express 'basis' clause in the Syria cooperation agreement, but the Decision derived one from its preamble. It stated that 'according to the Preamble of the Cooperation Agreement, both Parties wished, by concluding the Agreement, to demonstrate their common desire to maintain and strengthen friendly relations in accordance with the principles of the United Nations Charter.'

<sup>55</sup> Council Decision of 2 September 2011; Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 16, 19.1.2012, p. 1.

<sup>56</sup> These are an embargo on certain goods that might be used for the manufacture and maintenance of products that could be used for internal repression; a ban on provision of certain related services; control of export of certain other goods that might be used for the manufacture and maintenance of equipment that might be used for internal repression; control of provision of certain services; an import ban on arms and related materiel; a ban on provision of certain related services; an embargo on telecommunications monitoring and interception equipment; a ban on provision of certain services (related to such equipment); an import ban on crude oil and petroleum products; a ban on provision of certain services (related to crude oil and petroleum products); an embargo on key equipment and technology for the oil and natural gas industries; a ban on provision of certain services (to the oil and natural gas industries); a ban on provision of new Syrian banknotes and coins; a ban on trade in gold, precious metals and diamonds with the Government of Syria; an embargo on luxury goods; a ban on certain investment (in the oil and natural gas industries, in construction of power plants for electricity production); a prohibition on participating in the construction of new power plants for electricity production; a restraint on commitments for public and private financial support for trade with Syria and ban on new long term commitments of Member States; a ban on new commitments for grants, financial assistance and concessional loans to the Government of Syria; a prohibition on the European Investment Bank making certain payments; restrictions on issuance of and trade in certain bonds; restrictions on establishment of branches and subsidiaries of and cooperation with Syrian banks; restrictions on provision of insurance and re-insurance; restrictions on access to airports in the EU for certain flights; inspection of certain cargoes to Syria and prior information requirement on cargoes to Syria; restrictions on admission of certain persons; freezing of funds and economic resources of certain persons, entities and bodies; and a prohibition on satisfying claims made by certain persons, entities or bodies. See the summary in European Commission, Service for Foreign Policy Instruments, European Union – Restrictive measures (sanctions) in force (Regulations based on Article 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy), 17 January 2017, pp. 64-5.



sanctions (whether those of the party subject to the sanctions or those of the EU)<sup>57</sup> could be replaced by like products and services from the other EPA parties. But the present question concerns the negative effects of sanctions on other unsanctioned members of the regional agreement. It is suggested that the principle of proportionality, which governs the application of countermeasures, should be applied here, so that any such negative effects are minimised. This could be done by a careful selection of those economic sectors, and even particular products and services, so as to avoid indirect damage of the type described here.

Of course, should the situation improve, these measures can be reversed.

### 4.3 EU law

Procedurally, it may be observed that, as a matter of EU law, suspensions of agreements usually take place under Article 218(9) TFEU in conjunction with the legal basis on which the agreement was concluded. In the case of trade agreements, this will be Article 207, and perhaps certain other legal bases as well. The Syria Cooperation Agreement was suspended on the basis of these two provisions, for example<sup>58</sup>.

### 4.4 Dispute settlement

A question of some importance is whether a party may invoke the dispute settlement procedures set out in the EPAs and interim EPAs in relation to the 'basis' clauses in those agreements. This question has two distinct facets. One is whether one of the parties can resort to dispute settlement proceedings under an agreement in order to obtain a ruling on whether the other party has acted in a manner contrary to the principles reflected in the 'basis' clause of that agreement. The other is whether that other party can invoke dispute settlement proceedings in relation to the suspension of the agreement by the first party.

The dispute settlement procedures in the EPAs and interim EPAs all provide for arbitral panels with jurisdiction in respect of 'any dispute concerning the interpretation and application of this Agreement, except as otherwise expressly provided' (or words to identical effect). None makes an exception for the 'basis' clauses. This type of jurisdiction clause is standard for international tribunals. It certainly covers the first question, namely, whether one of the parties has respected the norms set out in a 'basis' clause<sup>59</sup>.

The second question – whether a party can challenge the suspension of an agreement – is more difficult. This question, properly understood, is whether the party suspending the agreement had a right to do so under the international law of treaties. That is arguably not a question concerning the interpretation or application of the agreement<sup>60</sup>. It would be different for a dispute concerning the adoption of 'appropriate measures' under the Cotonou Agreement as provided for in these agreements. That would be a question concerning the interpretation or application of the agreement. On the other hand, it is possible that the question could arise in the form of a defence. That is to say, if the other party challenges the suspension of

<sup>57</sup> This raises an additional question, as to whether the other EPA parties would be bound by a 'basis' clause not to undermine EU sanctions. 'Basis' clauses require the parties to respect human rights in their international policies. On the other hand, this does not require states to adopt EU sanctions policies. At most, it requires them to ensure that their own policies with the sanctioned state do not violate their obligation to 'respect' human rights in that state.

<sup>58</sup> Council Decision of 2 September 2011, OJ L 228.

<sup>59</sup> Due to the wording of the 'basis' clause, careful drafting of the question put to the tribunal may be needed; i.e. the question may need to be put as one of 'interpretation' involving, technically, hypothetical facts, much in the same way as questions are put to the CJEU in the context of the preliminary rulings procedure in Article 267 TFEU.

<sup>60</sup> Although see *ICAO Council (India v Pakistan)*, Judgment of 18 August 1972, ICJ Reports 1972, p. 60.



the agreement as a violation of the EPA, the suspending party would then raise material breach of the agreement as a reason for its suspension<sup>61</sup>.

## 5 Alternatives for reacting to human rights violations

Additionally, and in particular in light of the fact that there are no basis clauses in three of the interim EPAs, it is necessary to consider whether there are any additional options for suspending these agreements as a reaction to human rights violations. In fact, there are several such options. However, with the exception of measures necessary to protect human rights as 'public morals', and the possibility of denouncing the agreement, none of these substitute for a 'basis' human rights clause, let alone the more sophisticated mechanism provided for in the Cotonou Agreement.

### 5.1 UN Security Council resolutions

One option, which only needs to be noted, is where the UN Security Council requires its members to impose sanctions on other states in order to maintain or restore international peace and security under Chapter VII of the UN Charter. This rationale frequently overlaps with that of responding to human rights violations.

Where there is such a resolution, the EU (for its Member States) will be required to act against the subject of the sanctions. Under Article 103 of the UN Charter, any such obligations prevail over the treaty obligations of UN Member States, which means that mandatory UN Security Council sanctions prevail over the EPAs. In addition, however, such sanctions are covered by a clause contained in all of the EPAs and interim EPAs, based on Article XXI(c) of the General Agreement on Tariffs and Trade (GATT), permitting each party to take action 'in order to carry out obligations it has accepted for the purpose of maintaining international peace and security'.

In short, human rights clauses are not necessary for sanctions implementing UN Security Council resolutions.

### 5.2 Unilateral EU CFSP restrictive measures

Beyond UN sanctions, the EU also frequently adopts unilateral restrictive measures, under Article 215 TFEU, in the context of the Common Foreign and Security Policy (CFSP)<sup>62</sup>. For the most part, these measures involve the freezing of assets of individuals. Beyond this, there are sanctions that restrict trade in relation to military activities and equipment that might be used for internal repression. Third, there are broader restrictions affecting trade in more conventional products and services. As noted above, the various restrictions currently in place in relation to Syria are very wide, including, for example, an embargo on telecommunications monitoring equipment and restrictions on insurance and re-insurance<sup>63</sup>.

Measures of this type could violate obligations in relation to investment protection, capital movements, and also trade in goods (the assets). In terms of sanctions currently imposed against EPA parties, the current sanctions imposed on Burundi involve a freeze of funds and assets held in the EU by listed persons<sup>64</sup>, while

<sup>61</sup> See International Court of Justice, Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece), Judgment of 5 December 2011, ICJ Reports 2011, p. 662.

<sup>62</sup> European Commission, European Union – Restrictive measures (sanctions) in force (Regulations based on Article 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy), 17 January 2017, see above at footnote 56.

<sup>63</sup> Council Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L 147, 1.6.2013, p. 14; Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 16, 19.1.2012, p. 1.

<sup>64</sup> Council Decision (CFSP) 2015/1763 concerning restrictive measures in view of the situation in Burundi, OJ L 257, 2.10.2015, p. 37; Council Regulation (EU) 2015/1755 concerning restrictive measures in view of the situation in Burundi, OJ L 257, 2.10.2015, p. 1.

the sanctions imposed against Zimbabwe include such measures but also restrictions on trade in arms and related materiel<sup>65</sup>. Without engaging in a legal analysis of the legality of these measures under the EAC and ESA EPAs respectively, it can be said that any violation of EPA provisions on, for example, trade in goods and services, even for arms and related materiel, needs to be justified on some ground. There are several.

First, the relevant obligation of the agreement could be suspended under a human rights clause. This has been done. When the present set of sanctions was first imposed on Zimbabwe in 2002, the adoption of 'appropriate measures' under Article 96 of the Cotonou Agreement included the suspension of Article 12 of Annex II of the Cotonou Agreement, which provided for free capital movements<sup>66</sup>. As noted above, it was the same for Syria. This option is however of no use when there is no human rights clause (the assumption of this section of the study).

Second, the sanctions might be justified on the basis of the public policy or security exceptions in the agreement. This possibility raises identical issues to those in the WTO context, which are addressed below in Section 8. This would require that the measures at issue be no more restrictive or discriminatory (if at all) than necessary to achieve the objective of protecting EU public morals, which includes respect for human rights in third countries (e.g. under Articles 3(5) and 21 of the Treaty on European Union). As explained in Section 8, however, these conditions can be quite limiting.

Third, the sanction could be justified as a legitimate countermeasure in response to violations of international human rights obligations (i.e. beyond those set out in the agreement itself). The following addresses this possibility.

### 5.3 Countermeasures

Countermeasures permit a party to adopt proportionate measures that would otherwise be in violation of its international obligations in order to 'induce compliance' of the other party with its international obligations<sup>67</sup>. In principle, countermeasures could be available even in the absence of an effective 'basis' clause.

However, there are certain difficulties with this option in a human rights context. Countermeasures are only available for states and international organisations that have been 'injured' by a violation of international law by another party<sup>68</sup>. In the current state of international law, and in the context of human rights violations, it is generally considered that a state (or the EU) is only 'injured' if one of its nationals is affected by the conduct of the other state<sup>69</sup>. Correspondingly, there is no compelling state practice to this effect, and the EU would expose itself to violating international law if it sought to commence such a practice.

<sup>65</sup> Council Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe, OJ L 42, 16.2.2011, p. 6; Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe, OJ L 55, 24.2.2004, p. 1.

<sup>66</sup> Council Decision 148/2002 concluding consultations with Zimbabwe under Art 96 of the ACP-EC Partnership Agreement, OJ L 50, 21.2.2002, p.64.

<sup>67</sup> Article 22 of the Articles on the Responsibility of International Organisations (ARIO), annexed to UNGA Res 66/100, UN Doc A/Res/66/100, 27 February 2012.

<sup>68</sup> Articles 43 and 49 of the Articles on the Responsibility of International Organisations (ARIO).

<sup>69</sup> James Crawford, 'Overview of Part Three of the Articles on State Responsibility' in James Crawford et al (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 938-939.

This is not a surprising result. It was precisely because general international law did not offer the EU any option for suspending the Lomé Convention that it was felt necessary to invent human rights clauses in the first place.

## 5.4 Denunciation

An additional option for reacting to human rights violations by an EPA party is to denounce that EPA in accordance with its terms. Each of the EPAs and interim EPAs permits this with six months' notice, except for the Pacific interim EPA, which provides for twelve months' notice. No reasons need to be given for such a withdrawal from the agreement.

Insofar as denunciation of an agreement provides for its termination, this could be an effective means for the EU to react to human rights violations. As noted below, this is precisely the method that has been adopted for the EU-Canada Comprehensive Economic and Trade Agreement (CETA)<sup>70</sup>. On the other hand, as also noted there, denunciation only permits the full termination of the agreement. The six month delay in the termination taking effect (twelve months for the Pacific interim EPA) is also less effective as a means of reacting instantly to such violations. As a means of reacting to violations of human rights, democratic principles or the rule of law, denouncing the agreement is a blunt and permanent measure that is ill-suited to all but the most extreme cases where there is no possibility of further dialogue, and even then it comes with a significant delay in implementation<sup>71</sup>.

## 5.5 Conclusion

Beyond the suspension of an EPA or interim EPA on the basis of a human rights clause, there are various other options available to the EU to respond to human rights violations. This is of particular importance in relation to the interim EPAs with Central Africa, Ghana and Côte d'Ivoire, which, according to the analysis above, will not be subject to any form of human rights conditionality under a human rights clause after the expiry of the Cotonou Agreement in 2020.

Leaving aside the possibility of invoking a human rights clause, and ignoring the framework of UN Security Council sanctions, there are two main possibilities for adopting measures in response to human rights violations that could breach obligations in the EPAs and interim EPAs. The first is under the public policy or security exceptions in the agreements themselves. As discussed further in section 8, these exceptions permit such measures, provided that they are the least trade restrictive and discriminatory measures reasonably available that achieve the objective of protecting human rights in the target country. The second is by denouncing the agreement. For this, no reasons are necessary; the main disadvantages are the time lag (at least six months) and the fact that the agreement as a whole needs to be terminated, which precludes an easy balance between 'carrot' and 'stick'. Treating such unilateral measures as legitimate countermeasures, on the other hand, is unlikely to be legally justified.

# 6 Analysis of options post-2020

## 6.1 Post-2020 options

Negotiations on post-2020 arrangements have yet to be formally commenced, but it is already possible to foresee the likely range of options. As described in a recent Joint Communication by the European Commission and the High Representative for Foreign Affairs and Security Policy, these are fourfold:

<sup>70</sup> See below at footnote 88.

<sup>71</sup> This is the solution that has been adopted in the Canada-EU Strategic Partnership Agreement, applicable to the Canada-EU Comprehensive Economic and Trade Agreement (CETA), as discussed below.

- (a) the Cotonou Agreement is replaced by a successor ACP-EU agreement covering essentially the same subject matter;
- (b) the Cotonou Agreement replaced by an 'umbrella' plurilateral ACP-EU agreement and separate regional (EU-African, EU-Caribbean and EU-Pacific) agreements;
- (c) the Cotonou Agreement is replaced by separate regional (EU-African, EU-Caribbean and EU-Pacific) agreements; and
- (d) the Cotonou Agreement is not replaced, and its subject matter continues in other forms, including the EPAs.

The choice between these options will no doubt depend on a range of factors, including the impact of Brexit on post-2020 relations, and the possible 'budgetisation' of the standalone European Development Fund (EDF). It is however also important to note that the European Commission and the High Representative for Foreign Affairs and Security Policy have expressed a preference for the second, 'umbrella' option, one important reason being that this is the best way of preserving the *acquis* on respect for human rights, democratic principles and the rule of law<sup>72</sup>.

The European Parliament has expressed a similar view. In October 2016, the European Parliament 'called for the essential elements in the Cotonou Agreement regarding human rights, democratic principles and the rule of law to continue to form the value-based foundation of a new agreement and 'reiterate[d] the importance of fully implementing Article 9 of the Cotonou Agreement'<sup>73</sup>. The Parliament also emphasised the need for a future human rights clause to apply to the EPAs. It 'call[ed] for a post-Cotonou Agreement as a political umbrella agreement under which binding minimum requirements for EPAs are set, in order to ensure continuity for EPA linkages in the existing Cotonou Agreement to sustainability provisions on good governance, respect for human rights, including among the most vulnerable people, and respect for social and environmental standards'<sup>74</sup>.

From the perspective of consistency in the EU's external human rights policy, there are undoubted advantages to this preference. The more that human rights clauses are individualised, the more risk there is that their meaning fragments, whether as a result of negotiating imperatives or interpretation. To the extent that the norms embedded in human rights clauses are intended to reflect universally applicable international norms, this would be regrettable.

## 6.2 Relevance of post-2020 options to human rights clauses

From the perspective of the design of a human rights clause, these different options can to some extent be conflated. First of all, where there is a framework agreement, it does not much matter which version of the human rights clause – the more elaborate model in the Cotonou Agreement or a simpler 'standard' version in most other agreements – is adopted. What is important is that it provides for 'appropriate measures' permitting the suspension not only of obligations in the agreement itself, but also of any other obligations owed to the same parties. This is of course unnecessary in the event of option (d), where the

<sup>72</sup> European Commission and High Representative for Foreign Affairs and Security Policy, Joint Communication to the European Parliament: A renewed partnership with the countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52 final, 22.11.2016, p. 25.

<sup>73</sup> European Parliament, Resolution of 4 October 2016 on the future of ACP-EU relations beyond 2020 (2016/2053(INI)), para 9.

<sup>74</sup> European Parliament, Resolution of 4 October 2016 (2016/2053(INI)), para 31.

only extant agreements are the EPAs. In that case, it is sufficient that the ‘appropriate measures’ apply to that agreement itself.

Having said this, several issues remain. One, which arises in the event that the relevant provisions of the Cotonou Agreement are adopted<sup>75</sup>, concerns the fact that some of the institutions mentioned in these provisions may need to be substituted or abandoned, depending on the identity of the parties to the agreement containing a human rights clause. A second, relevant to options (a)-(c), concerns the possible expiry of the framework agreement containing the human rights clause, and the need to preserve its effect for other agreements that are relying on this clause. This is necessary to avoid a repetition of the situation that has led to the commissioning of this study.

## 6.3 Institutions

As noted, the ACP-EU Council of Ministers plays an indispensable role in relation to Article 96 of the Cotonou Agreement, and any replication of this provision would need to substitute the relevant bilateral or multilateral institution established under the successor agreement. That is done for every ‘appropriate measures’ clause, so it will not present any difficulties. Beyond this, Annex VII of the Cotonou Agreement states that:

‘The Parties acknowledge the role of the ACP Group in political dialogue based on modalities to be determined by the ACP Group and communicated to the European Community and its Member States. The ACP Secretariat and the European Commission shall exchange all required information on the process of political dialogue carried out before, during and after consultations undertaken under Articles 96 and 97 of this Agreement’<sup>76</sup>.

Assuming that the ACP Group continues, it is technically possible to continue its involvement, as foreseen here, in political dialogue, not only under a successor ACP-EU agreement, but potentially even under a regional agreement or an EPA. If not, and this is perhaps more likely in the event that there is no successor ACP-EU agreement, this provision can simply be deleted.

Finally, Article 8 and Annex VII of the Cotonou Agreement refer to a range of other institutions that can, optionally, be involved in political dialogue, these being ACP regional organisations, the African Union, the ACP Group, the ACP-EU Joint Parliamentary Assembly, ACP national parliaments, the EU and its Member States. The Guidelines for ACP–EU Political Dialogue refer also to the involvement of non-state actors, including those described in Article 6 (the private sector, economic and social partners, including trade union organisations, and civil society in all its forms according to national characteristics)<sup>77</sup>. However, this long list of potential participants in political dialogue is purely optional. It is to be expected that these provisions could be taken over verbatim in an ACP-EU successor agreement, and that references to EU actors, institutions, and organs would be replaced by their regional equivalents.

## 6.4 Expiry of human rights clauses

As is presently apparent, when reliance is being placed upon a human rights clause in another agreement, it is sensible to guard against the possibility that that agreement may expire. This can be because of a time limit, as with the Cotonou Agreement, but it could also be because a party to that agreement suspends,

<sup>75</sup> These are Article 9(2)(4) (essential elements), Article 8 (political dialogue), Article 96 (consultations, appropriate measures and special urgency) and Annex VII (intensive political dialogue) of the Cotonou Agreement.

<sup>76</sup> Article 3(4) of Annex VII of the Cotonou Agreement.

<sup>77</sup> Paragraph 16 of ACP-EU Council of Ministers, Guidelines for the ACP-EU Political Dialogue (Article 8 and Annex VII of the Cotonou Agreement), ACP Doc ACP/29/013/02 Rev.5, Brussels, 20 April 2009, states that ‘[a]ll actors of cooperation, as defined in Article 6 of the Cotonou Agreement, should participate if and when possible and appropriate’.

terminates, denounces or for some other reason that agreement ceases to operate. At issue are possible human rights clauses in framework ACP-EU agreements that apply to EPAs and (possibly) to regional agreements, and human rights clauses in framework regional agreements that apply to EPAs.

In such circumstances, there are several ways to ensure the ongoing validity of the human rights clause in a framework agreement in relation to the other agreement. One option would be to prevent that clause from expiring. It is not unusual to state that treaties or provisions in treaties are permanent, or have a continuing life, even after the termination of the treaty; indeed, this is the default position under the Vienna Convention on the Law of Treaties<sup>78</sup>. A second option would be to make an effective human rights clause in a framework agreement a condition of the other agreement, along the lines of the ‘guillotine’ clause applicable to the EU-Switzerland bilateral agreements. For example, the EC/MS-Switzerland agreement on free movement of persons states that ‘[t]he seven Agreements referred to in paragraph 1 shall cease to apply six months after receipt of notification of non-renewal [...] or termination [of this agreement]’<sup>79</sup>. A third option would be to replicate an identical human rights clause in all agreements, but subject to an exclusive ‘fork in the road’ provision requiring a party to elect one of the available clauses. That provision might read ‘once a party has initiated the consultation procedure under this provision, or under Article [X] of the [framework agreement], the procedure selected shall be used to the exclusion of the other’<sup>80</sup>. This would mean that it would make no difference which mechanism is chosen, and if one expires there is always another that can be relied upon.

Any of these options can be chosen to avoid a human rights clause in a framework agreement expiring. They all have the same effect.

## 7 Suggested improvements to human rights clauses

### 7.1 The EU’s external human rights obligations

As has recently been recognised by the EU Court of Justice<sup>81</sup>, the EU is obliged to respect human rights in its external action, as a result of Articles 3(5) and 21(3) of the Treaty on European Union. Article 21(3) is particularly important, as it states that:

‘The Union shall respect the [principles set out in paragraph 1] in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.’

These principles are: ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for

<sup>78</sup> Article 56(1) of the Vienna Convention on the Law of Treaties states that ‘[a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal, or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.’

<sup>79</sup> Article 25(4) of EC/MS-Switzerland agreement on free movement of persons, OJ L 114, 30.4.2002, p. 6.

<sup>80</sup> For example, Article 2005(6) of NAFTA states that ‘once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.’ See North American Free Trade Agreement (NAFTA), ILM 32 (1993) at p. 289.

<sup>81</sup> Case C-263/14, *Parliament v Council*, EU:C:2016:435, paragraph 47; Case C-104/16 P, *Council v Front Polisario*, Opinion of Advocate General Wathelet, 13 September 2016, paras 254-269.



the principles of the United Nations Charter and international law'. This obligation therefore also requires the EU to respect extraterritorial human rights in relation the effects of its internal policies<sup>82</sup>.

This obligation has several consequences for human rights clauses in the EPAs. Principally, it means that the EU should ensure that it is able to make sure that these agreements do not result in a violation of human rights in the partner countries. But it also means that the EU should ensure that there are procedural mechanisms in place to make sure that such violations do not occur.

## 7.2 Standards

As noted above, the standards set out in Article 9(2)(4) of the Cotonou Agreement do not need any changes, unless it is desired and politically feasible to include rights that are not necessarily well accepted in partner countries, such as those relating to sexual orientation and gender identity.

## 7.3 Monitoring

First, it is important for the EPAs to provide for a mechanism for reviewing the implementation of the agreement in accordance with human rights norms. In *Council v Polisario*, Advocate General Wathelet considered that the EU was under an obligation to conduct a human rights impact assessment prior to the conclusion of a trade agreement with Morocco<sup>83</sup>. It would follow that the EU also has an ongoing obligation to monitor the impact of an agreement on respect for human rights, democratic principles and the rule of law.

Beyond this, it could be argued that, where respect for such values is an 'essential element' of the agreement, and given that the EU has obligations not to contribute to violations of such rights, the conduct of a third state with which the EU has concluded such an agreement should also be subject to continual review. That does not mean that the EU must invoke a human rights clause<sup>84</sup>, but it does mean that it should have sufficient information before determining whether that is a discretion that it should exercise.

In this context, it is appropriate to consider the role of civil society in relation to the human rights impact of trade agreements. The most recent EU free trade agreements foresee a role for civil society, either via an agreement-specific consultative committee (e.g. in the EU-Cariforum agreement), joint and separate meetings of agreement-specific 'Domestic Action Groups' (e.g. in the EU-Korea agreement) or individual meetings of agreement-specific civil society groups administered by a joint consultative committee composed of organised civil society in the EU and the other party (EU-Central America agreement).

The most advanced of these agreements is the EU-Cariforum agreement. The EU-Cariforum Consultative Committee has the status of an organ of the agreement, has direct access to the principal Joint Council, providing it with recommendations after consultation or on its own initiative. In addition, the Consultative Committee receives the reports of the Committees of Experts tasked with resolving disputes on the implementation of the labour and environment obligations<sup>85</sup>. The mandate of the Consultative Committee is to promote dialogue and cooperation 'encompass[ing] all economic, social and environmental aspects of the relations between the [parties], as they arise in the context of the implementation of this Agreement'<sup>86</sup>.

<sup>82</sup> Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', *European Journal of International Law*, Vol. 25:4, 2014, p. 1071.

<sup>83</sup> *Council v Front Polisario*, Opinion of Advocate General Wathelet, paras 261-264.

<sup>84</sup> Case C-581/11 P, *Mugraby*, ECLI:EU:C:2012:466.

<sup>85</sup> Article 189(6) and Article 195(6) of the Cariforum-EU agreement.

<sup>86</sup> Article 232(1) of the Cariforum-EU agreement.

It would be desirable to ensure that similar organs are established in the EPAs, but with an even broader mandate to consider the human rights impacts of the agreement.

## 7.4 Enforcement

There are several points to be made in relation to the enforcement of human rights clauses applicable to the EPAs.

### 7.4.1 Recent weakened enforcement provisions

The first, and most important recommendation, is to guard against the risk that negotiations on human rights clauses in a framework agreement result in a watered-down version of a human rights clause.

The prime example of such a watered down clause is that in the Canada-EU/MS Strategic Partnership Agreement<sup>87</sup>. That clause expressly limits the adoption of ‘appropriate measures’ to a case of ‘special urgency’, this being ‘a particularly serious and substantial violation of [the essential elements clause]’, which is further qualified by the statement that ‘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’<sup>88</sup>. This formulation matches the practice of the EU in adopting appropriate measures under human rights clauses, but it is much narrower than is possible under Article 96 of the Cotonou Agreement, or indeed most traditional human rights clauses.

Moreover, and even more seriously, this agreement states that application of ‘appropriate measures’ to the Canada-EU Comprehensive Economic and Trade Agreement (CETA) is limited to one measure alone: the termination of that agreement in accordance with its own provisions. Article 28(7) states:

[T]he Parties recognise that a particularly serious and substantial violation of human rights [...] as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Article 30.9 of that Agreement<sup>89</sup>.

But Article 30.9 of CETA permits termination on any grounds whatsoever. As a result, this is an entirely redundant provision.

### 7.4.2 Trigger for ‘appropriate measures’

A second issue concerns the trigger for ‘appropriate measures’ under a human rights clause. Under Article 96 of the Cotonou Agreement, as is standard, appropriate measures may only be taken once there is a violation of human rights, democratic principles or the rule of law by the other party. This limits the possibility of acting proactively to forestall violations of human rights, democratic principles or the rule of law.

It is true that the mechanism of political dialogue under Article 8 of the Cotonou Agreement is an ongoing obligation. However, the invocation of the consultations procedure under Article 96 depends upon ‘a Party consider[ing] that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law’ and cases of ‘special urgency’ are defined as ‘exceptional cases

<sup>87</sup> EU/MS-Canada Strategic Partnership Agreement (SPA), OJ L329, 3.12.2016, p. 45, signed 30 October 2016, provisional application of part within EU competence envisaged once approved by the European Parliament (Art 30.2 SPA).

<sup>88</sup> EU/MS-Canada Strategic Partnership Agreement, Articles 28(3) and (6).

<sup>89</sup> EU/MS-Canada Strategic Partnership Agreement, Article 28(7).



of particularly serious and flagrant violation of one of the essential elements [...] that require an immediate reaction'<sup>90</sup>.

In light of the EU's obligations, discussed above, to ensure that human rights are respected in its external action, it would be preferable for the EU to be able to act proactively. Reform to this effect can be effected relatively easily, with a clause that references the EU's own external human rights obligations. Accordingly, it is suggested that the wording of Article 9(2)(4) of the Cotonou Agreement be amended as follows:

'If [...] a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2) or that a provision of the Agreement restricts its own ability to meet its human rights obligations it may take appropriate measures.'

This would permit the EU to adopt measures in order to comply with its external human rights obligations. In addition, it would enable both parties to take measures in the event that the agreement itself has negative human rights impacts.

### 7.4.3 A complaint mechanism

A further question is whether civil society should be empowered to initiate the process for the enforcement of human rights obligations under the EPAs. Various models might be envisaged, depending on the issues arising. One option might be to establish a domestic mechanism providing for complaints to be made to the EU, with a mandatory requirement that the EU take appropriate measures, either with or without the cooperation of the other party, depending on the nature of the violation. There are precedents for such models. In relation to the labour standards provisions contained in the United States (US) free trade agreements, the US, by domestic legislation, gives any person (including natural persons and other organisations) the right to file a submission with the Office of Trade and Labor Affairs requesting that the government instigate consultations with the other party for alleged violations<sup>91</sup>. A detailed procedure exists, including public hearings, prior to the instigation of consultations. There have been many complaints since North American Free Trade Agreement (NAFTA) came into force, and there are ongoing panel proceedings in relation to Guatemala under Central American Free Trade Agreement (CAFTA)<sup>92</sup>.

There is nothing directly equivalent in the EU in relation to such matters, although there are related procedures in relation to economic matters. Thus, under the Trade Barriers Regulation, companies and industry associations are able to bring a complaint to the European Commission alleging violations of trade obligations (under both WTO law and free trade agreements), which, following an investigation and report, can lead to the bringing of legal action by the EU<sup>93</sup>. There are similar mechanisms for antidumping and countervailing duty cases.

The absence of any possibility for EU civil society to bring a complaint about human rights violations associated with a trade agreement stands in stark contrast to these examples. This also stands in stark contrast to the EU's values, which prize human rights, democracy and the rule of law. It is entirely consistent with these values to expect that a mechanism similar to the Trade Barriers Regulation be established, accessible to individuals and civil society, with a mandate to investigate and report on issues arising under

<sup>90</sup> Article 96(2)(a)(i) and (b)(i) of the Cotonou Agreement.

<sup>91</sup> US Bureau of International Labor Affairs; Notice of Reassignment of Functions of Office of Trade Agreement Implementation to Office of Trade and Labor Affairs; Notice of Procedural Guidelines (2006) 71 (245) Federal Register 76691.

<sup>92</sup> CAFTA-DR, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*.

<sup>93</sup> Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation OJ L349, 31.12.1994, p. 71, as amended.

the human rights obligations set out in the EU's free trade agreements, with the possibility of dispute settlement or other appropriate measures should the matter not be resolved satisfactorily<sup>94</sup>. As a domestic mechanism, it is equally appropriate for all of the EU's international agreements.

## 7.5 The human rights clause and labour standards obligations

Since the 2008 EU-Cariforum agreement, the EU's trade agreements have all contained 'sustainable development' chapters, focusing on labour and environmental standards, and setting out specific mechanisms for the implementation, monitoring and enforcement of these obligations.

There is an undeniable overlap between the coverage of the human rights clause and these provisions, and in particular those on labour standards<sup>95</sup>. It is beyond question that International Labour Organisation (ILO) core labour standards are also human rights<sup>96</sup>; and indeed the European Commission has acknowledged that core labour standards are covered by the standard human rights clauses<sup>97</sup>. Likewise, there is an overlap between human rights and environmental protection, particularly in the context of indigenous rights and transboundary pollution<sup>98</sup>.

However, the existence of overlapping monitoring and enforcement structures for these two overlapping sets of obligations is not necessarily a problem. Even if there is some potential duplication in coverage, there is value in being able to enforce core labour standards both under the dedicated mechanisms established for these standards and, where necessary, by adopting 'appropriate measures' on the basis that these standards are also human rights.

Indeed, the overlaps between these sets of provisions could be used to advantage in the manner suggested above, namely, to extend the competence of the civil society organ dedicated to monitoring the impact of the EPAs with labour and environmental standards to human rights issues as well. The same could be done with the other organs established under the EPAs.

## 8 Limits to human rights conditionality under WTO law

### 8.1 Obligations

Reactions to violations of human rights, democratic principles and the rule of law may take the form of restrictions on trade in goods and services. If so, these restrictions must be compatible with WTO law. It is almost certain that there would be violations of the most favoured nation obligations in the GATT and the

<sup>94</sup> Lorand Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements', German Institute for Human Rights and Misereor, 2014.

<sup>95</sup> Lorand Bartels, 'Human Rights and Sustainable Development Obligations in the EU's Free Trade Agreements', *Legal Issues of Economic Integration*, Vol. 40:4, 2013, pp. 297. The overlap is not perfect. There is no equivalent for 'democratic principles' in the sustainability chapter; nor does the human rights clause necessarily prevent a treaty party from reducing the level of protection offered by domestic labour and environment legislation.

<sup>96</sup> Philip Alston, "'Core Labour Standards" and the Transformation of the International Labour Rights Regime', *European Journal of International Law* Vol. 15:3, 2004, p. 457, at p. 476 and Virginia Mantouvalou, 'Are Labour Rights Human Rights?', *European Labour Law Journal*, Vol. 2, 2012, p. 151.

<sup>97</sup> European Commission, Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM(2001) 416, at p.12.

<sup>98</sup> Alan Boyle, 'Human Rights and the Environment: Where Next?', *European Journal of International Law*, Vol. 23, 2012, p. 613.

General Agreement on Trade in Services (GATS), which apply to all goods and service sectors<sup>99</sup>. Depending on their form, such measures might also violate other WTO obligations.

However, there are also exceptions to these obligations. The following considers, first, whether such measures can be justified on the basis that they are adopted under a regional trade agreement (such as a free trade agreement); second, whether they can be justified on public morals grounds; and third, whether they can be justified on national security grounds.

## 8.2 Justification on grounds of regional trade agreements

It is unlikely that trade restrictions based on human rights grounds can be justified on the grounds that they affect trade under a regional trade agreement. The test is whether a measure in violation of the most favoured nation obligation is necessary for the formation of a free trade agreement<sup>100</sup>. It is implausible that this test would be met for such restrictions.

Furthermore, the Appellate Body has made it clear that, from the perspective of WTO law, any other justifications for such measures that may exist in regional trade agreements, for example, based on a human rights clause, are irrelevant. The WTO Appellate Body made this clear in *Peru – Agricultural Products* when it said that:

‘the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements – namely: Article XXIV of the GATT 1994, or the Enabling Clause<sup>301</sup> as far as agreements between developing countries are concerned, in respect of trade in goods; and Article V of the General Agreement on Trade in Services (GATS) in respect of trade in services’<sup>101</sup>.

In principle, therefore, the analysis of WTO law provided in this section applies to any action taken pursuant to an EPA, even if the EPA purports to authorise such action. The Appellate Body also indicated, although in a highly ambivalent manner, that if the agreement contained an express statement that, with respect to a certain issue, WTO dispute settlement was foreclosed, it may respect such a statement<sup>102</sup>. But the EPAs contain no such statement.

## 8.3 Justification on grounds of public morals

It is, on the other hand, much more likely that trade restrictions for human rights reasons could be justified on the grounds that they are necessary to protect public morals under Article XX(a) of the GATT and Article XIV(a) of the GATS respectively (and for this purpose identically).

### 8.3.1 ‘Public morals’

In *US – Gambling* the WTO Panel said, in a statement implicitly endorsed by the Appellate Body, that:

‘the term “public morals” denotes standards of right and wrong conduct maintained by or on behalf of a community or nation [...] the content of these concepts for Members can vary in

<sup>99</sup> The test is whether there is an economic disadvantage. Policy considerations are irrelevant at this stage.

<sup>100</sup> WTO Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R, paras 46-47, adopted 22 October 1999.

<sup>101</sup> WTO Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R, para 5.113, adopted 31 July 2015.

<sup>102</sup> WTO Appellate Body Report, *Peru – Agricultural Products*, para 5.25.

time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values<sup>103</sup>.

In *US – Gambling*, the Panel accepted that US ‘public morals’ included concerns relating to risks to youth, including underage gambling, as well as pathological gambling<sup>104</sup>, while in *EC – Seal Products*, the Appellate Body accepted that EU public morals included ‘seal welfare, while accommodating IC [indigenous community] and other interests so as to mitigate the impact of the measure on those interests’<sup>105</sup>. In *China – Audiovisual Products*, both the Panel and the Appellate Body accepted, without question, the proposition that the importation of uncensored materials could have a detrimental impact on public morals in China<sup>106</sup>. And in *Colombia – Textiles*, the parties accepted that combatting money laundering was one of the policies designed to protect public morals in Colombia<sup>107</sup>.

This goes to show that there is a good deal of flexibility as to the outer limits of public morals in any given country. However, the evidence must support, or at least not contradict, such a claim. Of the cases mentioned, the respondent’s claim concerning public morals was primarily at issue in *EC – Seal Products*. In assessing the respondent’s claim, the Panel took note of the legislative history of the measure at issue, as well as legislation on similar issues, and the fact that the Treaty on the Functioning of the European Union (TFEU), one of the constitutional founding treaties of the EU, refers to animals as ‘sentient beings’<sup>108</sup>. In the present situation, it would be straightforward to demonstrate that the EU’s public morals include the protection of human rights in third countries. This much is demonstrated by Article 21 of the Treaty on European Union, which states that ‘the Union shall respect the [following] principles [...] in the development and implementation of the different areas of the Union’s external action’, these being ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law [...]’<sup>109</sup>.

### 8.3.2 Measures ‘necessary’ to protect public morals

Once the public morals at issue have been identified, the next question is whether the given measure is ‘necessary’ for their protection. This depends on a number of different factors. First, the measure must not be incapable of serving its objective, which is a very relaxed ‘suitability’ test<sup>110</sup>. Some degree of quantification of the contribution of the measure to its objective is, however, necessary for the next stage of the analysis, which is whether there is any alternative measure that is both reasonably available and less trade restrictive that achieves the objective towards which the measure at issue is directed. It could be argued that such other measures exist, for example negotiations, or financial and technical aid. It is difficult

<sup>103</sup> WTO Panel Report, *US – Gambling*, adopted 20 April 2005, para 6.465; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 20 April 2005, para 299.

<sup>104</sup> WTO Panel Report, *US – Gambling*, para 6.469. This finding was seemingly accepted by the Appellate Body.

<sup>105</sup> WTO Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, adopted 18 June 2014, para 5.169, referring to the objectives of the EU’s measure, which was later found to be provisionally justified as ‘necessary for the protection of public morals’.

<sup>106</sup> WTO Appellate Body Report, *China – Audiovisual Products*, WT/DS363/AB/R, adopted 19 January 2010, para 148. It is relevant, though not conclusive, that the point was not challenged by the complainant.

<sup>107</sup> WTO Appellate Body Report, *Colombia – Textiles*, WT/DS461/AB/R, adopted 22 June 2016, para 5.97.

<sup>108</sup> WTO Panel Report, *EC – Seal Products*, WT/DS400/R, adopted on 18 June 2014, para 7.631, referring back to paras 7.386-7.421 (findings made in relation to the equivalent provision of the TBT Agreement).

<sup>109</sup> See, further, Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’, *European Journal of International Law*, Vol. 25:4, 2014, p. 1071.

<sup>110</sup> WTO Appellate Body Report, *Colombia – Textiles*, WT/DS461/AB/R, adopted 22 June 2016, para 5.103.

in the abstract to assess such claims, but it is unlikely they would be fully effective on their own. At most, they might form part of a regulatory package, including trade measures of the type at issue, which together would constitute an appropriate means of achieving the specified objective<sup>111</sup>.

### 8.3.3 Chapeau

The final stage of analysis concerns the so-called chapeau of Article XX of the GATT and Article XIV of the GATS. This introductory paragraph to these provisions requires that measures provisionally justified under the subparagraphs of Article XX '[may] not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

The chapeau establishes three tests<sup>112</sup>. First, it only applies in relation to measures that discriminate between products from 'countries where the same conditions prevail'. Second, in relation to such products, the chapeau prohibits arbitrary or unjustified discrimination. Third, for such products, the chapeau prohibits measures that purport to 'disguise' an improper purpose, such as economic protectionism, with a proper purpose.

The first question, then, is whether a prohibition on the importation and sale of exploited products would result in any discrimination between products from countries where the same conditions prevail. It has been established that 'conditions' for these purposes are to be understood in terms of the objective of the measure at issue<sup>113</sup>. In the present case, the objective of the measure is to protect human rights in third countries. Provided that the EU's trade restrictive policies are applied equally to all countries in which there are human rights violations, conditions will not, relevantly, be the same. However, if they are the same, and assuming discrimination, it will be necessary to establish that this discrimination is necessary on some legitimate grounds. It is difficult to know, in the abstract, whether that is possible to argue. The key, in other words, is that an EU trade restriction on human rights grounds would survive the chapeau provided that it applies similar restrictions to other countries in the same situation. That may be hard to demonstrate.

### 8.3.4 Public morals exceptions in EPAs

The EPAs all contain exceptions using the same wording as Article XX of the GATT 1994. As these are almost certainly to be interpreted in line with WTO law, the foregoing interpretations and conclusions can be taken as applying to the application of these clauses to any trade measures adopted for human rights reasons affecting trade with an EPA party other than by suspending the agreement under a 'basis' clause. As described above, basis clauses depend on human rights violations by the other party. This does not assist a party to an EPA seeking to adopt restrictive trade measures for human rights reasons in the absence of such a violation. For example, such a party might wish to suspend an EPA obligation in order to protect human rights in its own territory. In these circumstances, that party would be able to rely on a public morals clause even though a 'basis' clause would be inapplicable.

## 8.4 Justification on grounds of national security

Another possible justification for restrictive measures consists in the national security exceptions set out in Article XXI of the GATT and, in identical terms, Article XIVbis of the GATS. These provisions state, relevantly<sup>114</sup>:

<sup>111</sup> WTO Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para 154.

<sup>112</sup> Lorand Bartels, 'The Chapeau of the General Exceptions to the WTO GATT 1994 and GATS Agreements: A Reconstruction' *American Journal of International Law*, Vol. 109:95, 2015.

<sup>113</sup> WTO Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, adopted 18 June 2014, para 5.300.

<sup>114</sup> A further provision permits measures adopted in pursuance of mandatory UN Security Council resolutions.

‘Nothing in this Agreement shall be construed: [...] (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of [goods/services] as carried out directly or indirectly for the purpose of provisioning a military establishment; [...] [or]

(iii) taken in time of war or other emergency in international relations’.

In one important respect, this is a flexible provision. It does not require that a measure be necessary for the protection of its essential security interests, merely that the WTO member at issue consider that it is necessary for its essential security interests. This raises two questions: first, whether the EU would claim that a measure adopted in response to human rights violations is necessary to protect its security interests and, second, if it does, whether there is any ‘good faith’ test that subjects such a claim to objective scrutiny. The answer to the first question is likely to depend on the country at issue; the answer to the second is difficult to determine, on the present state of the law.

Beyond this, however, the measure must either relate to military matters, or be adopted ‘in time of war or other emergency in international relations’. Contrary to the ‘which it considers necessary’ test, this is an objective test. There must be a war or other emergency in international relations. Of course, in cases involving serious human rights violations, such as a *coup d’état*, one or both of these situations may be present. However, this cannot be said of all of the human rights violations in relations to which the provisions can be invoked.

The scope for using this exception is therefore confined to the more extreme cases, and this depends upon a willingness of the EU to claim that its measure is necessary to protect its essential security interests, and is not merely in pursuance of respect by another country of human rights, democratic principles and/or the rule of law.

## 8.5 Conclusion

EU trade restrictions under a human rights clause remain subject to WTO law, and would almost certainly violate WTO obligations. The question is whether such violations can be justified. It is no answer to say that they are justified simply because they take place under a free trade agreement. However, they can, in principle, be justified on the grounds that they are adopted to protect EU public morals. There are, however, two conditions. One is that there must be no other less trade restrictive means of achieving this objective. The other is that any such restrictions must be on a non-discriminatory basis as between products from countries with similar risks of human rights violations, unless this can be justified. Furthermore, the public morals exceptions in the EPAs can, in principle, justify trade restrictive measures under those agreements even when such restrictions would not be possible on the grounds of a ‘basis’ clause (because the other party has not violated human rights).

## 9 Implementation issues

The next section contains a number of recommendations, and it is suggested here that an appropriate way to implement these recommendations would be in the context of the revision (or review) clauses contained in several of the EPAs referring to the expiry of the Cotonou Agreement. These provisions differ slightly in their wording, but are to this effect: ‘this Agreement may need to be reviewed in the light of the



expiration of the Cotonou Agreement'<sup>115</sup>. The interim EPAs do not contain relevant review or revision clauses.

These clauses are very open-ended, and there is no legal reason the present recommendations cannot be incorporated in revisions to the EPAs. On the other hand, there may be political obstacles. It is well known that the EU's policy of subjecting the Lomé Convention to human rights conditionality struggled throughout the late 1970s and 1980s to become a reality only in the mid-1990s, and that this was entirely as a result of intransigence on the ACP side. Resistance to human rights conditionality on the ACP side has fluctuated since then, and it has also not been consistent within the group. For example, reference to child labour in the Cariforum EPA drew inspiration from that region's own precedents. Resistance to new human rights clauses is therefore to be expected.

In this context, the following points should be borne in mind. As explained in this study, with few exceptions (Central Africa, Ghana and Côte d'Ivoire, and with a minor equivocation the EAC) the EPAs give the EU the power to suspend or terminate the EPAs partially or fully if the other party violates the essential elements currently set out in Article 9(2) of the Cotonou Agreement. This power derives from the rule of treaty law expressed in Article 60(3)(a) of the Vienna Convention on the Law of Treaties, which permits such action in the event that a party acts in such a way as to repudiate the agreement. Importantly, this can happen without any of the procedural conditions that are currently established in Article 8, Annex VII and Article 96 of the Cotonou Agreement. Those conditions are to the advantage of the other side. The baseline for negotiations on new human rights clauses in the context of new framework agreements is therefore not that the EPAs have no human rights clauses, but rather that they already have human rights clauses with no procedural protections. As such, agreeing to new human rights clauses is in the interests of the ACP states.

## 10 Conclusions and recommendations

The conclusions of this study may be summarised in the form of comments and recommendations.

### 10.1 Comments

1. Human rights clauses providing for 'appropriate measures' apply to other agreements unless otherwise specified.
2. When the Cotonou Agreement expires in 2020, it will still be possible to suspend the SADC, Cariforum and (most likely) EAC EPAs, as well as the Pacific Interim EPA and (most likely) the ESA Interim EPA if the other party violates human rights, democratic principles or the rule of law. But it will not be possible to do this for the Interim EPAs with Central Africa, Ghana and Côte d'Ivoire.
3. It is possible to institute *ad hoc* political dialogue and consultations prior to, during and after the suspension of these agreements, but such procedures are not mandatory, as they are under the Cotonou Agreement.
4. Such suspensions take effect as the right to suspend a treaty on the grounds of 'material breach' of that treaty by the other party, this being due to acts constituting an implied repudiation of the treaty under the rule of customary international law codified in Article 60(3)(a) of the Vienna Convention on the Law of Treaties. *In casu*, such a repudiation takes the form of a violation of the principles that are agreed to be the 'basis' of the agreement.
5. There are certain viable alternatives for suspending these agreements, namely sanctions pursuant to UN Security Council Resolutions, countermeasures when EU nationals are affected, sanctions relating

<sup>115</sup> Article 246(3) of the Cariforum EPA, Article 111(3) of the West Africa EPA, Article 116(3) of the SADC EPA and Article 142(3) of the EAC EPA.

to military establishments when this concerns EU security, and sanctions that are necessary to the protection of human rights as the EU's 'public morals', provided that these are also no more trade restrictive or discriminatory than necessary to that objective. As noted, it may be difficult to demonstrate that a trade restrictive measure is no more discriminatory than necessary to achieve the objective of protecting human rights in the target country.

6. EU law mechanisms on the suspension of agreements, or on the adoption of other restrictive measures, are of purely domestic relevance and do not affect the EU's ability to suspend agreements at the international level.
7. It is in the interests of the ACP countries to agree to new human rights clauses in post-2020 framework agreements. This is because the default position, if they do not, is not that the EPAs have no human rights clauses, but rather that they are subject to the same essential elements clauses as in the Cotonou Agreement, but this time enforceable by suspension or termination of the agreement under international treaty law, specifically, the rule reflected in Article 60(3)(a) of the Vienna Convention on the Law of Treaties, without any of the procedural conditions and safeguards provided for in Article 8, Annex VII and Article 96 of the Cotonou Agreement.

## 10.2 Recommendations

1. New human rights clauses modelled on Articles 8, 9, 96 and Annex VII of the Cotonou Agreement should be included in any agreements succeeding the Cotonou Agreement, or in the alternative in the EPAs themselves. Such clauses will have to adapt the institutions mentioned in these provisions, but otherwise they can be adopted relatively verbatim.
2. Care should be taken to ensure that any human rights clauses in framework agreements do not expire. This can be done by express statement, by a 'guillotine' clause linking the framework agreement to the EPA, or by a duplication of provisions in the framework agreement, separated in practice by a 'fork in the road' provision requiring the parties to elect one procedure.
3. It is essential that any new human rights clauses included in any Cotonou successor agreements provide for 'appropriate measures' which include the suspension of obligations under those agreements and also other agreements between the same parties. This is the effect of standard 'appropriate measures' clauses. Variations, such as that in Article 28(7) of the Canada-EU Strategic Partnership Agreement, which counteract such an effect, are to be avoided.
4. The standards set out in the essential elements clause are those set out in the Universal Declaration of Human Rights, and cover a large range of civil, political, social, economic and cultural rights. They may not however cover more recent rights, in particular those concerning sexual orientation and gender identity. If such rights are unambiguously to be covered in a new human rights clause, it is recommended that they be expressly referenced.
5. In order to facilitate the EU's compliance with its external human rights obligations under Articles 3(5) and 21(3)(1) of the Treaty on European Union, it is recommended that the standard human rights clause be amended so as to permit consultations and 'appropriate measures' proactively, which is to say, prior to the violation of human rights by either party. Such a clause may read: 'If [...] a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2) or that a provision of the Agreement restricts its own ability to meet its human rights obligations it may take appropriate measures'. Such a clause would have the additional advantage of permitting the parties to take action when the agreement itself threatens human rights.



6. In the case of the adoption of restrictive measures following a suspension of an EPA, indirect negative effects on regional EPA parties must be avoided. This should be done by a careful selection of products and services subject to the measures, with a view to selecting those that are only traded bilaterally between the EU and the target EPA party, and which are also not in competition with regional products and services (given the price depressing effects of trade restrictive measures), while taking into account the more favourable position of those products and services in the EU market.
7. Consideration should be given to ensuring that the human rights impacts of the EPAs, and the parties' compliance with human rights, are appropriately monitored by the organs established under those agreements, including, where appropriate, organs representing civil society.
8. Consideration should be given to the establishment of a complaints mechanism whereby civil society can initiate a procedure leading to dialogue, consultations and potentially the adoption of appropriate measures under a human rights clause. Such a procedure might be modelled on those that exist in relation to economic issues, such as under the Trade Barriers Regulation.
9. These recommendations should be taken into account in the context of the reviews that are envisaged in the Cariforum, SADC, West African and EAC EPAs specifically for matters arising as a result of the expiry of the Cotonou Agreement.

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