


## “New conditionality” in the EU’s “new generation” Agreements with Asian Countries


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**Abstract:** The objective of the study is to verify the implementation, by the EU, of the treaties’ obligations to proliferate “non-trade” European values in agreements with Asian countries. The thesis of the study is that the EU with “new generation” agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument supporting the strengthening and development of the western hemisphere is the policy of “change through trade” combined with the promotion of “free and fair trade”. We claim that this policy contributed to political change in the world – the expansion of international law, the principles of the UN Charter, and EU values. Influence beyond the parties to the agreements takes place, although formally the agreements only govern the relationship between the parties. This influence is the outcome of, among other things, demonstrating the implementation of the values and benefits of value-based cooperation. By agreements (FTAs, IPAs and political) with Asian countries, the network of connections among the states of the Western hemisphere is developed and the community of values reinforced. The institutionalisation of the community of values of EU-Asian countries also fosters the institutionalisation of ties among the democratic Asian countries.

## 1. The objective of the study

The objective of the study is to verify the implementation, by the European Union (EU), of the treaties' obligations to proliferate "non-trade" European values in Free Trade Agreements (FTAs) and Investment Protection Agreements (IPAs) as well as political agreements with Asian countries<sup>1</sup>. The verification was conducted by applying the formal-dogmatic approach (analysing international texts). Together with the critical constructivism method, these approaches identify the link between norms and the conditions and effects of their implementation. The division of values embraced by trade agreements into: trade (free and fair trade) and non-trade (workers' rights, sustainability) was conducted on the basis of vague criteria since these values are indivisible. The "free and fair trade" is correlated with peace and justice ("McDonald's Theory"<sup>2</sup>). "Non-trade" values have an impact on the functioning of the market – they are cost-driving elements, they shape a "level playing field"<sup>3</sup>.

In the study, we present conclusions drawn from the assessment of the policy of "conditionality" and norms, which establish this policy conducted through the prism of universal norms and values of international law. Conclusions resulting from the assessment of the economic effects of the agreements have been formulated with the application of the non-quantitative methods.

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<sup>1</sup> The EU and Japan are joined by the Economic Partnership Agreement and Strategic Partnership Agreement. EU-South Korea economic relations are governed by the FTA. The EU-ASEAN (Association of South East Asian Nations) FTA negotiations, which started in 2007, were interrupted in 2009. To fill the gap, negotiations on bilateral (trade and investment) agreements were launched. Agreements were concluded with Singapore and Vietnam. EU-Indonesia negotiations and an investment protection agreement with Myanmar are ongoing. FTAs are being negotiated with Australia, India, and New Zealand.

<sup>2</sup> According to which no country in which McDonald's operates will ever attack the (other) country in which McDonald's is located (Thomas L. Friedman, *The World is Flat. A Brief History of the Twenty-first Century* (New York: Farrar, Straus, Giroux, 2005), 421).

<sup>3</sup> Fabian Zuleeg, David Baldock, Pablo Ibáñez Colomo, Emily Lydgate, Marley Morris, Martin Nesbit, Jacques Pelkmans, Vincent Verouden, and Larissa Brunner, *Ensuring a post-Brexit level playing field*, European Policy Center, 2019, 10–11, 34–43, 98–115, 120–137, accessed March 2021, [https://www.epc.eu/content/PDF/2019/pub\\_9223\\_brexit\\_lpf.pdf](https://www.epc.eu/content/PDF/2019/pub_9223_brexit_lpf.pdf).

The thesis of the study is that the EU with “new generation” agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument supporting the strengthening and development of the western hemisphere is the policy of “change through trade” combined with the promotion of “free and fair trade”.

The auxiliary thesis is the recognition that the *modus operandi* of introducing the EU’s values does not infringe the state’s right to self-determination (“the principle of the sovereign equality”<sup>4</sup>; and Article 2.7 of the UN Charter<sup>5</sup>. The apparent conflict of values is a derivative of existing a common part of the collection of norms included in “international” and “domestic” affaires; the vagueness of their division – the common part is connected with progressive “internationalisation” of the affaires<sup>6</sup>.

The study focuses on a comparison of the scope and implementation of ‘old’ and ‘new’ conditionality in EU agreements. The study is placed in the broader context of cooperation within the West and with countries outside this hemisphere.

## 2. Literature review and research gap

Research devoted to human rights and freedoms in EU foreign policies have been conducted for many years. One of the streams of the research is “conditionality” in economic agreements initially focused on the bundles of relations between the EU- African, Caribbean and Pacific countries (ACP) or the EU-candidate states. In the case of the relations with the ACP, the Community/EU was searching for a shaky balance between the desire to support social and economic development while ensuring the respect for human rights and freedoms and the willingness to stop the expansion of the Eastern Bloc.

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<sup>4</sup> Hans Kelsen, “The Principle of Sovereign Equality of States As A Basis For International Organization,” *The Yale Law Journal* 53(2) (1944): 207–220.

<sup>5</sup> David R. Gilmour, “The Meaning of “Intervene” within Article 2 (7) of the United Nations Charter. An Historical Perspective,” *The International and Comparative Law Quarterly* 16 (2) (1967): 330–351; Leland M. Goodrich, “The United Nations and Domestic Jurisdiction,” *International Organization* 3(1) (1949): 14–28.

<sup>6</sup> Thomas Oppermann, “Intervention,” in *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt (NHPC, 1982), 233–236.

In the case of the candidate states, “conditionality” was inscribed in the Copenhagen criterion and referred to as Europeanisation – a candidate state declares the will of its implementation. “Conditionality” was implemented in relations of unequal partners; the stronger party of the EU “paid” for respecting the values – in new states (ACP) or young democracies (candidates) – with economic concessions. Simultaneously, the concessions did not threaten the economic interests of the EU, as the parties did not compete at the economic level. The implementation of values, “conditionality” encountered, however, barriers in the recipient states. One of them was the limited ability to internalise these “foreign” values.

However, the above bundles of studies are poorly linked. One of the streams was determined by the optics of human rights; it was reflected in studies, among others, by Philip Alston and J.H.H. Weiler<sup>7</sup>, Barbara Brandtner<sup>8</sup>, Mielle Bulterman<sup>9</sup>, Elena Fierro<sup>10</sup>, Lorand Bartels<sup>11</sup>, Justice Nwobike<sup>12</sup>, Andrew Williams<sup>13</sup>, Caroline Dommen<sup>14</sup>. The second stream was created by studies on the enlargement of the EU. Alston and Weiler, Bartels, Bulterman, and Fierro focused their studies on conditionality and human rights clauses

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<sup>7</sup> Philip Alston and J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights,” *European Journal of International Law* 9 (1998): 658–723.

<sup>8</sup> Barbara Brandtner and Allan Rosas, “Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice,” *European Journal of International Law* 9(3) (1998): 468–490.

<sup>9</sup> Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Antwerp: Intersentia, 2001).

<sup>10</sup> Elena Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhoff Publishers, 2004).

<sup>11</sup> Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford: Oxford University Press, 2005).

<sup>12</sup> Justice Nwobike, “The Application of Human Rights in African Caribbean and Pacific – European Union Development and Trade Partnership,” *German Law Journal* 6 (10) (2005): 1381–1406.

<sup>13</sup> Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press, 2006).

<sup>14</sup> Caroline Dommen, “The WTO, international trade, and human rights,” in *Beyond the Nations State. Human Rights in Times of Globalization*, ed. Michael Windfuhr (Uppsala: Global Publications Foundation, 2005), 52–74; Caroline Dommen, “Trade and human rights: towards coherence,” *International Journal on Human Rights* 2, Issue 3 (2005): 7–24.

in Community foreign policy. Williams analyzed human rights in the context of trade. Nwobike examined development aid policy as an instrument for the implementation of human rights in beneficiary states. Dommen analyzed the impact of WTO cooperation on human rights protection in developing countries. The effect of existing different bundles of relations resulted in a restricted cohesion in research; perceiving – in a limited scope – the feedback loop of the “values and economy”.

From this perspective, relations between the EU and Asian countries open a new research area. The EU’s partners are the stable states; on the one hand, they are unwilling to adopt “foreign values”, and on the other hand, economic co-operation with them promising mutual benefits poses a new challenge of rivalry to the EU. Therefore, the EU’s capability to “pay” for respecting the values with economic concessions is substantially limited. The contribution to fill the research gap thus determined is the objective of this study.

### 3. EU’s “conditionality” policy – concept

“Conditionality” is the EU’s systemic policy in frames of which the EU encourages its partners to base their trade relations on the foundation of adopted values (not directly connected to “trade & investment”) and verifies their implementation.

The catalogue of values embraced by “conditionality” has been extended. Initially, it was created, among others, by norms oriented to the change of internal relations in a state (party); they were norms connected to human rights and freedoms, labour rights or support for Small and Medium Enterprises, SMEs (at the “expense” of state-owned enterprises of the heavy industry).

In “new generation<sup>15</sup>” agreements, the objective scope of regulations was extended (among others by intellectual property rights, and services), whereas the catalogue of values was complemented by norms changing the parties’ universal and regional environment. The integral part of these agreements are Trade and Sustainable Development (TSD) chapters. The legal basis of

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<sup>15</sup> “First generation” agreements comprised agreements until 2006, reducing customs duties. Besides that the EU concludes agreements – Deep and Comprehensive Free Trade Areas: to support close economic relations with EU’s neighbours.

the policy of “conditionality” are the norms of the TEU<sup>16</sup> and TFEU<sup>17</sup> (articles 3.5<sup>18</sup> (with regard to art. 3.1) as well as 21.1., sentence 1<sup>19</sup>).

The agreements implementing the policy of “conditionality” are both agreements between the EU and the party (FTA – Free Trade Agreement) as well as mixed agreements (IPA – Investment Protection Agreement, political agreement). Which are chosen depends on the objective scope of the agreements (in FTAs EU has exclusive competences, while in the mixed agreements the competences are shared with member states, articles 3, 4, 207 and 216 TFEU<sup>20</sup>).

The catalogue of values included in agreements comprises: the “provisions whereby the Parties will reiterate their commitment to promote, protect and fulfil human rights and fundamental freedoms, which are universal and indivisible, as well as to promote the values of democracy, good governance, the rule of law, and the principles of non-discrimination, equality and solidarity”<sup>21</sup>. Including in trade agreements non-trade norms-values differentiates the EU’s trade agreements from “classical” trade agreements<sup>22</sup>.

The effects of implementation of policy of “conditionality” are twofold. On the one hand “conditionality” is an instrument enhancing the coherence

<sup>16</sup> The Treaty on European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

<sup>17</sup> The Treaty on the Functioning of the European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

<sup>18</sup> “In its relations with the wider world, the Union shall uphold and promote its values... It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

<sup>19</sup> “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: 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>20</sup> Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford and Portland: Hart Publishing, 2010).

<sup>21</sup> *Answers from the Commission to written questions*. OJ 2018 C 415/06.

<sup>22</sup> Regulations of classical FTAs focused on tariff cuts and trade in goods.

of the implemented political strategy (Article 21.3<sup>23</sup>), as well as fulfils the political strategic objectives in international relations using “trade”. On the other hand, “conditionality” constrains the circle of the partners of agreements to states/economic groupings approving of the objective values. Thus, the EU resigns from the co-operation with other ones, treating the adoption of values as an indispensable element of a negotiated agreement must compensate the other party for their acceptance<sup>24</sup>. Consequently, the price for the implementation of the EU’s political-strategic objectives in international relations is restricting or resigning from trade advantages with entities rejecting the EU’s values, when these advantages could be the source of financing of the implementation of EU’s internal strategies. Another threat from refraining from trade with “bastards<sup>25</sup>” being the allies of the West, is replacing them by authorities equally not respecting the values, only that they are hostile towards the West.

#### 4. New agreements and new recipients of “conditionality”

##### 4.1. New agreements

The European Union’s (“new generation”) FTAs, IPAs as well as political agreements are an element of the EU’s broader strategy combining economic objectives with social and political ones. The EU’s pursuit of bilateral agreements is motivated by the failures of multilateralism (WTO). Bilateral agreements are the only effective instrument for implementing the EU’s values and objectives in the areas governed by these agreements. Bilateralism as a *modus operandi* is the same for the EU, the US, and China<sup>26</sup>.

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<sup>23</sup> “The Union shall respect the principles and pursue the objectives... in the development and implementation of the different areas of the Union’s external action..., and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies.”

<sup>24</sup> Article 21.1., sentence 2 “The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the (EU) principles”.

<sup>25</sup> As President Roosevelt justified the cooperation with dictator Somoza in a conversation with his Secretary of State: “Sumner Welles, once said «Somoza’s a bastard! (son of bitch)» and Roosevelt replied, «Yes, but he’s our bastard (son of bitch)»” Paul Coe Clark Jr., *The United States and Somoza, 1933–1956. A Revisionist Look* (London: Praeger, 1992), xii.

<sup>26</sup> Alan Hervé, “The European Union and its model to regulate international trade relations,” Fondation Robert Schuman, accessed February 1, 2021, <https://www.robert-schuman.eu/>

But the agreements not only influence relations among the parties, but also the pluri- and multilateral relations. As it was investigated in the previous section, the EU, by agreements, pursues the policy of “change through trade<sup>27</sup>”, directly implementing EU’s systemic norms expressed in the TEU.

The novelty of concluded FTAs determines extending their objective scope to norms beside establishing the free trade area (i.e. gradually abolishing customs duties, eliminating or restricting the technical<sup>28</sup>, sanitary and phytosanitary<sup>29</sup> barriers). These new areas include:

- improving market access for service suppliers<sup>30</sup>;
- protection of intellectual property rights, geographical indications, access to the public procurement market as well as facilities in terms of a public-private partnership (PPP), etc. These norms directly influence economic activities, and are not embraced by the “first generation” agreements;
- sustainable development, human rights, labour rights as well as fair and ethical trade. These norms are also related with economy, although perceived, by the EU, among others, through the prism of the system of values represented and promoted in external relations.

The adopted solutions in terms of sustainable development co-create an executive scheme of regulations in trade agreements of the European model of sustainable development<sup>31</sup>. According to this scheme,

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en/european-issues/0554-the-european-union-and-its-model-to-regulate-international-trade-relations.

<sup>27</sup> It translates into the conditionality of granting and withdrawing benefits, e.g., in terms of GSP+, the EU withdrew preferences from Belarus (June 2007 “in response to Belarus’ violations of the core principles of the International Labour Organisation.” European Commission. “EU will withdraw GSP trade preferences from Belarus over workers’ rights violations”, last modified June 18, 2007, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_07\\_844](https://ec.europa.eu/commission/presscorner/detail/en/IP_07_844).

<sup>28</sup> Recognition of standards.

<sup>29</sup> They do not lower the standards of health and consumer protection.

<sup>30</sup> Liberalisation in the sphere of financial, telecommunication, transport, postal and courier services, etc.

<sup>31</sup> The solutions agreed will be reproduced; see “Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements,” last modified February 26, 2018, <https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf>.



the matter of sustainable development was distinguished in FTAs in the formula of Trade and Sustainable Development (TSD) chapters<sup>32</sup>. In accordance with these regulations: 1) FTA commitments are closely tied to multilateral international agreements (including the ILO conventions); and 2) the agreements envisage the operations of civil society institutions implementing and monitoring the implementation of sustainable development (and in Vietnam, *de facto*, the authorities’ consent to the establishment of civil society institutions<sup>33</sup>).

The philosophy of “new generation” FTAs is based on the recognition that it is possible to achieve an “effect of leverage”, i.e., achieve an impact of increased trade and investment to achieve progress on the promotion of decent work and environmental protection or the fight against climate change. The effects of this policy are measurable<sup>34</sup>. The analogical references to values are repeated by IPAs.

#### 4.2. Parties of agreements

The first partners – recipients of the policy of “conditionality” were the ACP states. This group was later joined by candidates for membership in the EC/EU. In this group, for many years, there were not any countries from South or Central America or Asia. This “geographic exclusion” was a result of the division of tasks between the USA and European allies. The area of a tight co-operation for the EU were Europe and Africa; whereas the USA extended the umbrella of the “Monroe doctrine<sup>35</sup>” over South and Central America and also included the Asia region to its responsibility area (under the regime of the “hub and spoke”).

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<sup>32</sup> The aim of the EU is distinguishing a part devoted to the TSD in each EU’s FTA.

<sup>33</sup> The parties recognised that the civil society institutions and organisations will share responsibility for monitoring the implementation of these commitments (they were included in a new EU support programme, among others, offering financial support).

<sup>34</sup> The example are changes in labour law (in Vietnam, but also in Georgia, El Salvador, and Guatemala in terms of enhancing the labour standards).

<sup>35</sup> On December 2, 1823, US President James Monroe, in annual message to Congress, divided the world into Western (American) and Eastern (European) sphere of influence. Recognising these hemispheres as areas of exclusive interest, determined by neighbourhood, excluded political influence of states from outside the hemisphere (e.g., European colonisation and political influences on the American continent).

The EU has been gradually going beyond the transatlantic area. In the economic sphere, it was correlated with globalisation, in others it results, among others, from striving to the “strategic autonomy”<sup>36</sup>. The EU’s conclusion of agreements with Asian countries has been determined by the economic potential of countries in this region, combined with the threats to the international order located here and radiating far and wide.

The EU’s trade agreements with Asian countries began with the FTA with South Korea, which was later complemented by the Framework Agreement (it provides basis for closer political cooperation)<sup>37</sup>. The provisions regulating “conditionality” were included in chapter 13 of the FTA. The political framework of the co-operation determined in the Framework Agreement is underlined already in the Preamble, where the parties referred to “their traditional links of friendship and the historical, political and economic ties, which unite them”. They emphasised that their relationship is of a comprehensive nature. They committed themselves to a regular political dialogue, which was to result in a partnership in all fields. They emphasised the community of values<sup>38</sup> as well as they share the perception of challenges faced by the international community (climate issues, sustainable development, terrorism, countering the proliferation of weapons of mass destruction, etc.). The Preamble included an extremely wide catalogue of the spheres of co-operation. Such an extensiveness and cohesion of the catalogue indicates the intention to build ties among the allies. The commitments in this regard were specified in Title I, II and III of the Framework Agreement. The implementation of this agreement decides about the development of the strategic alliance.

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<sup>36</sup> Among others, President of the European Council Charles Michel was talking about it in his speech of 28 September 2020 – “Strategic autonomy for Europe - the aim of our generation” and President of the French Republic Macron (interview of 16 November 2020 “Doktryna Makrona: rozmowa z prezydentem Francji”).

<sup>37</sup> The EU-South Korea FTA was ratified in 2015 (since 2011 it was provisionally applied). Domestic Advisory Groups and mechanism for setting differences monitor implementation of the Agreement in the area of sustainable development and workers’ rights.

<sup>38</sup> Mark R. Kramer and Marc W. Pfitzer, “The Ecosystem of Shared Value,” *Harvard Business Review* (October 2016); Plamen Akaliyski, Christian Welzel, and Josef Hien, “A community of shared values? Dimensions and dynamics of cultural integration in the European Union,” *Journal of European Integration* (2021): 1–21, <https://doi.org/10.1080/07036337.2021.1956915>.

Another Asian partner bound with the EU is Japan. Since 1 February 2019, the EU is linked to Japan by the Economic Partnership Agreement (EPA) and the Strategic Partnership Agreement (SPA) (works on the Investment Protection Agreement (IPA) continue). The next two countries in the region which have signed agreements with the EU are Singapore and Vietnam. On 21 November 2019, the FTA with Singapore entered into force (the IPA is awaiting ratification), on 30 June 2019, the FTA and the IPA with Vietnam were signed.

There are many similarities between the EU FTA with South Korea and other Asian partners. The community of values was recalled by the EU and Singapore in the Preamble of the FTA. This FTA also includes norms determining “conditionality” regarding to the TSD. A broad reference to the community of values was also included in the Preamble of the EU-Japan EPA. In this EPA the TSD Chapter was also distinguished. In the case of the EU-Japan relations – similarly to the case of South Korea – there is a legal basis (the political agreement) of the strategic alliance. In the Preamble and text of the SPA, a detailed catalogue of common values and threats embraced by the co-operation were included.

There are also ongoing talks, such as negotiations on trade agreements with Australia and New Zealand. They are well advanced. The agreements will create new legal frameworks and give a strong development impulse to the advanced economic co-operation between the EU and those – geographically distant, but politically close – states. There is, however, a lack of substantial progress in negotiations on the FTA with India started in 2007.

Summing up, the process of establishing bilateral economic, political, and social ties between the EU and the democratic states of the Indo-Pacific region is advanced<sup>39</sup>. Finalisation of the process – reproducing the ties between the USA and the states of the region – will strengthen the cohesion of the Western hemisphere and may contribute to the institutionalisation of the co-operation among the states of the Indo-Pacific region<sup>40</sup>. The new in-

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<sup>39</sup> The region, in the US and its European Allies nomenclature, stretched from the east coast of Africa, across the Indian Ocean and into the western Pacific, encompassing Australia and Japan.

<sup>40</sup> Jerzy Menkes, “Demokratyczny Diament Bezpieczeństwa – kontekst prawnomiędzynarodowy,” in *Demokratyczny Diament Bezpieczeństwa – budowa nowego ładu pacyficznego*, ed. Andżelika Kuźnar (Warszawa: C.H. Beck, 2021), 12–57.

stitutions of cooperation of democratic Indo-Pacific states and their plurilateral relations with the EU are turbulent. Threats are both external, from counter-system states (China, Russia, North Korea) and internal – derived from rivalry or failure to communicate. The Australia-UK-US agreement<sup>41</sup> and France’s reaction in the form of summoning ambassadors “for consultations” and announcing a slowdown in EU-Australia FTA negotiations is an illustration of this<sup>42</sup>. France reacted to one of the consequences of AUK-US, namely when Australia decided to buy American submarines instead of French ones.

#### 4.3. EU-China, Comprehensive Agreement on Investment

Recently, in December 2020, the principles of the Comprehensive Agreement on Investment (CAI) with China were agreed on<sup>43</sup>. From the perspective of “conditionality”, an ambiguous picture emerges from the analysis of this agreement. This agreement, and more broadly the economic relationship with China, forces the EU to review in practice the hierarchy of values (expressed in conditionality) and economic interests, economic realities<sup>44</sup>. On May 2021, the European Parliament passed a resolution “on Chinese countersanctions on the EU entities and MEPs and MPs” to freeze ratification of the EU-China CAI. The freeze of ratification<sup>45</sup> was a consequence of the allegations on human rights violations in the region of Xinjiang.

<sup>41</sup> “Joint Leader Statement on AUKUS,” accessed September 15, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aukus>.

<sup>42</sup> Niklas Swanström and Jagannath Panda, “AUKUS: Resetting European Thinkg on Indo-Pacific?,” *Institute for Security & Development Policy. Special Paper* (October 2021).

<sup>43</sup> European Commission, “EU-China Comprehensive Agreement on Investment (CAI),” last modified January 22, 2021, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

<sup>44</sup> Katharina Meissner and Lachlan McKenzie, “The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes,” *Journal of European Public Policy* 26, no. 9 (2019): 1273–1291.

<sup>45</sup> “10. Takes the position that any consideration of the EU-China Comprehensive Agreement on Investment (CAI), as well as any discussion on ratification by the European Parliament, has justifiably been frozen because of the Chinese sanctions in place; demands that China lift the sanctions before Parliament can deal with the CAI, without prejudice to the final outcome of the CAI ratification process; expects the Commission to consult with Parliament before taking any steps towards the conclusion and signature of the CAI; calls on the Commission to use the debate around the CAI as leverage to improve the protection

On the one hand, *the agreement in principle* was announced directly before taking office by US President J. Biden, in the situation of the escalation of tensions in USA-China relations. The criticism of China’s actions, from the USA, its allies, and institutions of the West (e.g., NATO) relates not only to trade in the broadest sense, but also compliance with international law and universal values. The announcement of the Agreement may be a promise of a concession from the main EU states in relations with China.

On the other hand, already the CAI includes a wide and differentiated catalogue of norms of the “conditionality” nature; it signals that the analogical norms will be included in the FTA. Controversial is, however, the hierarchy of values in the Preamble; defence of economic interests in the formula of a “level playing field” precedes the reference to the UN Charter and the Universal Declaration of Human Rights. These references are – in comparison with the TSD in “new generation” FTAs – narrow. Simultaneously, the parties agreed that the co-operation will be realised with the respect for “the objective of sustainable development”, and to “promote investment in a manner supporting high levels of environmental and labour rights’ protection, including fighting against climate change and forced labour”. In the agreement, an imbalance between the meaning assigned to sustainability and human rights and freedoms as well as labour rights is noticeable (e.g., CSR was reduced to a relation with “sustainable growth”). The parties confirmed, however, their obligations assumed as a member of the International Labour Organization. In the IA, the possibility of “reviewing, monitoring and assessing” regarding human rights and freedoms as well as labour rights was not envisaged. To sum up, the EU has achieved the inclusion of a TSD chapter in the EU-China EU IPA in line with the practice of new generation agreements. However, the normative content of the chapter has been truncated compared to TSD’s chapters in other EU agreements. The complete picture of the continuation of the policy or concessions will only emerge from the FTA and the implementation of agreements.

The signing and subsequent freezing of the ratification of the CAI were influenced by China’s behaviour, the attitude of the US and the West’s

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of human rights and support for civil society in China and reminds the Commission that Parliament will take the human rights situation in China, including in Hong Kong, into account when asked to endorse the CAI”.

failure to develop (and subsequently work out) a concerted foreign policy. Trump's policy of weakening Western ties de facto forced the EU to seek strategic autonomy, including the widening of the circle of cooperation. The EU's decision to conclude economic agreements with China reflected China's economic and political weight combined with the philosophy of the "change through trade". The agreement was signed despite the evolution of Chinese policy contrary to Western expectations. The Chinese authorities have both rejected Western values (convergence) and abused the WTO membership to gain unilateral advantages contrary to WTO objectives. Western recognition of China as a strategic rival and the consolidation of allies are changing the way of conducting the policy.

## 5. "Conditionality" versus self-determination

With respect to "conditionality" in the European Union's agreements (primarily, with the ACP, but also with candidate states) an objection was raised that the EU imposes, in this way, "its" system of values and that such an operation is contrary to the "right to self-determination" – the principle of the UN Charter.

By the policy of "conditionality" the state's right to choose freely its political, economic, social, and cultural systems will be infringed. The state's right to "freely chose" is confirmed and guaranteed by articles 1, para 2 and 55, para 1 of the UN Charter as well as art. 1.1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. However, there are no grounds for qualifying the "conditionality" constituting *modus operandi* in shaping the internal relations of the states-parties and the system of values of the international community as *contra legem* actions. The principle of *volenti non fit iniuria* (to a willing person, injury is not done) co-decides about that and about linking the EU's values to compliance with the values accepted by the international community. The norms embraced by "conditionality" – including those constituting the TSD – in all EU agreements are consistent with the *jus cogens* norms of international law and international commitments of the parties.

From the perspective of assessing the effectiveness of the policy, the lack of "conditionality" decides about the competitiveness of other offers of cooperation addressed to the ACP countries from China and Russia, as well as states from other regions. The negative evaluation of the realization of

the commitments embraced by “conditionality” is a source of disputes of Poland and Hungary (EU members) with the EU as well as arguments over deepening the EU’s ties with Turkey. By concluding agreements, the EU demonstrates its international credibility and normative powers.

## 6. Conclusions

In this study we have formulated and proven the thesis that the EU with “new generation” agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument for that is the policy of “change through trade”, which is implemented by the “conditionality” in EU agreements.

The West believes in the possibility of bringing about the desirable changes, from the perspective of the values represented, and hopes that such changes will benefit everyone. The balance of the effects of “conditionality” in the lifetime of the agreements is positive. Standards of adherence to international law, respect for the principles of the UN Charter, the dissemination of EU values are improving. The balance is positive despite the fact that many states systematically violate the commitments made, and there is a regression in respect for the values covered by conditionality in many states.

This regression is influenced by, *inter alia*, the agreements concluded by the EU. And the impact of these agreements is not limited to the parties. The broader impact of EU agreements, beyond the parties to the agreements, is the result of, among other things, demonstrating the realisation of the values and benefits of value-based cooperation. With its agreements (FTAs, IPAs, and political agreements) with Asian countries, the EU is developing and strengthening the network of links between the countries of the Western hemisphere, reinforcing the Western community of values. The institutionalisation of the community of values of EU and Asian countries also fosters the institutionalisation of ties between democratic Asian countries. Through these agreements, the EU pursues an objective of strategic autonomy in a formula complementary (not competitive) to the relationship in the triangle: EU with Asian countries and the US.

## References

- Akaliyski, Plamen, Christian Welzel, and Josef Hien. "A community of shared values? Dimensions and dynamics of cultural integration in the European Union." *Journal of European Integration* (2021): 1–21. <https://doi.org/10.1080/07036337.2021.1956915>.
- Alston, Philip, and J.H.H. Weiler. "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights." *European Journal of International Law* 9 (1998): 658–723.
- Bartels, Lorand. *A model human rights clauses for the EU's International Trade Agreements*. German Institute for Human Rights, 2014.
- Bartels, Lorand. *Human Rights Conditionality in the EU's International Agreements*. Oxford: Oxford University Press, 2005.
- Brandtner, Barbara, and Allan Rosas. "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice." *European Journal of International Law* 9(3) (1998): 468–490.
- Bulterman, Mielle. *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality*. Antwerp: Intersentia, 2001.
- Clark, Paul Coe Jr. *The United States and Somoza, 1933–1956. A Revisionist Look*. London: Praeger, 1992.
- "Doktryna Makrona: rozmowa z prezydentem Francji." Accessed February 18, 2021. <https://legrandcontinent.eu/pl/2020/11/16/macron/>.
- Dommen, Caroline. "The WTO, international trade, and human rights." In *Beyond the Nations State. Human Rights in Times of Globalization*, edited by Michael Windfuhr, 52–74. Uppsala: Global Publications Foundation, 2005.
- Dommen, Caroline. "Trade and human rights: towards coherence." *International Journal on Human Rights* 2, Issue 3 (2005): 7–24.
- European Commission. "EU will withdraw GSP trade preferences from Belarus over workers' rights violations." Last modified June 18, 2007. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_07\\_844](https://ec.europa.eu/commission/presscorner/detail/en/IP_07_844).
- European Commission. "EU-China Comprehensive Agreement on Investment (CAI)." Last modified January 22, 2021. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.
- "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements." Last modified February 26, 2018. <https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf>.
- Fierro, Elena. *The EU's Approach to Human Rights Conditionality in Practice*. The Hague: Martinus Nijhoff Publishers, 2004.



- Friedman, Thomas L. *The World is Flat. A Brief History of the Twenty-first Century*. New York: Farrar, Straus, Giroux, 2005.
- Gilmour, David R. “The Meaning of “Intervene” within Article 2 (7) of the United Nations Charter. An Historical Perspective.” *The International and Comparative Law Quarterly* 16 (2) (1967): 330–351.
- Goodrich, Leland M. “The United Nations and Domestic Jurisdiction.” *International Organization* 3(1) (1949): 14–28.
- Hervé, Alan. “The European Union and its model to regulate international trade relations.” Fondation Robert Schuman. Accessed February 1, 2021. <https://www.robert-schuman.eu/en/european-issues/0554-the-european-union-and-its-model-to-regulate-international-trade-relations>.
- Hillion, Christophe, and Panos Koutrakos. *Mixed Agreements Revisited: The EU and its Member States in the World*. Oxford and Portland: Hart Publishing, 2010.
- “Joint Leader Statement on AUKUS.” Accessed September 15, 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aucus/>.
- Kelsen, Hans. “The Principle of Sovereign Equality of States As A Basis For International Organization.” *The Yale Law Journal* 53(2) (1944): 207–220.
- Kramer, Mark R., and Marc W. Pfitzer. “The Ecosystem of Shared Value.” *Harvard Business Review* (October 2016).
- Meissner, Katharina, and Lachlan McKenzie. “The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes.” *Journal of European Public Policy* 26, no. 9 (2019): 1273–1291.
- Menkes, Jerzy. “Demokratyczny Diament Bezpieczeństwa – kontekst prawnomiędzynarodowy.” In *Demokratyczny Diament Bezpieczeństwa – budowa nowego ładu pacyficznego*, edited by Andżelika Kuźnar, 1–50. Warszawa: C.H. Beck, 2021.
- Nwobike, Justice. “The Application of Human Rights in African Caribbean and Pacific – European Union Development and Trade Partnership.” *German Law Journal* 6 (10) (2005): 1381–1406.
- Oppermann, Thomas. “Intervention.” In *Encyclopedia of Public International Law*, edited by Rudolf Bernhardt, 233–236. NHPG, 1982.
- “‘Strategic autonomy for Europe – the aim of our generation’ – speech by President Charles Michel to the Bruegel think tank.” Accessed February 18, 2021. <https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/1-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-dis-cours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/>.

- Swanström, Niklas, and Jagannath Panda. "AUKUS: Resetting European Think on Indo-Pacific?" *Institute for Security & Development Policy. Special Paper* (October 2021).
- Williams, Andrew. *EU Human Rights Policies: A Study in Irony*. Oxford: Oxford University Press, 2006.
- Zuleeg, Fabian, David Baldock, Pablo Ibáñez Colomo, Emily Lydgate, Marley Morris, Martin Nesbit, Jacques Pelkmans, Vincent Verouden, and Larissa Brunner. *Ensuring a post-Brexit level playing field*. European Policy Center, 2019. Accessed March 2021. [https://www.epc.eu/content/PDF/2019/pub\\_9223\\_brexit\\_lpf.pdf](https://www.epc.eu/content/PDF/2019/pub_9223_brexit_lpf.pdf).