

GT12 – Make-or-break:

Including multilateral environmental agreements as “essential elements” in EU free trade agreements

Introduction

This note, which focuses on introducing “essential element” clauses in EU FTAs, is prepared as part of a series of publications that Europe Jacques Delors has undertaken with the support of the European Climate Foundation, to explore critical issues at the intersection of trade and sustainable development. This policy paper builds on preliminary ideas on this issue set out in [GT7](#), entitled *Sustainable Developments in EU trade Agreements*.

The European Union (EU) is increasingly recognizing the importance of linking trade with environmental objectives. The Green Deal notes that “trade policy could serve as a platform to engage with trading partners on climate and environmental action”¹. Similarly, the Trade Policy Review published by the European Commission in 2021 highlights the important role of trade policy in combatting climate

¹ European Commission, 11 December 2019. “The Green Deal”.

Authors

**COLETTE
VAN DER VEN**

Research
Associate

**PASCAL
LAMY**

Vice-president of
Europe Jacques Delors
and Coordinator of
the Jacques Delors
institutes

**GENEVIÈVE
PONS**

Vice President and
Director General
of Europe Jacques
Delors

**PIERRE
LETURCQ**

Director of
Studies and
Development

change and environmental degradation, noting that progress will depend on the level of ambition adopted by global partners that are large emitters².

Free Trade Agreements (FTAs), which comprise a significant part of the EU's trade policy, are a critical tool for aligning the EU's trade and environmental agendas. FTAs can serve as a platform of engagement on sustainability issues with global trade partners and facilitate trade in green technologies, goods, services, and investment. In addition, FTAs can encourage the ratification and implementation of commitments made under Multilateral Environmental Agreements (MEAs). Hitherto, this has been done in EU FTAs through provisions that reaffirm the parties' commitments to MEAs that they have ratified and require the parties to implement them. However, these provisions may be inadequate to incentivize compliance with MEAs, as they fail to stipulate the consequences of a breach.

To address limitations of existing MEA references in FTAs, momentum is building in the EU to elevate MEA provisions to the status of "essential element" clauses. Specifically, in its 2021 Trade Policy Review and 2022 Review of Trade and Sustainable Development provisions, the Commission announced its intent to make the Paris Agreement an essential element of future trade agreements³. So far, this approach has already been adopted in the EU-UK Trade and Cooperation Agreement (TCA). In other recently concluded, or ongoing FTA negotiations, such as the EU-New Zealand FTA and the EU-Mercosur FTA respectively, the parties' obligations under the Paris Agreement are highlighted, but not as part of an essential element clause.

Legally, turning the Paris Agreement into an essential element of the FTA allows the parties to suspend the trade agreement in whole or in part, following a breach of the Paris Agreement. This marks an important innovation in the

EU's approach to sustainable trade, with potential significance for the wider sustainability agenda⁴.

The EU's commitment to turning the Paris Agreement into an essential part of its FTAs represents a significant step towards better aligning environmental and trade objectives in FTAs. However, it is only the beginning of what will likely be a complicated and lengthy process focused on how to operationalize these essential element clauses, and on identifying what MEAs, other than the Paris Agreement, could be elevated to essential elements of the EU's FTAs. Indeed, the Commission in the Trade Policy Review has noted that it will evaluate the possibility of including the Convention on Biological Diversity (CBD) as an essential element in its FTAs⁵. Moreover, once a more comprehensive list of MEAs has been identified, work must be done to clarify how the parties can establish a breach of an essential MEA, as well as how FTAs can be a more effective vehicle to ensure compliance with MEAs.

To further facilitate the uptake of the essential element concept in the context of MEAs, this policy brief first explores the origin of essential element clauses and the rationale of applying them to MEAs. It then develops parameters to assess what other MEAs could appropriately be considered essential elements of future EU FTAs. Finally, it explores, with an emphasis on the Paris Agreement, how to operationalize essential provisions in MEAs by distilling provisions that set out the "essence" of the MEA.

² European Commission, 18 February 2021, "Trade Policy Review".

³ European Commission, 18 February 2021, "Trade Policy Review"; European Commission, 22 June 2022, "TSD Review".

⁴ Bryan, Katharina, 2 February 2021, "Climate change and human rights in EU international agreements: Essential elements" (<https://www.linkedin.com/pulse/climate-change-human-rights-eu-international-agreements-bryan/>)

⁵ Communication from the Commission, 22 June 2022, "The power of trade partnerships: together for green and just economic growth".

I. “Essential element” clauses – an overview

1. What are essential element clauses?

Essential element clauses signal that certain provisions are considered fundamental to accomplishing the object and purpose of the agreement. When a provision is considered “essential” to the agreement, it creates the possibility for a party to the agreement to fully or partially suspend the agreement in the event of a material breach. The legal basis for this is the Vienna Convention on the Law of Treaties (VCLT), which defines a material breach, *inter alia*, as a “violation of a provision essential to the accomplishment of the object or purpose of the treaty”. When this type of breach exists, it entitles the other party to terminate (or suspend) the treaty in whole or in part⁶.

Essential element clauses can be distinguished from “non-essential” clauses in two main ways. First, elevating a provision to an essential element of the agreement means that a party can unilaterally decide that there has been a breach and take appropriate action accordingly. By contrast, in a situation concerning a non-essential clause, a party cannot act based on a unilateral determination of a breach. Rather, whether a party has acted inconsistently with one or more provisions of the FTA must be determined as part of a dispute settlement process, or through alternative dispute resolution.

Second, elevating a provision to essential element status raises the severity of the consequences of a breach compared to a breach of a non-essential clause, given that it could lead to a suspension of the agreement. A finding

⁶ The Vienna Convention on the Law of Treaties, Article 60 (1) establishes that “a material breach of a bilateral treaty 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”. Article 60 (3) further specifies that a material breach consists, *inter alia*, in “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”. (emphasis added).

of non-compliance of a non-essential clause in an EU FTA would, at most, result in requiring that the breaching party bring its measure into compliance with the agreement, or else be subject to retaliatory measures proportionate to the harm inflicted by the breach. With respect to environmental provisions set out in most EU Trade and Sustainable Development (TSD) chapters, disputes need to be submitted to a panel of experts charged with adopting non-binding recommendations, excluding the use of economic sanctions in case of failure of observance⁷. Elevating a provision previously set out in the TSD chapter and not subject to regular dispute settlement to essential element status would thus entail an even greater significance with regards to enforcement options⁸.

2. The application of “essential element” clauses to human rights, democratic principles, and the rule of law

Until recently, essential element clauses have only been applied in the context of human rights and democracy. Their origin dates back to wide-scale human rights abuses committed by Idi Amin in Uganda in 1977. In the face of these abuses, the European Economic Community (EEC) was unable to stop providing financial support, given that the Lomé Agreement did not establish commitments to human rights and democracy as an essential element of the agreement that would have allowed the EEC to suspend its commitments⁹. Thus, the EU progressively moved towards adopting an approach that would give it the possibility to suspend obligations under international agreements, where required¹⁰.

⁷ EU-New Zealand FTA: Towards a new approach in the enforcement of trade and sustainable development obligations”, 25 September 2022, (<https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/>)

⁸ It must be noted that the EU, in its Action Plan, has announced its intention for core provisions of the TSD to apply the option of sanctions as a last resort in the case of non-compliance with a panel report.

⁹ Hachez, Nicolas, 2015, “‘Essential elements’ clauses in EU trade agreements making trade work in a way that helps human rights?”

¹⁰ *Ibid.*

In 1995, the EU began integrating “essential element” clauses for human rights, democratic principles, and the rule of law into all its cooperation and trade agreements. Over time, the EU also started to include “non-execution” clauses that would stipulate the exact consequences attached to a violation of the essential element clause. Essential element clauses that have been set out as part of one agreement have also been cross-referenced in subsequent agreements.

One of the more comprehensive “essential element” clauses is set out in the Cotonou Agreement, a treaty between the EU and African, Caribbean and Pacific (ACP) Group of States. It provides that “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”¹¹. Furthermore, Article 96 of the Cotonou Agreement comprises the non-execution clause, which reveals a gradual approach to addressing violations of the essential elements clause: except for situations of extreme urgency, the parties shall engage in consultation prior to adopting appropriate measures. It also highlights that “appropriate measures” must be applied in accordance with international law and be proportional to the violation¹². The detailed provisions set out in the non-execution clause suggest that it was not only meant to penalize human rights violations, but also to promote the implementation of human rights, democratic principles, and the rule of law, by combining “strong elements of both coercion and persuasion”¹³. While the Cotonou Agreement expired in 2020, the post-Cotonou Agreement likewise refers to respect for human rights,

democratic principles, and the rule of law as essential elements of the post-Cotonou Agreement.

Despite the widespread inclusion of essential element clauses in its agreements, the EU has rarely activated or invoked the clause and, where it has, it has never suspended or terminated the trade agreement¹⁴. Part of the reason might be that the consequences of doing so would be very costly, not only for the trading partner but also for the EU¹⁵. Given the reciprocal nature of FTAs, benefits are incurred by both parties, and the EU might not be willing to give these up in response to a violation of the essential elements clause by one of its trading partners. This can be contrasted with the EU’s relative ease¹⁶ to withdraw unilateral preferences under the Generalized Scheme of Preference (GSP), which, while highly political, tends to be less costly for the EU compared to reciprocal trade arrangements.

3. Expanding the scope of essential elements clauses to address the environment

In its 2021 Trade Policy Review, the Commission announced its intention to expand the scope of the essential element clause to also include relevant environmental provisions. Specifically, it announced, “to make the respect of the Paris Agreement an essential element in all future agreements”

¹⁴ “EU trade policies: Carrot-and-stick mechanisms in pursuit of non-trade policy objectives?”, 2 July 2020, (<https://ecdpm.org/work/square-pegs-in-round-holes-using-trade-policy-for-non-trade-objectives-volume-9-issue-2-2020/eu-trade-policies-carrot-and-stick-mechanisms-in-pursuit-of-non-trade-policy-objectives>)

¹⁵ “EU trade policies: Carrot-and-stick mechanisms in pursuit of non-trade policy objectives?”, 2 July 2020, (<https://ecdpm.org/work/square-pegs-in-round-holes-using-trade-policy-for-non-trade-objectives-volume-9-issue-2-2020/eu-trade-policies-carrot-and-stick-mechanisms-in-pursuit-of-non-trade-policy-objectives>)

¹⁶ For instance, the EC may withdraw preferences under the GSP for systematic violations of the principles of the ILO Convention No. 29 concerning Forced or Compulsory Labour or the ILO Convention no. 105 concerning the Abolition of Forced Labour. European Commission, 22 September 2021, “Questions and Answers - Review of EU Generalised Scheme of Preferences” (https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_4802).

¹¹ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (Cotonou Agreement), Article 9.2.

¹² The Cotonou Agreement (2000).

¹³ Hafner-Burton (n 141) 607, cited in European Commission, “Report on the integration of human rights in EU development and trade policies”.

and highlighted the Convention on Biological Diversity (CBD) as a priority¹⁷. In its review of TSD Chapters, the Commission noted that it would be exploring whether the CBD could be considered an essential element, thereby suggesting an openness to further expanding the MEAs to be considered as essential elements of the EU's FTAs.

References to fight climate change and to the Paris Agreement or other MEAs in EU FTAs are not new. The EU's recent trade agreements include commitments to environmental standards, including various MEAs such as the Paris Agreement. However, enforcement mechanisms tend to be weak. Until recently, TSD Chapters set out a self-contained system of dispute settlement, requiring consultations followed by a referral of the matter to an expert panel which examines whether obligations have been breached. Based on their determination, a set of non-binding recommendations are provided¹⁸. Some FTAs require parties to make their best efforts to implement recommendations¹⁹, whereas others require the parties to develop and implement an action plan²⁰. There is, however, no system that establishes sanctions in response to failure to implement the non-binding recommendations.

This is now changing. In response to strong criticism from civil society, academics, and politicians,²¹ coupled

¹⁷ European Commission, 18 February 2021, "Trade Policy Review".

¹⁸ Bartels, Lorand "Chapter 7. The EU's approach to social standards and the TTIP".

¹⁹ For example, under the EU-Korea agreement, the parties "shall make their best efforts to accommodate advice or recommendations... on the implementation of [the sustainable development] chapter". The Report is also sent to the Domestic Advisory Group.

²⁰ In the EU-Central America FTA, the non-binding recommendations are published, and the relevant party must develop and implement an appropriate action plan, which would be monitored by the Trade and Sustainable Development Board. European Union-Central America Association Agreement, Article 301. Bartels, Lorand "Chapter 7. The EU's approach to social standards and the TTIP".

²¹ "EU – New Zealand FTA: Towards a new approach in the enforcement of trade and sustainable development obligations", 25 September 2022, (<https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/>)

by an increased emphasis on pursuing a green growth agenda, the EU has proposed the possibility of trade sanctions as a last resort, in instances of serious violations of core TSD commitments, including ILO fundamental principles and the Paris Agreement²². Moreover, it has proposed to make respect for the Paris Agreement an essential element in its future trade agreements. On October 17, 2022, this approach was endorsed by the Council. As noted earlier, giving a provision "essential element" status allows parties to unilaterally suspend or terminate the agreement.

The EU-UK TCA has adopted this approach, explicitly noting that the fight against climate change and the Paris Agreement are essential elements of the EU-UK TCA Agreement²³. Moreover, the EU-UK TCA contains a non-execution clause, authorizing the parties to terminate or suspend the operation of this agreement in the case of "serious and substantial failure by the other Party" to fulfill its obligations under the essential elements of the agreement. The non-execution clause further clarifies that "any act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a serious and substantial failure for the purpose of this Article". Expanding the scope of essential elements to include core environmental agreements in addition to human rights and good governance principles is an important step in better aligning environmental and trade objectives.

This approach also raises new questions. On the one hand, it raises the question of how the approach could be further expanded to include other MEAs. On the other hand, it requires looking at implementation in more detail, i.e., besides complete withdrawal, how would a party demonstrate that the obligations of the Paris Agreement, or other MEAs, have not been fulfilled? The sections below further explore these issues.

[sustainable-development-obligations/](https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/)

²² European Commission, 22 June 2022, The power of trade partnerships: together for green and just economic growth, p. 4.

²³ EU-UK TCA, Art. 401.

II.

Other MEAs that could become essential elements of the EU's FTAs

1. Essential element selection criteria

While respecting the Paris Agreement has been singled out as an essential element of future EU FTA agreements, there appears to be an openness to expanding this list to also include other MEAs. In particular, the Commission is considering the possibility of expanding the approach to also include the CBD²⁴.

As the Commission considers this approach, it is important not to cast the net too wide, but rather, to be selective and focus on MEAs that are foundational in addressing the most urgent global environmental issues of our time. To give essential element status to an MEA, thus enabling the parties to unilaterally suspend commitments made in the agreement, it is crucial that the selected MEA is considered as a foundational instrument that addresses the most urgent global environmental issues. Applying the term loosely by considering a large list of MEAs as essential elements could risk triggering unilateral suspension or termination of the agreement based on provisions that are not actually "essential to the accomplishment of the object or purpose of the treaty".

This paper proposes four criteria that MEAs must meet to be considered as an essential element in future EU FTAs:

- **Criterion 1: The MEA must address an urgent global environmental crisis.** This criterion has two elements. First, it is important to ensure that the MEA addresses a global environmental crisis of such gravity that failing to implement the MEA can have catastrophic consequences. This ensures that the essential element status is given only to those MEAs that address the most urgent environmental issues. To identify urgent global environmental crises, this policy brief uses the planetary bound-

aries framework, further elaborated below. Second, for an MEA to "address" environmental harm, it must do so directly. In other words, if an MEA addresses the environmental harm only tangentially (but the main focus of the MEA is elsewhere) it would not be included in the list of MEAs that address the environmental harm.

- **Criterion 2: The MEA must have been ratified by a large majority of states (3/4 of all states)²⁵.** This requirement gives the selected MEAs a solid multilateral foundation, which is important to legitimize a decision to turn respect for an MEA into an essential element clause. Ensuring that at least 3/4 of all states have ratified the treaty further guarantees inclusion by developing and least-developed countries, which is another legitimizing factor, as it signals that the MEA does not just reflect a developed country agenda.
- **Criterion 3: The MEA must be relevant to all trading partners.** This requirement ensures that the selected MEA is, in fact, relevant to all parties to the FTA. While criterion 1 already limits the selection of essential element clauses to those that address urgent global environmental crises, some of these problems still manifest predominantly in specific parts of the world (e.g., desertification, deforestation, eutrophication)²⁶. Therefore, the general list of MEAs to be considered as essential elements across EU FTAs should exclude MEAs that cover issues that are relevant only to some countries²⁷.
- **Criterion 4: There needs to be a link between the MEA and trade.** There should be a link between fostering trade bilaterally and minimizing the risk of environmental degradation through the effective implementation of the MEA. This is important to ensure that respecting the MEAs is "essential to the accomplishment of the

²⁵ EJD, 2021, "Sustainable development in EU trade agreements".

²⁶ The European Commission in its Communication (22 June 2022) "The power of trade partnerships: together for green and just economic growth, emphasized the need for TSD commitments tailor-made to each trading partner.

²⁷ The EU could consider including these MEAs in FTAs on a case-by-case basis. They should not, however, be included as an essential element in the EU's FTAs to be applied across the board.

²⁴ European Commission, 22.6.2022 "TSD Review".

object or purpose of the treaty”²⁸, i.e., the FTA, as set out in the Vienna Convention on the Law of Treaties, Article 60.

2. Additional MEAs as essential elements

Having set out the four selection criteria to elevate an MEA to essential element provision, this section applies these four criteria and proposes a list of MEAs that the EU could consider essential elements going forward.

Criterion 1: The MEA must address an urgent, global environmental crisis

The planetary boundary concept, which was introduced in 2009, aimed to define the environmental limits within which humanity can safely operate. In particular, the planetary boundary framework identifies nine global processes, set out in Box 1 below, that regulate the stability and resilience of the Earth’s ecosystem²⁹. For these nine processes, scientists also sought to propose quantitative boundaries. When these boundaries are crossed, it increases the risk of generating irreversible environmental changes and destabilize the earth³⁰.

The planetary boundary framework, while not without criticism, has become an important reference point, including in EU policy discussions that seek to advance environmental objectives. For example, in its reflection paper “Toward a sustainable Europe by 2030” the European Commission refers to “planetary boundaries” as a key principle to be

respected by both the European Commission and stakeholders³¹. Therefore, this policy brief uses the planetary boundary framework as an anchoring point to identify MEAs that could be elevated to “essential element” status.

Box 1: The Planetary Boundaries

1. **Climate change:** the effect of carbon emissions on increasing global warming
2. **Ocean acidification:** the effect of carbon emissions on increasing acidification of the ocean
3. **Novel entities:** the effect of toxic material released into the natural environment, including plastics
4. **Biochemical flows** (namely interference with the phosphorous and nitrogen cycles): the effect of fertilizer in natural environments
5. **Freshwater use:** the effect of depleting freshwater sources
6. **Land system change:** the effect of converting natural environments into land for economic activity
7. **Change in biosphere integrity** (driven by biodiversity loss): the effect of economic activity on reduction or extinction of species
8. **Atmospheric aerosol loading:** the effect of aerosol emission on the health of species and precipitations
9. **Stratospheric ozone depletion:** the effect of chemicals on the ozone layer

In particular, in identifying whether an MEA addresses an urgent global environmental crisis, this policy brief focuses on the latest evidence collected that identifies which of the nine planetary boundaries have been transgressed. As illustrated in Figure 1, there is evidence that the boundaries for climate change, biosphere integrity, land-system change, “novel entities” (including plastics), biochemical flows, and freshwater use have been transgressed. Two other planetary boundaries, i.e., stratospheric ozone

²⁸ Article 60(3)(b) of the Vienna Convention on the Law of Treaties notes that a material breach of a treaty consists in “the violation of a provision essential to the accomplishment of the object or purpose of a treaty”. This language would leave the door open, potentially, for parties to challenge the identification of an “essential element” clause where such essential element clause may not be connected to the accomplishment of the object or purpose of the treaty.

²⁹ Stockholm Resilience Centre, “Planetary boundaries” (<https://www.stockholmresilience.org/research/planetary-boundaries.html>).

³⁰ Stockholm Resilience Centre, “Planetary boundaries” (<https://www.stockholmresilience.org/research/planetary-boundaries.html>).

³¹ European Commission, 2019, “Towards a Sustainable Europe by 2030: reflection paper”. European Environmental Agency and Federal Office for the Environment, 2020, “Is Europe Living within the Limits of Our Planet? An Assessment of Europe’s Environmental Footprints in Relation to Planetary Boundaries”.

depletion and ocean acidification, are still within the safe operation space; while the status quo of atmosphere aerosol loading with respect to its safe operation space has not yet been quantified.

For each of the five planetary boundaries for which the safe

operation space has been exceeded, this section identifies MEAs that focus on addressing the environmental harm caused by transgressing the planetary boundaries. While some MEAs might tangentially cover the planetary boundary, this section seeks to identify MEAs that directly address the identified environmental crisis.



Figure 1: Overview of planetary boundaries and the extent to which they have been transgressed³²

³² Azote for Stockholm Resilience Centre, based on analysis in Wang-Erlandsson et al. 2022. Stockholm Resilience Centre, "Planetary boundaries" (<https://www.stockholmresilience.org/research/planetary-boundaries.html>).

Climate change: A key MEA that addresses climate change is the Paris Agreement, adopted at the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which seeks to keep increases in global temperature below 2 °C. The centrality of the Paris Agreement in the fight against climate change has already been recognized by the Commission by announcing its intention to turn the Paris Agreement into an “essential element” of the Agreement. The main way in which the Paris Agreement seeks to reduce global warming is through Nationally Determined Commitments (NDCs), which embody efforts by each state party to reduce national emissions and adapt to the impacts of climate change.

Novel entities: This planetary boundary refers to harmful chemicals, materials, and other new substances, such as plastic, in addition to some naturally occurring substances that are released into the environment. Four current MEAs directly address these environmental harms. This includes the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Chemicals and Pesticides in International Trade, which seeks to help disseminate information about hazardous substances; the Stockholm Convention on Persistent Organic Compounds, which focuses on prohibiting and restricting persistent pollutants; and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the “Basel Convention”), which seeks to limit trade in hazardous and other types of waste. In January 2021, the parties to the Basel Convention adopted the Plastic Waste Amendment specifically addressing trade in hazardous and contaminated plastic waste. These agreements together, and especially the Basel Convention, seek to minimize the introduction of novel entities through trade in hazardous products, which is directly related to the planetary boundary in question. Finally, the Minamata Convention on Mercury focuses on protecting the environment from anthropogenic emissions and mercury releases.

Change in biosphere integrity: This category refers to the functional integrity of the ecosystem and encompasses the rapid decline in plant and animal populations, as well

as the degradation of ecosystems and the loss of genetic diversity. A key MEA that addresses biodiversity loss is the CBD. The Convention confirms key concepts such as “do no harm” and serves as a crucial basis for further developments through related protocols and agreements. Supplementary agreements to the CBD are the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which sets out obligations for its contracting parties to take measures in relation to access to genetic resources, benefit-sharing, and compliance; and the Cartagena Protocol on Biosafety, which seeks to ensure safety in handling, transporting, and using living modified organisms that could have an adverse effect on biological organisms. However, since the CBD is the foundational convention and the protocols set out further commitments that are more specific to a part of the biodiversity preservation challenge, the CBD without the protocols would be the most relevant to be considered an essential element of future EU FTAs.

Another MEA relevant to addressing biosphere integrity is the Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES). This agreement seeks to protect endangered animals from the threats of international trade. Specifically focused on marine biodiversity, the Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) seeks to enhance long-term conservation and the sustainable use of living marine resources and marine ecosystems, and is thus relevant with respect to maintaining biosphere integrity. The United Nations Convention on the Law of the Sea (UNCLOS) also encompasses provisions that seek to protect marine biodiversity, but these provisions are also covered by the CBD. Between the CBD and UNCLOS, the CBD would be a better candidate for essential element status, given that its direct objective is to enhance biodiversity preservation, while UNCLOS focuses more generally on states’ rights and obligations relevant to the seas³³. Moreover, the CBD is

³³ Convention on Biological Diversity (22 February 2003) “Marine and coastal biodiversity: Review, further elaboration and refinement of the programme of work”. Moreover, UNCLOS

broader in scope, covering not only marine biodiversity but biodiversity more generally.

Biochemical flows: Biochemical flows, especially of nitrogen and phosphorus, can have profound implications for the environment. Nutrients applied to agricultural land have an especially significant impact as they can enter waterways and put both aquatic and marine systems at risk. Currently, no MEA directly addresses biochemical flows. That said, the UNCLOS encompasses provisions on marine pollution caused by nitrogen and phosphorus, which could be relevant to addressing parts of the biochemical environmental crisis. However, these provisions fall short of being a foundational agreement to addressing global biochemical flows, given that it is not the agreement's main focus and it addresses only a part of the issue (i.e., biochemical flows relevant to the maritime environment). The Convention on Long-Range Transboundary Air Pollution (LRTAP), for its part, emphasizes the importance of addressing eutrophication. However, as further discussed below, this is a regional agreement.

Land system change: This planetary boundary refers to situations such as the conversion of tropical forests to farmland, which has a significant impact on climate change, including CO₂ concentrations, freshwater, biodiversity, and others. No MEAs directly address land-use change or forestry at a global scale. A potentially relevant international treaty is the International Tropical Timber Treaty, which promotes the sustainable management of tropical forests, with the goal that by 2000, all tropical timber traded would be coming from sustainably managed forests. Another relevant agreement is the United Nations Convention to Combat Desertification (UNCCD) which relates to desertification and the effects of growth. However, as it focuses on desertification, it only addresses land system change partially.

Freshwater use: This is considered a planetary boundary based on the dominance of humans as a driving force to alter global scale river flows. A relevant MEA that seeks to address this environmental challenge is the UN Convention on the Protection and Use of Transboundary Water Courses and International Lakes (the Water Convention), which sets out legal principles to improve protection and management of transboundary waters and groundwaters.

Based on the above analysis, the list of relevant MEAs that directly correspond to planetary boundaries that have been transgressed are: the Paris Convention/UNFCCC; the Basel, Rotterdam, and Copenhagen Conventions; the Minamata Convention on Mercury; the CBD; the CITES; the Port State Measure Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; the Air Pollution Convention; the Tropical Timber Treaty; the UNCCD; and the Water Lake Convention. Turning to the second criterion, the subsequent section will analyze which one of these treaties has been ratified by a large majority of states.

Criterion 2: Significant majority (3/4) of states must have ratified the MEA

For each of the MEAs that directly address a transgressed planetary boundary, Table 1 sets out the number of countries that have ratified the MEA. Based on this Table, it can be concluded that, besides the Paris Agreement/UNFCCC, the MEAs that could possibly be considered "essential elements" of the EU FTAs are the Basel Convention and possibly also the Stockholm and Rotterdam Conventions, the CBD, the CITES, and the UNCCD. The rest of the MEAs that passed criterion 1 have not been ratified by a sufficiently number of states.

provisions relevant to the conservation of biodiversity in the marine environment make up only a handful of pages of the 200-plus pages of text of UNCLOS.

Table 1: Ratification numbers of MEAs that address transgressed planetary boundaries

MEA	Number of countries ratified	Ratified by ¾ of countries?
Paris Agreement/UNFCCC	193 (Paris) 197 (UNFCCC)	✓
Rotterdam Convention	164	✓
Stockholm Convention	184	✓
Basel Convention	187	✓
Minamata Convention	112	X
Convention on Biological Diversity	196	✓
CITES	197	✓
Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing	70	X
LRTAP	51	X
International Tropical Timber Treaty	59	X
United Nations Convention to Combat Desertification	197	✓
The Water Lake Convention	45	X

Criterion 3: The MEA must cover issues that are relevant to all parties of the FTA

A third criteria to be applied in identifying whether an MEA could be considered “essential” is whether it covers an issue that is applicable to all parties to the FTA. While the planetary boundaries framework focuses on global environmental problems, some of them predominantly manifest in a select number of countries. Desertification, for instance, is an issue that is faced only by certain countries. This means that a provision related to the UNCCD would not be an appropriate provision to include as an “essential element” in FTAs between parties that do not experience desertification issues. The UNCCD could, however, be included as an “essential element” in trade agreements if desertification is a problem that is relevant to both parties to the FTA.

Since climate change and biodiversity are global problems affecting all countries. MEAs addressing these issues can be presumed to be relevant to all potential EU trading partners. With respect to novel entities, and their introduction to trade, this too concerns all trading partners, given the ubiquitous of persistent pollutants, covered by the Stockholm Convention, and trade in hazardous waste. Thus, outside the context of a specific FTA, MEAs covering global issues affecting all countries, including the CBD,

CITES, the Paris Agreement, the Basel, Stockholm and Rotterdam Conventions, would be relevant to all trading partners of an EU FTA.

Criterion 4: There must be a link between the MEA and trade

The fourth criterion is that there must be a link between the MEA and bilateral trade. This link exists, inter alia, when trade can be leveraged to implement the MEA. For example, tackling climate change through the Paris Agreement will require parallelism in the scale and pace of low-carbon investments as no country’s domestic actions can mitigate climate change. From an economic perspective, ensuring that bilateral trading partners implement commitments made under the Paris Agreement could ensure establishing a level playing field and avoiding the use of distortive protectionist measures. The same can be said for tackling biodiversity through the CBD.

Another way to establish this link would be by demonstrating how the FTA, by fostering trade between the parties, could mitigate potential environmental damage stemming from trade and an increase in global demand. For example, the EU-UK TCA makes a connection between trade and climate change, including through promoting the mutual supportiveness of trade and climate policies and

measures, and the objective to facilitate the “removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation...”³⁴. The EU-Vietnam FTA mentions CITES and the importance of adopting effective measures that would reduce illegal trade in wildlife.

A clear link also exists between fostering bilateral trade and minimizing the risk of environmental degradation for the Basel, Stockholm and Copenhagen Conventions, which seek to minimize environmental damage associated with trade in hazardous waste. Moreover, it can be estab-

lished for MEAs that address issues such as deforestation, in situations where an increase in global consumption in certain commodities generated by trade risks aggravating deforestation in commodity-producing countries.

Summary overview

Based on the analysis undertaken in this section, five additional agreements could be included in future EU FTAs as essential elements, in addition to the Paris Agreement/ UNFCCC. These are: the CBD, the CITES, and the Basel, Rotterdam, and Stockholm Conventions. A summary of the analysis is set out in Table 2 below.

Table 2: Summary table of findings

MEA	Directly addresses planetary boundary that has been transgressed	Number of countries ratified	Relevant to all trading partners	Link between FTA and MEA
MEAs analyzed that meet the criteria to be considered essential elements				
Paris Agreement/UNFCCC	✓	✓	✓	✓
Rotterdam Convention	✓	✓	✓	✓
Stockholm Convention	✓	✓	✓	✓
Basel Convention	✓	✓	✓	✓
Convention on Biological Diversity	✓	✓	✓	✓
CITES	✓	✓	✓	✓
MEAs analyzed that do not meet the criteria to be considered essential elements				
Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing	✓	X	✓	✓
Minamata Convention	✓	X	X	✓
International Tropical Timber Treaty	✓	X	X	✓
United Nations Convention to Combat Desertification	✓	✓	X	✓
The Water Lake Convention	✓	X	✓	✓
Montreal Protocol	X	✓	✓	✓
UNCLOS	✓/X ³⁵	✓	✓	✓

³⁴ EU-UK TCA, Art. 401 (2)(b)(c).

³⁵ As set out in the analysis, UNCLOS is directly relevant to addressing the preservation of the marine environment, including ecosystems and marine life. However, these provisions only constitute a small part of the UNCLOS agreement and are not the agreement's main focus. Indeed, UNCLOS seeks to more comprehensively establish states' rights and obligations relevant to the seas.

III.

The “essence” of the essential element

As set out above, turning an MEA into an essential element of the Agreement can have great promise. However, it is important to dig deeper and understand how this important innovation in EU trade policy can be implemented. As highlighted earlier, essential element clauses allow a party to suspend or terminate an agreement in whole or in part in the case of serious and substantial failure by the other party to fulfill its obligations under the essential elements of the agreement. Many MEAs do not impose strong, detailed, or quantifiable obligations on the parties, and thus lack the specificity required to demonstrate/convince a third-party adjudicator that a party to an FTA has breached an MEA. Because, even though a breach of an essential element provision authorizes a party to unilaterally suspend the agreement *when it considers a breach has occurred*, the grounds on which this determination is made could still be subjected to challenge by the other party as part of a dispute, depending on the FTA.

Hence, it is critical to better understand how to include additional specificity with respect to the MEA considered as an essential element of the FTA. Are there particular elements of MEAs that could be referenced to add this specificity? Are there ways in which FTAs could share the parties’ joint interpretation of the MEA in the FTA and, by doing so, clarify the obligations? This section explores both questions and highlights relevant shortcomings – both from an implementation and political perspective.

1. Identifying essential provisions in “essential element” MEAs

Overview

While the list of specific provisions in an MEA that capture the agreement’s essence will necessarily differ for each agreement, some key provisions would likely be applicable to all MEAs. This is the case of provisions that set out the objective of the agreement, provisions that reference the

implementation approach, and, in FTAs with developing countries, provisions that include capacity building, financial and technical assistance.

First, this includes the provision that sets out the MEA’s objective and, therefore, captures its essence. For example, the Paris Agreement notes, in Article 2, that the agreement “aims to strengthen the global response to the threat of climate change...” including by holding the increase in global average temperature to well below 2°C, increasing the ability to adapt to adverse impacts of climate change, and by making finance flows consistent with a pathway towards low greenhouse gas emissions.

The CBD sets out the agreement’s objective in Article 1, noting that “the objectives of this Convention... are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources...”. By identifying the objective of the agreement as an essential provision of the MEA, it establishes clearly what the parties must tailor their measures to.

Various examples exist of FTAs referencing specific parts of an MEA. The EU-UK FTA highlights that “the parties recognize the importance of taking urgent action to combat climate change.... in line with... the purpose and goals of the Paris Agreement”³⁶. It further singles out one of the principle aims of the Paris Agreement, i.e., holding the increase in the global average temperature to well below 2°C³⁷. The EU-New Zealand FTA references the “purpose and goals of the Paris Agreement”³⁸, whereas the draft TSD Chapter in the EU-Mercosur FTA references Article 2 of the Paris Agreement.³⁹

A second set of provisions that could be relevant include clauses that set out how will the parties accomplish the

³⁶ EU-UK, Art. 401.

³⁷ EU-UK, Art. 401 (1).

³⁸ EU-New Zealand, Art. X.6.(1).

³⁹ EU-Mercosur Association Agreement, Trade and Sustainable Development, Article 6.2(b).

objectives in the agreement. With respect to the Paris Agreement, Article 3 requires all parties to undertake NDCs to the global response to climate change. For the CBD, Article 6 contains the obligation for parties to the agreement to develop national strategies, plans, or programmes for the conservation and sustainable use of biological diversity. The FTA could specify that the parties consider, in particular, that the obligations set out in Article 3 of the Paris Agreement and Article 6 of the CBD are essential. This approach has already been adopted in some FTAs. For example, the EU-New Zealand FTA explicitly mentions that the parties commit to implementing their NDCs⁴⁰.

Third, in a situation involving an FTA between the EU and a developing country, parties could also consider essential elements of the MEA provisions that focus on the needs of developing countries. In the context of the Paris Agreement, this would include Article 9 which requires developed countries to offer financial resources to assist developing countries with respect to both mitigation and adaptation in the context of the Paris Agreement. Similarly, CBD Article 12 covers research and training programs to be set up for developing countries. By including these development-oriented provisions as essential provisions of the Paris Agreement, the FTA would reflect the concept of Common But Differentiated Responsibilities, which is central to the UNFCCC.

Shortcomings

Even when an FTA identifies the essential provisions of MEAs as key obligations that form part of the essential elements clause, demonstrating that a party has breached its essential obligations set out under an MEA will remain challenging. As noted earlier, in the context of the Paris Agreement, the non-execution clause notes that “any act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a serious and substantial failure for the purpose of this

Article”. How could a party establish that an act or omission materially defeats the Paris Agreement? For example, does the fact that the Paris Agreement requires that countries make finance flows consistent with temperature goals mean that providing fossil fuels subsidies breaches the Paris Agreement?⁴¹ This problem highlights shortcomings in the MEAs themselves.

The most straightforward way to address this in EU FTAs would be by examining whether a party has failed to meet its NDCs. However, NDCs tend to set goals at a very high level. For example, Brazil has noted in its NDCs its intention to achieve zero illegal deforestation of the Brazilian Amazon by 2030, and to restore and reforest 12 million hectares of forests by 2030⁴². To demonstrate that Brazil has engaged in an act of omission which materially defeats the Paris Agreement, would it suffice to highlight that there has been an omission of best efforts from Brazil to meet these objectives? What kind of evidence would have to be submitted to demonstrate this? Political statements and regulations that authorize the use of or the destruction of the Amazon? These questions will likely be clarified over the course of time, as parties trigger the essential element clause relevant to the Paris Agreement.

2. Clarifying the essence of MEAs by adding specificity

Another way for the parties to an FTA to enhance the implementation of the MEA considered as an essential element of the agreement would be by adding additional specificity in the FTA.⁴³ In this regard, a FTA could contain an open-

⁴¹ Bryan, Katharina (2 February 2021), “Climate change and human rights in EU international agreements: Essential elements” (<https://www.linkedin.com/pulse/climate-change-human-rights-eu-international-agreements-bryan/>)

⁴² Brazil committed to reduce its greenhouse gas emissions in 2025 by 37%; to reduce its emissions in 2030 by 50%; and to achieve climate neutrality by 2050. Federative Republic of Brazil (21 March 2022). “Nationally Determined Contribution (NDC)”. However, newly elected President Lula da Silva has promised to update Brazil’s NDCs.

⁴³ The inclusion of deadlines, targets and specific objectives is included in the 2022 Action Plan of the Commission.

⁴⁰ EU-New Zealand, Art. X.6. (2). It is important to ensure that elevating NDCs to essential element status would not inadvertently lower countries’ ambitions when establishing NDCs.

ended illustrative list of actions and omissions that would be presumed to constitute a breach of the relevant MEA. For example, the parties could consider adding a provision that states: “based on the joint interpretation of the parties to this agreement, the parties consider that the following actions and omissions are presumed to be inconsistent with the object and purpose of the Paris Agreement”⁴⁴. Examples could include failure to take consistent and continuing efforts to comply with the parties’ NDCs; passing new laws and/or regulations that directly undermine one or more of the parties NDCs; failure to submit the required NDC progress reports, etc. A list of more specific actions and omissions would have to be further developed by the parties to the agreement, enabling the parties to add a level of specificity with direct relevance to parties’ NDCs⁴⁵. To ensure continued relevance over time, it would be important to also include a provision in the FTA that would enable for the illustrative list to be revised and updated.

⁴⁴ This would constitute an elaboration by the parties of their understanding of the MEA in the context of the FTA but would not change the MEA itself.

⁴⁵ FTAs can also seek to incorporate stronger references to specific action-oriented obligation that correspond to the MEA. This is already a common practice. For example, the EU-Vietnam FTA incorporates Article 15 of the Convention on Biodiversity (CBD), which recognizes the sovereign rights of states over their natural resources. It subsequently sets out several actions that parties shall perform to this end, including encouraging trade in products that contribute to the sustainable use and conservation of biological diversity and provisions that require information exchanges. (EU-Vietnam FTA, Article 13.7 (a) and (c)) By incorporating explicit CBD-based provisions in the FTA that are action-oriented, RTAs can strengthen the parties’ commitments to implementing specific MEAs. However, it is important to keep in mind that this will have no bearing on interpretations of whether a party has breached the essential element clause or not.

IV.

Incorporating essential element clauses in ongoing EU FTA negotiations

The extent to which the Commission’s proposal to turn the Paris Agreement into an essential element of its FTAs will be applied to ongoing FTA negotiations, and FTA modernization negotiations, is unclear. However, should there be interest in including essential element clauses relevant to MEAs in ongoing FTA negotiations, it will politically be more feasible to start with MEAs that are already included in the agreements’ draft TSD chapters. The EU’s draft TSD chapters in ongoing FTA negotiations with India, Australia, Indonesia, and Mercosur, and modernization negotiations with Mexico and Chile all explicitly reference three out of six MEAs identified in this paper as potential candidates to receive essential element status: the UNFCCC and the Paris Agreement, the CBD, and CITES.⁴⁶ By contrast, none of the TSD Chapters in ongoing FTAs negotiations mention the other three agreements identified as candidates to receive essential element status, i.e., the Basel, Rotterdam, and Copenhagen Conventions. Furthermore, the draft TSD Chapters all reference the parties’ commitments to implement management measures and sustainable exploitation of marine living resources as enshrined in UNCLOS, an agreement not considered as a good candidate for

⁴⁶ While the exact language in draft TSD chapters vary per agreement, generally with respect to the Paris Agreement, the Parties recognize the importance of taking urgent action to combat climate change, consistent with the goals of the Paris Agreement, and agree to effectively implement the UNFCCC and the Paris Agreement, including with regards to its Nationally Determined Contributions (see, e.g., Draft EU TSD Chapters EU-Australia FTA, Article X.5.1,2 (a); EU-India FTA, Article X.6.1-2; EU-Indonesia Article X.5.1-2). With respect to the CBD and CITES, the parties recognize the importance of conserving and sustainably using biological diversity and the role of trade in pursuing these objectives, consistent with the CBD (and its Protocols) and the CITES. (see, e.g., Draft EU TSD Chapters in EU-Australia FTA, Article X.6.1; EU-Indonesia Article X.6.1).

essential element status as explained earlier, given that, unlike the CBD, its main objective is establishing states' rights and obligations relevant to the sea. While it includes provisions that seek to preserve (marine) biodiversity, this is not its main focus.

The fact that the EU's proposed TSD chapters in ongoing FTA negotiations make explicit reference to the Paris Agreement, CBD, and CITES, establishes a solid foundation to turn these provisions into essential elements of the FTA should there political will to do so. Conversely, the general absence of references to the Basel, Rotterdam, and Stockholm Conventions suggests that including these MEAs as essential elements in ongoing FTAs will be an uphill battle.

So far, however, the Commission has only proposed that the Paris Agreement be elevated to "essential element" status. This means, realistically, that attention should be directed to turning the Paris Agreement into an essential element of ongoing FTA negotiations. In particular, doing so might be a possibility for the EU-India FTA, given that the draft EU TSD Chapter already includes language noting that "the commitment to effectively implement the Paris Agreement... includes the obligation to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement."⁴⁷ Explicitly referencing Article 9 of the Paris Agreement, which requires developed countries to offer financial resources to assist developing countries, might increase India's interest in making the Paris Agreement an essential part of the FTA.

Moreover, elevating the Paris Agreement to an essential element will likely be of interest in the context of the EU-Mercosur FTA, as it could potentially alleviate environmental and deforestation concerns. This might be particularly the case given that the newly elected President Luiz Ignacio Lula da Silva has promised to update the country's NDCs.⁴⁸

In seeking to include the Paris Agreement as an essential element in ongoing FTAs, it would be important to ensure that the language used enables the operationalization of the essential element provisions. To this end, ongoing FTAs could be used as a laboratory to explore different options.

climatechangenews.com/2022/10/07/lula-campaign-update-brazil-climate-plan-ndc-new/). In this context, it is important to ensure that strengthening enforcement of failure to comply with the Paris Agreement and a countries' NDCs would not inadvertently lower a country's NDC ambitions.

⁴⁷ Draft TSD Chapter, EU-India FTA, Article X.6.1-2.

⁴⁸ Alice de Souza, "Lula will update Brazil's 'insufficient' climate plans if elected: advisor." (7 October 2022). (<https://www.climatechangenews.com/2022/10/07/lula-campaign-update-brazil-climate-plan-ndc-new/>).

Conclusion

The Commission's approach to making the Paris Agreement an essential element of its future FTAs is a step in the right direction that can already be implemented in ongoing FTA negotiations. It is, however, critical to build upon the momentum and expand the approach to other MEAs that could be appropriately considered essential to the EUs' future FTAs. On the basis of four criteria, this policy brief has identified other MEAs that could be included as "essential elements" in future FTAs: i.e., the CBD, CITES and the Rotterdam, Basel and Stockholm Conventions. This paper's analysis can be used as a starting point to further explore how to incorporate these MEAs as essential elements in EU FTAs.

For essential element clauses to be a game changer, however, it will be important to develop a better understanding of how a party to an FTA can establish a breach of the essential element clause. Since many MEAs do not require

the parties to make measurable and verifiable commitments to which they can be held accountable, it can be challenging to delineate the nature of the "essential" obligations the parties have made under MEAs. This policy paper has provided initial suggestions on how FTAs can address this, including through the inclusion of additional details as to what kind of action or omission would amount to a breach of the MEA. However, the issues associated with the implementation of essential element would need to be further researched.

Finally, in seeking to enhance the effectiveness of essential element clauses, it is also important to guard against turning FTAs into a substitutable enforcement mechanism for MEAs. Ultimately, to enhance implementation of MEAs, the parties must also agree to strengthen these agreements' enforcement mechanisms.

Managing Editor

—
GENEVIÈVE PONS

Copyrights

—
The document may be reproduced in part or in full on the dual condition that its meaning is not distorted and that the source is mentioned. The views expressed are those of the author(s) and do not necessarily reflect those of the publisher. Europe Jacques Delors cannot be held responsible for the use which any third party may make of the document. Original version. © Europe Jacques Delors

Contact

—
Europe Jacques Delors
Penser l'Europe / Thinking Europe / Europa Denken
Rue du Duc 139, 1200, Bruxelles
+32 471 93 36 13
<https://europejacquesdelors.eu>
info@europejacquesdelors.eu