



The integration of human rights in EU development and trade policies

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EXECUTIVE SUMMARY

The EU has attempted to foster the nexus between trade, development and human rights by gradually integrating human rights into its trade and development policies from the 1990s onwards. The Lisbon Treaty subsequently made it a legal requirement for all relevant EU institutions and bodies to ensure that trade and development are a positive force for human rights. FRAME WP 9 seeks to make sense of the intricate toolbox the EU has at its disposal to foster human rights throughout its trade and development policies, and to evaluate how the EU's nexus between trade, development and human rights is coming to fruition in the post-Lisbon era. This first report maps the various ways human rights are integrated into trade and development policies and instruments and lays out the building blocks towards further research in this area.

Human rights are channelled into trade policies through two types of instruments: unilateral and bilateral. Unilateral trade measures (i) grant preferential market access to developing countries in exchange for the implementation of human rights standards under its GSP scheme; and (ii) place restrictions on the trade in certain goods that have been detrimental to human rights. In practice, research shows that the GSP, although deemed to be 'a dying breed', has concretely resorted to human rights conditionality the most, as trade preferences were withdrawn on three occasions in response to human rights violations (Myanmar, 1997-2013; Belarus, 2007-present and Sri Lanka, 2010-present). EU issue-specific measures tend to paint a bleaker picture. While earlier measures on instruments of torture (2005), export of military equipment (2008) and renewable energy (2009) pay considerable attention to their linkages to human rights, the more recent measures relating to extractive industries and international forest management have been increasingly silent on this issue.

Bilateral or regional trade agreements have systematically included human rights clauses since 1995, and have since recently also included sustainable development chapters specifically addressing labour rights. However, amongst a number of other flaws the monitoring and enforcement of such clauses has been found to be particularly erratic, leading to suspicions of pusillanimity and double standards. Another explanation might be that the EU favours 'quiet diplomacy' when human rights issues emerge in relation to trade relations. Even so, this mixed record in effectively linking bilateral trade instruments to human rights affects the credibility of the EU as a global human rights actor. Investment agreements are still in the making since Lisbon made FDI an exclusive EU policy. Regarding human rights, the little information available regarding EU BITs currently negotiated does not indicate that the EU will break any ground or adopt a particularly bold stance in linking investment and human rights.

Regarding development, under the impetus of the Agenda for Change and the Strategic Framework, human rights, democracy, the rule of law and good governance have been made a priority of the EU's development policies, as is evident notably in the 2014-2020 Multiannual Financial Framework.

The EU has developed policies and measures which may be summarised into three broad categories. First, it has progressively refined its legal and policy frameworks for conditioning the provision of development assistance based on a country's performance on human rights and democratic governance through negative and positive conditionality. Second, the EU has scaled up its support for actors and processes related to human rights (notably the funding of the EIDHR was increased). Third, the EU is developing more coherent

'transversal' policies integrating human rights as a cross-cutting dimension of development cooperation, such as 'Human Rights Country Strategies' for nearly all of its partner countries. The EU and in particular DG DEVCO have moved to strengthen the development-human rights nexus in several ways, most importantly the development and promotion of a 'rights-based approach encompassing all human rights' in programmes and projects. Progress has thus been made at the level of policy formulation, but the implementation of such policies and their capacity to shape the EU's development cooperation efforts towards partner countries will require close follow-up and scrutiny.

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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
Aft	Aid for Trade
ACP	African, Caribbean and Pacific countries
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China and South Africa
BTWC	Biological and Toxin Weapons Convention
CARIFORUM	Forum of the Caribbean Group of African, Caribbean and Pacific States
CAT	Convention against Torture
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
CWC	Chemical Weapons Convention
DROI	European Parliament's Subcommittee on Human Rights
EBA	Everything But Arms
EC	European Commission
ECJ	European Court of Justice
ECOSOC	United Nations Committee on Economic, Social and Cultural Rights
EEA	European Economic Area
EEAS	European External Action Service
EITI	Extractive Industries Transparency Initiative
EP	European Parliament
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign Direct Investment
FLEGT	Forest Law Enforcement, Governance and Trade
FTA	Free Trade Agreement
G20	Group of 20
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
HDI	Human Development Index
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
INTA	European Parliament's International Trade Committee
IPR	Intellectual Property Rights
ITTA	International Tropical Timber Agreement
ITTO	International Tropical Timber Organization
KPCS	Kimberley Process Certification Scheme
LDC	Least Developed Country
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersexual
MEA	Multilateral Environmental Agreements
MNC	Multinational Corporation
MTCR	Missile Technology Control Regime
NPT	Nuclear Non- Proliferation Treaty
NSA	National Surveillance Agency

NSG	Nuclear Suppliers Group
ODA	Official Development Assistance
OSCE	Organization for Security and Co-operation in Europe
PCD	Policy Coherence for Development
PNR	Passengers Name Record
RED	Renewable Energy Directive
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TFTP	Terrorist Finance Tracking Program
TRA	Trade-Related Assistance
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UN-REDD	United Nations initiative on Reducing Emissions from Deforestation and forest Degradation
US	United States
VPA	Voluntary Partnership Agreement
WMD	Weapons of Mass Destruction
WP	Work Package
WTO	World Trade Organization

I. INTRODUCTION

The entry into force of the Lisbon Treaty has firmly anchored the commitment of the European Union ('EU' or 'Union') to foster human rights into primary law. Reflecting the EU's deliberate 'normative power'¹ strategy of actively promoting human rights abroad, the 'general provisions on the Union's external action' have mandated the EU to, *inter alia*,

consolidate and support democracy, the rule of law, human rights and the principles of international law;²

foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;³ and,

encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.⁴

To this end, Art. 21 (3) of the Treaty on European Union (TEU) states that:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

The insistence on human rights mainstreaming in all areas of external relations, as well as the explicit requirement to pursue these policies consistently and coherently,⁵ has thus slowly given rise to a so-called **nexus** joining up **trade, development and human rights** policies.⁶ Indeed, pursuant to Art. 207 (1) of the Treaty on the Functioning of the European Union (TFEU),

The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

As the European Parliament ('EP' or 'Parliament') recently remarked, this is 'an important innovation – the recognition, for the first time, that, external policies and international trade are strictly linked'.⁷ Given that those external policies are now also explicitly guided by the promotion and protection of human rights

¹ Ian Manners, 'Normative Power Europe – A Contradiction in Terms?' [2002] 40 *Journal of Common Market Studies*, 235.

² Art. 21 (2) (b) TEU.

³ Art. 21 (2) (d) TEU.

⁴ Art. 21 (2) (e) TEU.

⁵ For a recent discussion of the notion of coherence in EU external relations, see Anne-Claire Marangoni and Kolja Raube, 'Virtue or Vice? The Coherence of the EU's External Policies' [2014] 36(5) *Journal of European Integration*, 473-489.

⁶ Maurizio Carbone and Jan Orbie, 'Beyond Economic Partnership Agreements: the European Union and the trade–development nexus' [2009] 20(1) *Contemporary Politics*, 1-9.

⁷ Roberto Bendini, 'In-depth Analysis: The European Union's trade policy, five years after the Lisbon Treaty', European Parliament's Directorate-General for External Policies, DG EXPO/B/PolDep/Note/2014_76, March 2014, 9.

principles, it follows that, for the first time, the EU's Common Commercial Policy (CCP) has the deliberate objective of fostering human rights throughout its trade and investment policies.

By the same token, development cooperation, which pertains to a separate title on 'cooperation with third countries and humanitarian aid' (Title III TFEU), is now also poised to be guided by human rights principles in the implementation of its policies. Pursuant to Art. 208 (1) TFEU,

Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action.

As will be elaborated on in the next sections, the EU has repeatedly attempted to foster the nexus between trade, development and human rights by gradually integrating human rights into its trade and development policies from the 1990s onwards (see below, Figure 6).⁸ It was not until the entry into force of the Lisbon Treaty, however, that it also became an explicit and legal requirement for all relevant EU institutions and bodies to ensure that trade and development are a positive force for human rights.

This '**human rights momentum**' in EU trade and development policies, as created by the Lisbon Treaty, has neither been automatic nor inevitable. Instead, it has been the result of a series of epistemological and institutional developments. On the one hand, a growing number of scholars have come to believe that trade, development and human rights are intimately intertwined: that trade can create economic growth and help countries develop; that development cooperation can enhance and stimulate economic growth through various interventions, including by strengthening a country's capacity to trade; and that all the while, human rights have a multiplier effect on the benefits of trade and development policies (A brief history of the development-trade-human rights nexus). On the other hand, the EU institutions have seen a gradual expansion and deepening of their competences, thereby enabling, inter alia, a wider EU scope for manoeuvre and the rise of an empowered Parliament in the realm of trade and development policies (See below, sections III.B; IV.B).

Five years after the Lisbon Treaty entered into force, the EU now thus has a myriad of both 'soft' and 'hard' leverages at its disposal to protect and promote human rights, which are meant to be running as a 'silver thread' through all its trade and development policies.⁹ In spite of the human rights potential brought forth by the Lisbon Treaty, however, the EU has also been confronted with a number of challenges in this regard. Cognisant of the need to uphold the principles of coherence, transparency, predictability, feasibility and effectiveness when pursuing human rights policies, therefore, **the Council adopted its landmark Strategic Framework and corresponding Action Plan for Human Rights and Democracy**

⁸ See European Commission, 'Trade and Development – Assisting developing countries to benefit from trade', Communication to the Council and the European Parliament, Brussels 18 September 2002, COM(2002) 513 final; European Commission, 'Trade, growth and development – Tailoring trade and investment policy for those countries most in need', Communication to the European Parliament, the Council, and the European Economic and Social Committee, Brussels 27 January 2012, COM(2012) 22 final.

⁹ European Commission and High Representative of the European Union for Common Foreign and Security Policy, 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach', Joint Communication to the European Parliament and the Council, 12 December 2011, COM(2011) 886 final, 11, 4.

(‘Strategic Framework’), as the roadmap to mainstream human rights into ‘all areas of its external action without exception’.¹⁰

Aimed at effectively cementing the nexus between trade, development and human rights, the EU identified a number of ‘action points’ in its Strategic Framework which it intends to implement by the end of December 2014. On the one hand, it has pledged to ‘[m]ake trade work in a way that helps human rights’, thereby committing to:

- (a) Develop [a] methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion;
- (b) Reinforce human rights (or political) dialogues with FTA partners to encourage the protection and promotion of human rights (including core labour standards) and apply the strengthened GSP+ monitoring mechanism;
- (c) Ensure that EU investment policy takes into account the principles and objectives of the Union’s external action, including on human rights;
- (d) Review Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture to ensure improved implementation;
- (e) Ensure that the current review of Council Common Position 2008/944/CFSP on Arms Exports takes account of human rights and International Humanitarian Law;
- (f) Work towards ensuring that solid human rights criteria are included in an international arms trade treaty.¹¹

At the same time, the EU has also pledged to ensure that it ‘strengthens its efforts to assist partner countries in implementing their international human rights obligations’.¹² To this end, it envisages ‘[w]orking towards a rights based approach in development cooperation’, consisting of the need to:

- (a) Develop a toolbox for working towards a rights based approach to development cooperation, with the aim of integrating human rights principles into EU operational activities for development, covering arrangements both at HQ and in the field for the synchronisation of human rights and development cooperation activities;
- (b) Include the assessment of human rights as an overarching element in the deployment of EU country aid modalities, in particular regarding budget support;
- (c) Integrate human rights issues in the EU advocacy on the global development agenda and other global issues, in particular the process post the Millennium Development Goals.¹³

With the passing of more than two years since the Strategic Framework was first put in place, the study at hand presents a timely effort to extensively map the intricate toolbox the EU has at its disposal to foster human rights throughout its trade and development policies. Although preliminary reflections will be offered in this respect, at this stage, this study does not yet aim to exhaustively assess the impact of the

¹⁰ Council of the European Union, ‘EU Strategic Framework on Human Rights and Democracy’, Luxemburg 25 June 2012, 11855/12, 2.

¹¹ Ibid. Action 11.

¹² Ibid. Action 2.

¹³ Ibid. Action 10.

various instruments and policies on the actual protection of the human rights of citizens in EU partner countries. Instead, it intends to compile an overview of how the EU's nexus between trade, development and human rights is being brought to life in the post-Lisbon era. In a subsequent phase of the ongoing research, this mapping exercise will then further be valorised as an analytical tool to come to a more in-depth assessment of the EU's pledge to truly place human rights at the heart of all its trade and development policies.

A. Research context

The report at hand represents one of the four envisaged deliverables of Work Package ('WP') 9 of the FRAME project,¹⁴ which seeks to assess the extent to which EU trade and development policy work together in support of human rights. Concerned with how human rights are fostered amongst EU policies, the trade and development WP covers an important spectrum within which the effectiveness, coherence and consistency of EU policy-making vis-à-vis its own human rights standards have been called into question. Bearing in mind the Lisbon Treaty's overarching aims of enhancing coherence in the EU's external and internal policies, it is therefore of utmost importance to critically assess the instruments available to the EU to integrate human rights concerns into these policies. **This report** constitutes a first step in this process and **aims to provide an extensive mapping** of the different ways the EU integrates human rights concerns and obligations in trade and development policies.

By critically mapping the myriad of ways in which human rights are integrated into trade and development policies since the Lisbon Treaty entered into force, the present study aims to lay out the building blocks towards further research in this deliverable. In this first stage, account will be taken of the very distinct nature of both policy fields in terms of the scope of EU competence, as well as the respective international constellations within which they are situated. In addition, specific attention will be paid to the ways in which the EU makes use of its (positive and negative) conditionality policies (Deliverable 9.1).

This extensive mapping will then enable an empirical analysis of whether, together, trade and development policies effectively foster human rights, as mandated by the Lisbon Treaty. Most notably, in a second phase, the WP will aim to assess the impact of, and compliance with, human rights obligations in development and trade agreements within third countries, and to verify the effectiveness of using trade and development benefits as an incentive to promote respect for human rights. To this end, the WP envisages a thorough scrutiny of the EU's human rights-related impact assessments that are carried out prior to the conclusion of trade agreements,¹⁵ as well as the very recently adopted toolbox on employing a rights-based approach to the EU's development policies (Deliverable 9.2).¹⁶

In a third phase, the WP will explore how a human rights-consistent shaping of EU development and trade policies can make these policies a force for 'good global governance' and help protect third countries against an erosion of basic rights, such as the right to food, the right to health and the right to water. Here,

¹⁴ See <<http://www.fp7-frame.eu/>>.

¹⁵ At the time of writing, a public consultation on the revision of the Commission's Impact Assessment Guidelines is still ongoing (from 1 July 2014 to 30 September 2014), shortly after which new Guidelines will enter into force. See European Commission, 'Impact Assessment Guidelines' 15 January 2009, SEC(2009) 92.

¹⁶ Council of the European Union, 'Council conclusions on a rights-based approach to development cooperation, encompassing all human rights', 19 May 2014.

particular attention will be paid to EU initiatives that aim to improve the international regulatory frameworks on the enforcement of intellectual property rights (IPR), while also bringing a human rights-dimension to international trade negotiations and agreements within the context of the WTO (Deliverable 9.3).

In a fourth phase, an in-depth case-study will be conducted of the 2014 reform of the Generalised System of Preferences ('GSP') and the Everything But Arms ('EBA') initiative, as the embodiment *par excellence* of the nexus between trade, development and human rights. The synergies and potential for the mutual alignment of trade and development policies, at the benefit of least-developed countries, will thus be examined from the viewpoint of the instrumental role which human rights can play therein (Deliverable 9.4).

B. Research objectives and methodology

In line with the overall objectives of FRAME's Work Package 9 the aims of this report are:

- to map and assess how human rights are integrated into EU policies on trade and development and to what extent this is translated in concrete policy instruments and tools;
- to map and analyse the various EU institutional structures responsible for developing and implementing human rights policies in development and trade; and the challenges in creating a coherent and consistent framework for implementing human rights into EU action.

In order to map the diverse ways in which human rights are integrated in development and trade policies and identify the obstacles and opportunities offered by the Lisbon Treaty in this regard, an analysis is made on the basis of primary sources (i.e. official EU documents, including legislative acts, policy documents and working documents); secondary sources (i.e. state-of-the-art literature on human rights policies in EU external relations, including scholarly research, think tank reports and civil society assessments); as well as semi-structured interviews. Thirteen interviews were conducted with officials in the EU External Action Service ('EEAS') and the European Commission ('EC' or 'Commission') in Brussels. In addition, four more interviews were conducted with civil society organisations in Brussels. As agreed with the interviewees, all names and affiliations have been kept confidential in this report.

C. Structure

In order to assess the instruments available to the EU to integrate human rights into its trade and development policies, the report will **first** focus on the trade-development-human rights nexus, how it developed, and how it has been operationalised in the EU (see below, Chapter II). Particular focus will be put on strategies of human rights mainstreaming, and on concepts and policies which have enabled the realms of trade and development cooperation to operate in tandem, such as the objective to pursue 'Aid for Trade' or 'Policy Coherence for Development' (see below, section 0).

Second, the report will analyse in detail how specific trade policies and instruments have been designed and adapted over time so as to fully integrate 'beyond-trade' components such as human rights (see below, Chapter III). The report will then address unilateral EU trade policies, throughout which the EU has made the access to and from its market conditional upon the respect for human rights writ large. In

particular, an analysis will be made of the Generalised System of Preferences (see below, section III.C.1.a)) as well as the EU's Specific Measures (see below, section III.C.1.b)), encompassing both country-specific and issue-specific instruments to restrict trade with certain countries, or in certain sectors which are known to be prone to human rights violations – such as military equipment, the extractive industries, or the forestry sector. The report will then closely survey how EU bilateral trade agreements have come to include hard or soft clauses, in order to ensure that the reaping of trade benefits go hand in hand with the respect for human rights in the EU's partner countries (see below, section III.C.2). Most notably, an analysis will be made of the typology of trade instruments, the human rights component in EU trade agreements, the essential elements clause, the sustainable development chapters and the realm of EU investment policies which has now become an exclusive competence following the entry into force of the Lisbon Treaty.

Third, the report will move on to the field of development cooperation, thereby delving into an analysis of how human rights concerns have progressively come to occupy central stage in the EU's aid agenda (see below, section IV.A). First, an overview will be presented of how human rights have increasingly been integrated into the multilateral architecture of development cooperation (see below, section IV.A.1). Subsequently, this chapter will map the key actors and the financial instruments which shape the EU's development cooperation agenda (see below, sections IV.B.1 and IV.B.2), as well as the EU's financing instruments which also enable a human rights-perspective on an operational level (see below, section IV.C). Charting human rights-inducing policies in particular, the chapter further identifies specific EU policies on aid allocation and budget support (see below, section IV.C.5), policies and efforts aimed at supporting actors and processes related to human rights, as well as transversal policies on human rights mainstreaming and the recent adoption of a rights-based approach (see below, section IV.C.6 and IV.C.6.a)).

Finally, this report will offer preliminary concluding remarks on the intricate nexus between the EU's trade and development policies, and the extent to which they allow for the integration of human rights concerns. As such, these concluding remarks should be read in the light of the next deliverables envisaged within this Work Package which, as explained above, will conduct a more empirical analysis of whether the trade-development-human rights nexus is actually contributing to the EU's aim of upholding its principles of effectiveness, coherence, transparency, predictability or legitimacy throughout its human rights agenda.

II. CONTEXTUALISING AND CONCEPTUALISING THE DEVELOPMENT-TRADE-HUMAN RIGHTS NEXUS

A. A brief history of the development-trade-human rights nexus

As the world's largest aid donor and a powerful trading bloc, the EU has evolved from being a mere 'normative power', which 'acts to change norms in the international system',¹⁷ to a fully-fledged 'market power', which 'exercises its power through the externalization of economic and social market-related policies and regulatory measures'.¹⁸ Inevitably, whether intentional or not, its trade and development policies have a major impact on the protection and promotion of human rights worldwide. Although the EU has sought to use this leverage to promote a human rights agenda, it remains vulnerable to the criticism that these measures are not effectively implemented,¹⁹ or not impartially enforced.²⁰ Indeed, the 2011 Communication on 'Human Rights and Democracy at the Heart of EU External Action', has already stressed that 'the challenge is to make trade work in a way that helps rather than hinders human rights concerns'.²¹ In a similar vein, the Communication also highlighted the challenge of EU development policies in 'better supporting the efforts of partner countries in implementing their domestic and international obligations on human rights'.²² Subsequently, the 2012 Strategic Framework for Human Rights pledged to simultaneously address both development and trade-related human rights concerns in the coming years.²³

The Strategic Framework's emphasis on the nexus between development, human rights and trade is not new, and has gradually evolved since the adoption of the 1995 landmark Communication on the inclusion of human rights principles in all agreements between the EU and third countries (see below, section III.C.2.b)).²⁴ As will be shown in the following sections, however, this policy shift has neither been automatic nor inevitable. Rather, it is the result of a historical process marked by three distinct phases. At first, both international development cooperation and international trade had been operating in spheres which were kept separate from the realm of international human rights. On the one hand, development policy was deemed to pertain to the working area of economists and civil engineers, who were primarily concerned with stimulating economic growth and productivity, as well as providing basic protection from

¹⁷ Manners (n 1) 252.

¹⁸ Chad Damro, 'Market Power Europe', [2012] 19 *Journal of European Public Policy* 682.

¹⁹ See, e.g., European Parliament, Resolution on human rights, social and environmental standards in International Trade Agreements, 25 November 2010, P7_TA-PROV(2010)04347, para 12; Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005), 37-38; David Kinley, *Civilising Globalisation* (Oxford University Press 2009), 256. Regarding GSP+, see Federica Petrucci, Jean Bossuyt, Koen De Feyter, Marta Foresti, Pilar Domingo, Sara Monti, Thematic evaluation of the European Commission support to respect of Human Rights and Fundamental Freedoms (including solidarity with victims of repression), Final report, Vol. 1, December 2011, available online <<http://www.oecd.org/derec/49682223.pdf>> 25-26.

²⁰ The Thematic evaluation has called the EU political commitment towards human rights in its external policies (such as trade) 'selective', on account of the fact that 'double standards continue to be applied depending on the strategic importance of the partner country.' Ibid. 69-70, and 18.

²¹ European Commission and High Representative of the European Union for Common Foreign and Security Policy (n 9) 11.

²² Ibid.

²³ Council of the European Union (n 10) Action 10 and 11.

²⁴ European Commission, 'Communication on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries', Brussels 23 May 1995, COM(95)216 final.

the scarcity of goods and services in the economy.²⁵ For a long period, the discipline of development studies was focused on finding technical solutions, often within specific sectors such as agriculture.²⁶ International trade, on the other hand, had mostly been focusing on the balance of power between national governments that pursue international trade policies – policies which in turn ran the risk of undermining the end-goal of trade liberalisation worldwide.²⁷ The discipline of international trade had thus been oriented towards the macro- or the meso-level, without necessarily taking into account the implications for human rights at the individual level. Accordingly, the study of international trade was deemed to pertain to the realm of either economists or lawyers.²⁸ As a third category distinct from both development and trade studies, finally, human rights had primarily been concerned with state power and the need to provide basic protection from possible abuses against citizens. Conversely, human rights were perceived to fall under the expertise of lawyers, political and social scientists.²⁹ As a result, the three disciplines thus all ‘evolved along separate institutional paths’.³⁰

The end of the Cold War rang in a second phase, which was marked by the gradual merger between development and human rights on the one hand, and between trade and human rights on the other. Spurred by the United Nations (UN) General Assembly’s ‘Declaration on the Right to Development’ in 1986,³¹ development and human rights were increasingly considered to be ‘communicating vessels’³² (see below, section IV.A.1). By the same token, the last two decades have also been characterised by a ‘growing sensitivity to the fact that international trade and human rights law share a similar intellectual lineage reflecting a liberal commitment to the importance of the rule of law, private property, economic markets, representative democracy, education, and limits on social inequality’.³³ Although the 1996 Singapore Consensus represented a failure to integrate trade and human rights at the multilateral level,³⁴ the late 1990s nevertheless prompted a more ‘normative’ approach towards international trade policies. At this stage, however, the human rights-infused disciplines of development and trade still operated in relative isolation from each other.

It was not until the third phase was reached, that that final distinction also began to blur. One decade after the fall of the Berlin Wall, Amartya Sen published his influential work on the ‘capability approach’, which highlighted the importance of ensuring economic liberalisation whilst also protecting a wide range of freedoms at the individual level.³⁵ Developed at a time when the World Trade Organization (WTO)’s

²⁵ David D’Hollander, Axel Marx and Jan Wouters, ‘Integrating Human Rights in Development Policy: Mapping Donor Strategies and Practices’ (2013) Leuven Centre for Global Governance Working Paper No. 108, available online <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp108-dhollander-marx-wouters.pdf> 7.

²⁶ Katarina Tomasevski, *Development Aid and Human Rights* (Palgrave Macmillan 1989).

²⁷ Daniel Drache and Lesley Jacobs, *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (Cambridge University Press 2014) 4.

²⁸ Siobhan McInerney-Lankford, ‘Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective’ [2009] 1 *Journal of Human Rights Practice* 51.

²⁹ *Ibid.*

³⁰ D’Hollander, Marx, Wouters (n 25) 22.

³¹ UN General Assembly, ‘Declaration on the Right to Development’, 4 December 1986, Resolution 41/128.

³² D’Hollander, Marx, Wouters (n 25), p. 6.

³³ Drache and Jacobs (n 27).

³⁴ World Trade Organization, Singapore Ministerial Declaration, 13 December 1996, WT/MIN(96)/DEC. This statement was later reaffirmed in the 2001 Doha WTO Ministerial Declaration.

³⁵ Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

Uruguay Round (1986-1994) had produced an outcome to the detriment of developing countries,³⁶ the capability approach was widely adopted as a guiding theoretical paradigm amongst both academics and practitioners,³⁷ at first within the development community at large, and then gradually within civil society organisations (CSOs) concerned with the human rights impacts of international trade. According to one study, Oxfam receives particular merit for ‘helping policymakers and the public understand the relationship between poverty, development, human rights, and trade’.³⁸ As a result, the early 2000s gave rise to a growing recognition that trade, development and human rights policies are closely interlaced, and should thus be pursued in a coherent and synergetic manner.

Drawing on the lessons learned from the ‘Uruguay hangover’,³⁹ it had become difficult to cement the trade-development nexus through a new round of multilateral talks. Early attempts to launch new trade talks at the WTO Ministerial Conference in Seattle (1999) had resulted in widespread anti-globalisation protests, which were recognised to be a ‘watershed event’ in the history of the anti-globalisation movement.⁴⁰ Developing countries had also grown increasingly ‘wary of a repeat of the unfairness of Uruguay’.⁴¹ As a result, a number of high-income countries, including the EU, were eventually able to garner support for a new round of talks at the WTO Ministerial Conference in Doha (2001-present), by explicitly pledging to put ‘the promotion of economic development and the alleviation of poverty’ at the heart of international trade.⁴² Precisely because one of its fundamental objectives is to cement the trade-development nexus, the ongoing Doha Round is also colloquially known as the Doha Development Agenda.⁴³

As the Doha Round has currently reached a stalemate,⁴⁴ however, alternative avenues for cementing the trade-development nexus had to be sought (see below, section III.C). According to some accounts, the Doha impasse, combined with ‘the implacable sense that the world trading system was manifestly unfair to developing countries’⁴⁵ therefore paved the way for the introduction of multilateral policy initiatives which would ‘bring development closer to the centre of the WTO’s work programme and mollify the

³⁶ Joseph Stiglitz and Andrew Charlton have argued that: ‘[a]most as soon as the ink dried on the Uruguay deal, it became clear that the agreement was unbalanced. The final terms reflected, in large part, the priorities of the advanced countries. Market access gains were concentrated in areas of interest to developed countries including services, intellectual property and advanced manufacturing. Far less progress was made in areas of interest to the poor countries such as agriculture (including subsidies to agriculture) and textiles’. See Joseph Stiglitz and Andrew Charlton, *The Right to Trade – Rethinking the Aid for Trade Agenda* (Commonwealth Secretariat 2013) 3.

³⁷ D’Hollander, Marx, Wouters (n 25).

³⁸ Susan Aaronson, Jamie Zimmerman, ‘Fair Trade? How Oxfam Presented a Systemic Approach to Poverty, Development, Human Rights, and Trade’ [2006] 28 Human Rights Quarterly 998.

³⁹ Stiglitz and Charlton (n 36) 4.

⁴⁰ Seattle Police Department, ‘The Seattle Police Department After Action Report: World Trade Organization Ministerial Conference Seattle, Washington 29 November – 3 December 1999’, 4 April 2000, available online <http://www.seattle.gov/police/publications/WTO/WTO_AAR.PDF> 3.

⁴¹ Stiglitz and Charlton (n 36) 5.

⁴² World Trade Organization, Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/1, para 2.

⁴³ See <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development>.

⁴⁴ Stephen Hartman, ‘The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs’ [2013] 27(5) International Trade Journal,

⁴⁵ Stiglitz and Charlton (n 36) 5.

concerns of developing countries'.⁴⁶ Indeed four years later, the 'Aid for Trade' (AfT) initiative was launched at the WTO Ministerial Meeting in Hong Kong as a follow-up to the Doha Development Agenda.⁴⁷

According to the WTO, '[a]id for Trade helps developing countries, and particularly least developed countries, trade'.⁴⁸ Most notably, the reasoning goes, '[m]any developing countries face a range of supply-side and trade-related infrastructure obstacles which constrains their ability to engage in international trade'.⁴⁹ At the time of its launch, expectations surrounding the potential of AfT were high. In earlier appraisals, the AfT initiative had already been hailed for its potential (i) to mitigate the comparative disadvantages of developing countries that take part in global trade; and (ii) to enhance the effectiveness of aid disbursements.⁵⁰ In subsequent years after its launch, its scope was substantially expanded to also include support for infrastructure and production.⁵¹ At the Group of 20 ('G20') Summit in 2010, leaders from around the world adopted AfT benchmarks in the 'Seoul Development Consensus for Shared Growth', thereby committing to maintaining 'Aid for Trade levels that reflect the average of the last three years (2006 to 2008)'.⁵² Ten years after its introduction, AfT has gained prominence as a proposed part of the post-2015 agenda,⁵³ and is said to have become 'a fixture in the development landscape',⁵⁴ as it now accounts for 30% of total official development aid (ODA).⁵⁵ From a rights-based perspective, however, the notable absence of any human rights discourse in the AfT initiative has been criticised.⁵⁶

⁴⁶ Ibid.

⁴⁷ World Trade Organization, Doha Work Programme, Ministerial Declaration, 18 December 2005, WT/MIN(05)DEC.

⁴⁸ World Trade Organization, 'Aid for Trade', available online <http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm>.

⁴⁹ Ibid.

⁵⁰ Stiglitz and Charlton (n 36)

⁵¹ As a result, AfT now encompasses five categories: trade policy and regulation; trade-related infrastructure; productive capacity; trade-related adjustment; other trade-related needs. See European Commission, 'Aid for Trade Report 2013. Review of progress by the EU and its Member States', Staff Working Document, 16 July 2013, SWD(2013) 273, 3.

⁵² G20, 'Seoul Development Consensus for Shared Growth', 11 November 2010, available online <www.g20.utoronto.ca/2010/g20seoul-consensus.pdf>.

⁵³ Jodie Keane and Claire Melamed, 'Trade and the post-2015 agenda. From Millennium Development Goals to Sustainable Development Goals', (2014) Overseas Development Institute Briefing Paper No 89, available online <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9016.pdf>>.

⁵⁴ Stiglitz and Charlton (n 36) viii.

⁵⁵ World Trade Organization, 'Aid for Trade fact sheet', available online <http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm>.

⁵⁶ Nicolas Gloeckl, 'Reforming Aid-for-Trade towards Development' (2011) IBON International issue paper, available online <<http://iboninternational.org/resources/pages/EDM/141/438>>.

B. The EU's development-trade-human rights nexus: The challenge of coherence

From its very inception, the EU has been a proponent of introducing AfT at the WTO Doha Round.⁵⁷ In 2002, the Commission had already adopted a communication outlining the EU's priorities on so-called 'Trade-Related Assistance' (TRA) issues,⁵⁸ and the EU's commitment to AfT was subsequently endorsed by a Joint EU-Member States 'Strategy on Aid for Trade'.⁵⁹ In doing so, it aims to contribute to the eradication of poverty and thereby also the advancement of the Millennium Development Goals. According to the latest figures on AfT-flows in 2011, the EU indeed also maintained its pole-position in practice, as the largest provider of AfT in the world, 'accounting collectively for 32% of total AfT, despite the global economic downturn and the overall decline of 14% of global AfT'.⁶⁰ Although human rights promotion has been highlighted as being of particular relevance for the EU's support to TRA in a recent large-scale evaluation,⁶¹ however, no such reference was made in the EU's AfT Strategy. Based on an analysis of the latest EU AfT Report, furthermore, it appears that human rights language still remains largely absent in the EU's discourse on AfT. By the same token, no reference is made to the role of human rights in AfT in the EU's designated 2012 Strategic Framework for Human Rights. This finding seems to corroborate with recent research pointing towards persisting tensions between EU trade and development actors in the area of AfT, which makes it difficult to pursue a coherent strategy in the promotion of the development-trade-human rights nexus. As a result, notable discrepancies seem to persist between the EU's commitments to simultaneously pursue regional integration and market liberalisation, whilst also pledging to adopt pro-poverty measures in the process.⁶²

Whilst supporting the introduction of the AfT initiative on the global scene, the EU also took on the commitment in 2005 to pursue its flagship 'Policy Coherence for Development' (PCD), and pledged to produce biennial reports on the progress made.⁶³ Recognising that some of the EU's policies 'can have a significant impact outside of the EU [...] that either contributes to or undermines its development policy',⁶⁴ also known as the so-called beyond-aid drivers, the EU aims to 'take into account development cooperation objectives in non-development policies'⁶⁵ by instrumentalising the objective of ensuring PCD. This policy shift was noted by one leading Commission official to have come as a surprise, given that PCD

⁵⁷ Patrick Holden, 'Tensions in the discourse and practice of the European Union's Aid for Trade' [2014] 20:1 Contemporary Politics, 3.

⁵⁸ European Commission, 'Trade and Development. Assisting Developing Countries to Benefit from Trade', Communication from the Commission to the Council and the European Parliament, 18 September 2002, COM(2002) 513final.

⁵⁹ Council of the European Union, 'EU Strategy on Aid for Trade: Enhancing EU support for trade-related needs in developing countries', Conclusions of the Council and of the Representatives of the Governments of the Member States meeting within the Council, 29 October 2007, 14470/07.

⁶⁰ European Commission (n 51).

⁶¹ European Commission, 'Evaluation of the European Union's Trade-related Assistance in Third Countries', Final Report, Volume 1, April 2013, 11, available online <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2013/1318_vol2b_en.pdf> .

⁶² Holden (n 57) 90–102.

⁶³ European Commission, 'Policy Coherence for Development – Accelerating progress towards attaining the Millennium Development Goals', Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Brussels 12 April 2005, COM(2005) 134 final.

⁶⁴ Ministry of Foreign Affairs of Denmark, 'EU Development Cooperation', available online <<http://amg.um.dk/en/multilateral-cooperation/eu-development-cooperation/>> .

⁶⁵ Ibid.

had already been enshrined in the Treaty of Maastricht, but had never before been taken to heart.⁶⁶ In an evolution similar to the promotion of the AfT initiative, the changing trade-development paradigm thus induced the EU to link the progress made towards attaining the Millennium Development Goals to so-called beyond-aid drivers under the umbrella of PCD. In a similar vein, the EU has now equally been insisting on the need to instill PCD in the post-2015 agenda⁶⁷.

Fleshing out what the EU meant by beyond-aid drivers, the original communication identified eleven priority areas,⁶⁸ 'where the challenge of attaining synergies with development policy objectives is considered particularly relevant'.⁶⁹ First and foremost, it identified trade as a beyond-aid driver, and already pledged that '[t]he EU is strongly committed to ensuring a development-friendly and sustainable outcome of the Doha Development Agenda and EU-ACP Economic Partnership Agreements (EPAs)'⁷⁰ (for a discussion of the latter see below, section IV.C.5.a)). In addition to consolidating its multilateral trade agenda with more development-oriented needs, the EU also pledged to 'further improve its Generalised System of Preferences, with a view to effectively enhancing developing countries' exports to the EU'⁷¹ (see below, section III.C.1.a)). Endorsing the Commission communication, furthermore, the Council later on added climate change as a twelfth beyond-aid driver.⁷²

In assessing the widely hailed objective of ensuring PCD, however, some observers noted that it remains a 'mission impossible',⁷³ due to the fragmented institutional landscape of EU development policies (see below, section IV.B.1), which has inevitably translated into varying commitments to PCD. Over the years, the specific beyond aid drivers thus underwent several changes in order to suit the policy needs as identified in the 2009 evaluation.⁷⁴ Subsequently, the Council agreed to reduce the number of 'global development challenges for PCD' to five areas, including the area of trade and finance which maintained its pole-position as a beyond-aid driver.⁷⁵ This constellation of policy priorities was also reaffirmed in the latest PCD Report.⁷⁶ On the issue of trade and finance, progress was most notably mentioned in (i) the recent reform of the EU's unilateral Generalised System of Preferences (see below, section III.C.1.a)), (ii) the EU's multilateral efforts to bring its Free Trade Agreements in line with the aims of the Doha

⁶⁶ Quoted in Maurizio Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development' [2008] 30 *European Integration* 323, 340.

⁶⁷ Jan Wouters, Laura Beke, David D'Hollander and Kolja Raube, 'The Search for a Post-2015 International (Sustainable) Development Agenda: Some Reflections from a European Perspective', in Dirk Arts, Wouter Devroe, René Fokué, Karel Marchand and Ivan Verougstraete (eds.), *Liber Amicorum Jacques Steenbergen, Mundi et Europae Civis* (Larcier, 2014), 197-216.

⁶⁸ Priority areas for PCD include trade; environment; security; agriculture; fisheries; the social dimension of globalisation, promotion of employment and decent work; migration; research and innovation; information society; transport; and energy.

⁶⁹ European Commission (n 63) 4.

⁷⁰ *Ibid.*, 5.

⁷¹ *Ibid.*

⁷² Council of the European Union, 'Council Conclusions: Accelerating progress towards achieving the millennium development goals', 24 May 2005, available online <<http://www.eu2005.lu/en/actualites/conseil/2005/05/23cagre/milldego.pdf>>, 6.

⁷³ Carbone (n 66).

⁷⁴ European Commission, 'Policy Coherence for Development – Establishing the policy framework for a whole-of-the-Union approach', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 15 September 2009, COM(2009) 458 final.

⁷⁵ Council of the European Union, 'Council Conclusions on Policy Coherence for Development', 17 November 2009, available online <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/111278.pdf>.

⁷⁶ European Commission, 'EU 2013 Report on Policy Coherence for Development', Commission Staff Working Document, 31 October 2013, SWD(2013) 456 final.

Development Agenda, including Aid for Trade (see above, section A), a balanced policy of intellectual property rights and good governance in the trade in raw materials (see below, section III.C.1.d)(5)); as well as (iii) the EU's efforts to encourage European companies to promote corporate social responsibility in their business operations.⁷⁷

Interestingly, however, although the EU's Strategic Framework for human rights also sets out the objective of 'pursuing coherent policy objectives',⁷⁸ human rights still do not seem to run as a 'silver thread' throughout the EU's different beyond-aid drivers. While the references made to human rights language in PCD reports have notably increased in frequency over the years, it is yet to be included as a substantial dimension of the EU's PCD policy. For now, its importance is mentioned in the context of the GSP reform (see below, section III.C.1.a)), the EU's Agenda for Change (see below, section IV.C.2), the deliberations on the post-2015 development agenda (see below, section IV.C.4). This indicates that the emerging development-trade nexus, itself still in a formative phase, seems to increasingly integrate a human rights dimension. This was reiterated by the Council in its endorsement of a rights-based approach to development cooperation (see below, section), whereby it stressed the need to 'strive for positive impact of EU internal and external policies on the realisation of human rights in partner countries' by 'building on EU efforts to promote human rights across all areas of its external action and in line with Policy Coherence for Development'.⁷⁹ In conclusion, while good intentions seem to be present, the way that this human rights dimension was implemented in the middle of the trade-development nexus has been criticised on a number of counts by partner countries, by other international organisations (notably the WTO), civil society and academia. In this report we will seek to present a balanced assessment of EU policies in light also of this criticism.

C. A framework for the development-trade-human rights nexus

In spite of the heightened emphasis on pursuing policies which simultaneously fall within the development-trade-human rights nexus, this study approaches the analysis of the EU's policy instruments and tools as pertaining to either the section on trade or the section on development policy. The reason behind this approach is two-fold.

First, the link between trade and human rights on the one hand and development and human rights on the other hand still differs significantly on a conceptual level. The question whether the EU's trade policy should adopt 'human rights' as an objective, despite the legal framework for external action described in chapter 1 of this report, is still relevant.⁸⁰ The core premise of development cooperation on the other hand, is to be beneficial to the population outside the EU. As such, it can be argued that the development-human rights nexus is less problematic than the trade-human rights nexus. This situation seems to be reflected in the emergence of comprehensive concepts such as the 'right to development' and 'human

⁷⁷ Ibid., 11-12.

⁷⁸ Council of the European Union (n 10) Action 6, Action, Action 8, Action 9.

⁷⁹ Council of the European Union, 'Press Release on the 3315th Council meeting Foreign Affairs', PRESSE 300 PR CO 27, available online <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/142687.pdf>.

⁸⁰ Friedrich Benjamin Schneider, 'Human Rights Conditionality in the EU's Generalised System of Preferences: Legitimacy, Legality and Reform' [2012] 3 Zeitschrift für Europarechtliche Studien 301.

rights-based approaches', which have taken root primarily in the area of development – yet remain much more problematic to directly integrate into trade policies.

Second, although the aforementioned analysis has shown that the EU deliberately aims to pursue coherent policy objectives in the realm of human rights-related policies, the EU's corresponding institutional set-up in these areas still differs significantly. The EU's Common Commercial Policy (CCP) is an exclusive competence of the Union.⁸¹ Following its expansion under the Lisbon treaty to now also include both trade and investment issues,⁸² furthermore, it is deemed to be 'the oldest, most integrated and most powerful external policy domain of the EU'.⁸³ By contrast, development cooperation is a shared competence between the EU and its Member States, meaning that the exercise of EU competences does not prevent Member States from exercising theirs.⁸⁴ Even though strategies have been developed to ensure that the policies of the EU and the Member States are consistent and effective (see above, section 0), European development cooperation policy has long been criticised for its fragmented institutional set-up, lack of coherence and unclear division of labour.⁸⁵

Notwithstanding the distinct conceptual and institutional framing two issues can be identified which are transversal across the two policy areas, namely a broad conceptualisation of the concept of human rights and the idea of mainstreaming human rights in EU policies. Each is briefly introduced.

1. Conceptualising human rights

The EU emphasises the centrality of human rights in its domestic and external policies, and claims to have maintained that emphasis since its very foundation.⁸⁶ As for the EU these rights are purportedly 'embedded in its founding treaty',⁸⁷ it also proclaims that it 'actively promotes and defends them both within its borders and when engaging in relations with non-EU countries'.⁸⁸ However, although human rights are 'commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being',⁸⁹ and while the scope of the Charter is not limited to the territory of the EU but also applies to EU external policies,⁹⁰ it is not always very clear what these rights concretely entail for the EU when pursuing its trade and development policies.⁹¹ Indeed the 2011

⁸¹ See Art. 3 (1) (e) TFEU.

⁸² Articles 206 and 207 TFEU.

⁸³ Fabienne Bossuyt, Lotte Drieghe and Jan Orbie, 'Living Apart Together: EU Comprehensive Security from a Trade Perspective' [2013] 18 European Foreign Affairs Review, 63

⁸⁴ See Art. 4 (4) TFEU.

⁸⁵ Organisation for Economic Co-operation and Development (OECD) (2012) Peer Review, European Union Development Assistance Committee (DAC), available online <<http://www.oecd.org/dac/peer-reviews/50155818.pdf>>.

⁸⁶ Stijn Smismans, 'The European Union's Fundamental Rights Myth' [2010] 48 Journal of Common Market Studies 45.

⁸⁷ European External Action Service, 'The EU and human rights', available online: <http://eeas.europa.eu/human_rights/index_en.htm>.

⁸⁸ Ibid.

⁸⁹ Magdalena Sepúlveda, Theo van Banning, Gudrún D Gudmindsdóttir, Christine Chamoun and Willem J M van Genugten, *Human Rights Reference Handbook* (Costa Rica: University for Peace 2004) 3.

⁹⁰ The Commission, referring to Art 21 TEU, states that 'the Charter also applies to [the Union's] external action.' See European Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', Communication from the Commission, 19 October 2010, COM (2010) 573 final, 4.

⁹¹ Regarding the concrete obligations placed on EU institutions by the Charter as to the exercise of external relations policies, they seem to require both that the activity covered be of the competence of the EU, and that a 'jurisdictional' link exists between the EU and the right bearer. While studies have demonstrated this link to exist in regard, for example, of migrants. See Elspeth Guild, Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact

communication unequivocally stresses that ‘*all* human rights - civil, political, economic, social and cultural – are universal in nature, valid for everyone, everywhere’ and that all of these run ‘through all EU action both at home and abroad’.⁹² In a similar vein, the EEAS lists amongst its human rights priorities a combination of ‘civil, political, economic, social and cultural rights,’ thereby adding that ‘[i]t also seeks to promote the rights of women, of children, of those persons belonging to minorities, and of displaced persons’.⁹³ As clarified in the latest available EU Annual Report on Human Rights, furthermore, the EU’s envisaged actions as listed in its Strategic Framework ‘cover *all* aspects of human rights, ranging from the eradication of torture to fighting forced marriage to defending freedom of expression’.⁹⁴

In an effort to come towards a more precise conceptualisation of human rights promotion, the EU has over the years adopted a number of ‘soft law’ instruments on external human rights promotion. The EU Guidelines on Human Rights, adopted by the Council of the European Union, are most noteworthy in this respect. Although not legally binding, the Guidelines do shed light on the EU’s policy in a particular field of human rights promotion and are deemed to be influential in practice. As they have been endorsed at the EU ministerial level, they are said to ‘represent a strong political signal that they are priorities for the Union’.⁹⁵ So far, 11 EU Human Rights Guidelines have been adopted, covering the issues of the death penalty,⁹⁶ torture and other cruel, inhuman or degrading treatment or punishment,⁹⁷ freedom of religion or belief,⁹⁸ the rights of lesbian, gay, bisexual, transgender and intersexual (LGBTI) people,⁹⁹ human rights

on EU Home Affairs Agencies’ (2011) European Parliament Directorate for Internal Policies, available online <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf>, 49), and while it can be imagined to exist in relation to EU development projects, such jurisdiction of the EU on persons located outside of the EU territory is more difficult to find in trade policies. Moreno-Lax and Costello have a broader interpretation of the applicability of the Charter to EU external policies, by stating notably that ‘[t]he Charter applies to a particular situation once EU law governs it. There is no additional criterion, of a territorial character or otherwise, that needs to be fulfilled in this context. The point, therefore, is not to identify an independent field of application of the Charter, but to determine the remit of EU law and its relevance to a particular situation. See Violeta Moreno-Lax and Cathryn Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’, in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), pp. ____ (section D.)

⁹² European Commission and High Representative of the European Union for Common Foreign and Security Policy (n 9) 4 (emphasis added).

⁹³ European External Action Service (n 87).

⁹⁴ Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports)’, 9431/13, 13 May 2013, 10 (emphasis added).

⁹⁵ European External Action Service, ‘Human Rights Guidelines’, available online: <http://eeas.europa.eu/human_rights/guidelines/index_en.htm>.

⁹⁶ Council of the European Union, ‘EU Guidelines on Death Penalty’, 8416/13, 12 April 2013.

⁹⁷ Council of the European Union, ‘Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment’, 6129/1/12, 20 March 2012.

⁹⁸ Council of the European Union, ‘EU Guidelines on the promotion and protection of freedom of religion or belief’, 24 June 2013.

⁹⁹ Council of the European Union, ‘Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons’, 24 June 2013.

dialogues,¹⁰⁰ children's and armed conflict,¹⁰¹ human rights defenders,¹⁰² rights of the child,¹⁰³ violence against women,¹⁰⁴ international humanitarian law,¹⁰⁵ and, most recently, freedom of expression.¹⁰⁶

Leaving aside the policy implications of broadly conceptualising human rights for now, this study will follow a similarly transversal approach when assessing the integration of human rights in EU trade and development policies. In doing so, it will draw on the categorical division of human rights into 'three generations', as originally developed by Karel Vasak in the late 1970s.¹⁰⁷ Concretely, this study will conceive of human rights as consisting of civil and political rights ('first-generation human rights' or 'blue rights'); economic, social and cultural rights ('second-generation human rights' or 'red rights'); and the collective rights which revolve around the former two categories at the meso- or macro-level ('third-generation human rights' or 'green rights').¹⁰⁸ Cognisant of the 1993 Vienna Declaration and Programme of Action on Human Rights, which reaffirmed that '[a]ll human rights are universal, indivisible and interdependent and interrelated',¹⁰⁹ furthermore, all three generations of human rights will be used interchangeably here. Conversely, this approach also implies that the prevailing distinction within the EU between 'internal' fundamental rights and 'external' human rights will not be taken up here, as has been done elsewhere,¹¹⁰ but will also be analysed on an equal and interchangeable footing.

2. Mainstreaming human rights

The process of 'mainstreaming' human rights has been defined as a strategic way of 'deliberately incorporating human rights considerations into processes or organisations which are not explicitly mandated to deal with human rights'.¹¹¹ At a more operational level, it has also been described as the '[...] reorganisation, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages'.¹¹² The concept emerged

¹⁰⁰ Council of the European Union, 'EU guidelines on human rights dialogues with third countries – Update', 2009.

¹⁰¹ Council of the European Union, 'EU guidelines on children and armed conflict – Update', 2008.

¹⁰² Council of the European Union, 'Ensuring protection – European Union Guidelines on Human Rights Defenders', 2008.

¹⁰³ Council of the European Union, 'EU Guidelines for the Promotion and Protection of the Rights of the Child', 2008.

¹⁰⁴ Council of the European Union, 'EU guidelines on violence against women and girls and combating all forms of discrimination against them', 2008.

¹⁰⁵ Council of the European Union, 'EU Guidelines on promoting compliance with International Humanitarian Law – Technical Update', 16841/09, 1 December 2009.

¹⁰⁶ Council of the European Union, 'EU Human Rights Guidelines on Freedom of Expression Online and Offline', 12 May 2014.

¹⁰⁷ Karel Vasak, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' [1977] 30 UNESCO Courier.

¹⁰⁸ For a more detailed discussion of the categorisation of human rights into 'three generations', see Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' [1982] 29 Netherlands International Law Review 307-322; Susan Marks, 'Emerging Human Rights: A New Generation for the 1980s?' [1980] 33 Rutgers Law Review, 435.

¹⁰⁹ Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, §1(5). Available online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>>.

¹¹⁰ Jan Wouters, Laura Beke, Anna-Luise Chané, Nicolas Hachez and Kolja Raube, 'Enhancing Cooperation between the European Parliament and EU National Parliaments on EU Human Rights Policy', European Parliament Directorate-General for External Policies of the Union, EXPO/B/DROI/2013/20, February 2014, available online <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433789/EXPO-DROI_ET\(2014\)433789_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433789/EXPO-DROI_ET(2014)433789_EN.pdf)>.

¹¹¹ Florence Benoit-Rohmer et al., 'Human Rights Mainstreaming in EU's External Relations' (2009) European Parliament Directorate-General for External Policies of the Union, EXPO/B/DROI/2008/66, available online <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/407003/EXPO-DROI_ET%282009%29407003_EN.pdf>, 15.

¹¹² Christopher McCrudden, 'Mainstreaming Human Rights', in Colin Harvey (ed.), *Human Rights in the Community: Rights as Agents for Change* (Hart Publishing, 2005) p. 9.

prominently on the policy agenda of the UN as part of the 1997 reform programme which called for a full integration of human rights into the broad range of UN activities.¹¹³ Since then, the mainstreaming of human rights has become a concept that is much referred to within and outside the UN architecture.

Various rationales drive the adoption of policies for mainstreaming human rights. For some institutions and organisations, it stems from a legal obligation to take into account human rights in the policy making process. Mainstreaming policy has been seen as instrumental for achieving greater coherence (and consistency) within a given policy domain wherein several actors operate, as is the case of external action and foreign policy. There are several other potential benefits linked to the concept of human rights mainstreaming. As argued by De Schutter, mainstreaming can be an incentive to develop new policy instruments and energise institutional learning.¹¹⁴ It potentially improves the involvement of civil society, and enhances the transparency and accountability of policy making.¹¹⁵ It can also be instrumental in improving coordination between different services, and can lead to transformative policies as it aims to tackle the underlying causes of problems rather than their symptoms.¹¹⁶ However, 'human rights mainstreaming' is not universally accepted as a policy concept, as we will show in this study by pointing, for example, to the mainstreaming of human rights in the field of development cooperation.

In assessing how the concept of mainstreaming human rights has been translated into policy and practice, it should be noted that the implications of mainstreaming can vary widely as institutions and organisations operationalise human rights mainstreaming according to their role and mandate. Furthermore, mainstreaming policies play out on several interconnected levels, actors can engage in:

- Internal mainstreaming; ensuring organisational capacity and coherence through establishing standard procedures, investing in staff training and fostering an internal 'human rights culture', etc.
- Mainstreaming human rights in bilateral relations and policies; ensuring human rights are embedded in bilateral dialogues, carrying out country level reporting and elaborating human rights country strategies, etc.
- Mainstreaming at the multilateral level; consistently addressing human rights in international fora and within multilateral organisations, engaging with the UN human rights architecture, etc.

As a cross-cutting issue, the competence for human rights mainstreaming in EU external policies is conversely allocated to all three EU institutions. The Council is in charge of setting the EU's overall human rights promotion agenda in external relations. Both the Commission and the External Action Service are responsible for implementing that agenda by cooperating with its country desks and the EU Delegations. The Parliament acts as a co-legislator according to the ordinary legislative procedure both in development

¹¹³ UN General Assembly, 'Renewing the United Nations: A Programme for Reform', Report from the Secretary-General, 14 July 1997, A/51/950, para79.

¹¹⁴ Olivier De Schutter, 'The New Architecture of Fundamental Rights Policy in the EU', in Wolfgang Benedek, Florence Benoit-Rohmer, Karl Wolfram and Manfred Nowak (eds.), *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag 2011) 131.

¹¹⁵ *Ibid.*, 132.

¹¹⁶ *Ibid.*, 132-133.

cooperation and in trade matters, and in that capacity the Parliament must notably assent to international agreements concluded in relation to those competences (see Arts. 207, 209 and 218 TFEU). In exercising its legislative role in these fields, the Parliament has generally been very attentive to the human rights dimension of trade and development instruments.¹¹⁷

This intricate division of labour is reinforced by the fact that the implementation of human rights mainstreaming policies as such still remains in the hands of Member States. Coupled with the reality that Member States often operate at different paces in their implementation process of such measures, the net result is that human rights mainstreaming policies are often fragmented across the EU, thereby potentially undermining efforts to arrive at a coherent EU human rights policy.¹¹⁸ Promoting human rights externally therefore not only raises the challenge of consistency, requiring the EU and all Member States to speak with one voice in their external relations, but also the challenge of coherence either because human rights promoted externally are not implemented internally. These challenges owe in part to the separate logics between 'internal' fundamental rights in the EU and 'external' human rights outside the EU, or because human rights are not promoted in the same fashion across different policies (such as trade, development, investment, and migration) or toward different partners.

¹¹⁷ European Parliament, 'Resolution on the EU-China negotiations for a bilateral investment agreement', 8 October 2013, 2013/2674(RSP), which accords a prominent place to human rights aspects in the negotiation of such agreement.

¹¹⁸ Wouters, Beke, Chané, Hachez, and Raube (n 110).

III. TRADE AND HUMAN RIGHTS

A. A brief history of the EU's approach to trade and human rights

Economic globalisation – defined as the transnational mobility of goods, capital and people – has been so defining for a country's Gross Domestic Product (GDP) and the everyday lives of people, that it has become one of the most determining traits of the post-war period.¹¹⁹ Indeed, recent empirical research has highlighted just how pervasive international trade has become: 'the volume of trade increased 27-fold between 1950 and 2008, three times more than the growth in global GDP. The value of global trade in goods and services passed the \$22 trillion mark in 2013 or 59% of global GDP, up from 39% of GDP in 1990'.¹²⁰ The importance of international trade for the overall economic development of a country, in other words, seems to even have been underestimated thus far.

Because of its ubiquitous presence, economic globalisation has long been the object of a number of 'discontents',¹²¹ voiced by a colourful mix of 'globalisation opponents'.¹²² Most commonly scorned for inducing race-to-the-bottom dynamics in order to boost a country's international competitiveness,¹²³ globalisation has been faulted with exerting downward pressure on the protection of human rights worldwide.¹²⁴ Indeed, early scholarship had already cautioned that 'as the value of the market grows, the value of individual human rights decreases'.¹²⁵ Potential pitfalls were noted to include a 'citizenship gap'¹²⁶ between governments and their citizens whose human rights they would increasingly fail to protect.¹²⁷ In 2004, the International Labour Organization (ILO)'s prestigious World Commission, composed of an impressive array of policy-makers and scholars alike, rang the alarm and called for 'a process of globalisation with a strong social dimension based on universally shared values, and respect for human rights and individual dignity; one that is fair, inclusive, democratically governed and provides opportunities and tangible benefits for all countries and people'.¹²⁸

Recent scholarship has added some nuance to this debate by uncovering the positive effects of foreign direct investment (FDI) flows on human rights, as opposed to the negative impact of trade competition and its related dynamics of subcontracting.¹²⁹ Some have posited that globalisation has overall favoured human development, and the protection of women's rights in particular.¹³⁰ Others foresee opportunities in the fact that, 'despite significant globalization over the past three decades and increasing regulation via

¹¹⁹ For a comprehensive overview, see Jan Aart Scholte, *Globalization: A Critical Introduction*, (Palgrave Macmillan 2005).

¹²⁰ Bernard Hoekman, *Supply Chains, Mega-Regionals and Multilateralism. A Road Map for the WTO* (London CEPR Press 2014).

¹²¹ Joseph Stiglitz, *Globalization and its Discontents* (W.W. Norton and Company 2002).

¹²² Claus Leggewie, *Die Globalisierung und ihre Gegner* (C.H.Beck 2003).

¹²³ Ajit Singh and Ann Zammit, 'Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives' [2004] 20 *Oxford Review of Economic Policy* 85.

¹²⁴ Andrew Glyn, *Capitalism unleashed: finance, globalization, and welfare* (Oxford University Press 2007).

¹²⁵ Tony Evans, *The politics of human rights: a global perspective* (Pluto Press, Palgrave Macmillan 2001).

¹²⁶ Alison Brysk and Gershon Shafir, *People Out of Place: Globalization, Human Rights and the Citizenship Gap* (Routledge 2004).

¹²⁷ *Ibid.*, 127.

¹²⁸ International Labour Office, 'A Fair Globalization: Creating Opportunities for All', World Commission on the Social Dimension of Globalization, February 2004, ix.

¹²⁹ Layna Mosley and Saika Uno, 'Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labor Rights' [2007] 40:8 *Comparative Political Studies*, 23. See also Layna 129, *Labor Rights and Multinational Production* (Cambridge University Press 2011).

¹³⁰ Niklas Potrafke, 'The Evidence on Globalisation' [2014] *The World Economy*, doi: 10.1111/twec.12174.

free trade agreements, governments still have national policy space to innovate in response to grassroots social movements and the human rights agenda'.¹³¹ Most empirical findings, however, still seem to corroborate with an overall downward trend in human rights protection around the world. Covering the period 1985-2002, the World Bank already forewarned that 'most regions exhibit no sustained improvement over time in average labor rights performance, [and] most appear worse off in 2002 than in 1985'.¹³² Faced with the predicament that human rights might be reaching their 'endtimes',¹³³ therefore, the net impact of trade liberalisation on the protection of human rights in a 'Neo-Westphalian world'¹³⁴ is found to be mixed at best.¹³⁵

In response to these concerns, two schools of thought have emerged over the past two decades. On the one hand, it is argued that trade and human rights constitute two sides of the same coin. Dating as far back as the early nineteenth century, this perspective had already been advocated by early 'social reformers' such as Robert Owen and Daniel Le Grand, whose 'desire to ease the plight of workers, coupled with the fear that any easing of employment conditions would work in favour of foreign competitors, led at the end of the nineteenth century to a multitude of efforts for international legislation'.¹³⁶ In recent times, those efforts have been voiced by human rights bodies such as the UN Committee on Economic, Social, and Cultural Rights (ECOSOC),¹³⁷ who increasingly remind governments of their duty to comply with their extraterritorial human rights obligations when concluding international trade and investment agreements.

Extraterritorial obligations imply that States, but also the EU, in addition to their 'domestic' obligation to protect human rights within the confines of their own territory,¹³⁸ 'must [also] ensure that the measures they adopt unilaterally or the international agreements they negotiate, have no adverse impact on the human rights of persons outside their national territory; and that they protect human rights outside their borders by appropriately regulating non-State actors over which they are able to exercise influence'.¹³⁹ To this end, various human rights treaty bodies have increasingly formulated recommendations on the need

¹³¹ Drache and Jacobs (n 27) 10.

¹³² Margaret Levi, Christopher Adolph, Daniel Berliner, Aaron Erlich, Anne Greenleaf, Milli Lake and Jennifer Noveckl, 'Aligning Rights and Interests: Why, When and How to Uphold Labor Standards' (2012) Background Paper for the World Development Report, available online <http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Aligning_Rights_and_Incentives.pdf> 7.

¹³³ Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).

¹³⁴ Doutje Lettinga and Lars van Troost (eds.), *Debating The Endtimes of Human Rights. Activism in a Neo-Westphalian World* (Amnesty International Netherlands 2014).

¹³⁵ Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights', forthcoming in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge University Press 2015).

¹³⁶ Cleopatra Doumbia-Henry and Eric Gravel, 'Free trade agreements and labour rights: Recent developments' [2006] 145 *International Labour Review* 185.

¹³⁷ See e.g. UN Economic and Social Council, 'The right to adequate food', General Comment No. 12, 1999, E/C.12/1999/5, para 19 and 36; UN Economic and Social Council, 'The right to the highest attainable standard of health', General Comment No. 14 (2000), 2000, E/C.12/2000/4 (2000), para 39; UN Economic and Social Council, 'The right to water', General Comment No. 15, 2002 E/C.12/2002/11, para 31 and 35-6.

¹³⁸ Art. 31 (3) (c) Vienna Convention of Law of Treaties.

¹³⁹ Olivier De Schutter, 'Foreword', in Sarah Joseph, *Blame it on the WTO: A Human Rights Critique* (Oxford University Press, 2013) v-vi.

to conduct human rights impact assessments in the realm of international commerce.¹⁴⁰ Concerned with the widespread lack of human rights enforcement, furthermore, some have also argued that the sticks-and-carrot approach of tying commercial benefits to the compliance with human rights is one of the only effective ways to enforce human rights protection worldwide.¹⁴¹ On the opposite end of the spectrum, however, there has also been the deeply held concern that trade and human rights issues simply ‘diverge at the theoretical level’.¹⁴² As a result, some have called into question the very legitimacy of mixing both elements.¹⁴³

These two diametrically opposed camps collided in the context of the Copenhagen World Summit of Social Development (1995), which had ‘highlighted four fundamental labour standards and brought the role of the ILO to centre stage’.¹⁴⁴ Shortly after, an alliance of WTO members, including the EU, had attempted to incorporate ‘beyond-trade issues’ into the Charter of the then newly established WTO. In doing so, the alliance had drawn on the preamble of the ILO Constitution (1919) which declares that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’,¹⁴⁵ and had aimed to infuse some obligation to preserve those conditions into multilateral trade agreements.¹⁴⁶ However, set against the background of the post-Uruguay hangover (see above, section II.A), a defining majority of WTO members, including an empowered group of developing countries, feared that this move would constitute a Trojan horse of signing onto protectionist measures in disguise, and therefore refuted any explicit link between commerce and human rights.

Resulting in what has come to be known as the Singapore Consensus (1996), the signatories thus ‘reject[ed] the use of labour standards for protectionist purposes, and agree[d] that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’.¹⁴⁷ In addition, the Singapore outcome also reaffirmed the ILO’s pioneering role in watching over the trade-labour rights nexus. Perhaps unsurprisingly, the subsequent WTO Charter has been ‘virtually silent’¹⁴⁸ on the need to mitigate the potential impact of international commerce on human rights

¹⁴⁰ See e.g. UN Economic and Social Council, ‘Concluding Observations regarding Ecuador’, 7 July 2004, E/C.12/1/Add.100, para 56; UN Committee on the Rights of the Child, ‘Concluding Observations regarding El Salvador’, 30 June 2004, CRC/C/15/Add.232, para 48; UN Committee on the Elimination of Discrimination against Women, ‘Concluding Observations regarding Colombia’, 2 February 2007, CEDAW/C/COL/CO/6, para 29; UN Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations regarding Philippines’, 25 October 2006, CEDAW/C/PHI/CO/6, para 26; UN Committee on the Elimination of Discrimination Against Women, ‘Concluding Observations regarding Guatemala’, 2 June 2006, CEDAW/C/GUA/CO/6, para 32; UN General Assembly, Human Rights Council, ‘Report on the Mission to the World Trade Organization’, Report of the Special Rapporteur on the right to food, 4 February 2009, A/HRC/10/5/Add.2, paras 37–8.

¹⁴¹ Emilie Hafner-Burton, ‘Trading Human Rights: How Preferential Trade Agreements Influence Government Repression’ [2005] 59 *International Organization* 593.

¹⁴² Ibrahim Abadir, ‘International Trade and Human Rights: An Unfinished Debate’ [2013] 14 *German Law Journal* 322.

¹⁴³ Schneider (n 80) 301-328.

¹⁴⁴ Jan Orbie and Lisa Tortell, ‘Exporting the European social model: broadening ambitions, increasing coherence?’ [2009] 19 *Journal of European Social Policy* 99, 100.

¹⁴⁵ See Preamble to the EU Constitution.

¹⁴⁶ Mosley (n 129); Evgeny Postnikov and Ida Bastiaens, ‘Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements’ [2014] 21 *Journal of European Public Policy* 923; Emilie Hafner-Burton, *Forced to be Good. Why Trade Agreements Boos Human Rights* (Cornell University Press 2009).

¹⁴⁷ World Trade Organization (n 34).

¹⁴⁸ Drusilla Brown, Alan Deardorff and Robert Stern, ‘Labor Standards and Human Rights: Implications for International Trade and Investment’ (2011) IPC Working Paper Series University of Michigan 2011/119, 1.

protection.¹⁴⁹ The only exception in this regard has been the prohibition to trade in goods ‘relating to the products of prison labour’.¹⁵⁰ The quest for a multilateral solution to the human rights-related challenges of international trade, in other words, was deemed to have been buried at the WTO Ministerial in Singapore.

Against this backdrop, human rights have nevertheless increasingly been integrated into a growing number of international trade, development and investment agreements.¹⁵¹ More often than not, these agreements have been signed by Canada, the United States (US) and the EU.¹⁵² Rendering the validity of such agreements conditional upon the compliance with human rights considerations, these so-called ‘new generation agreements’¹⁵³ thus attempt to interweave inherently commercial interests with more normative concerns. Indeed ‘commerce’, as one scholar recently quipped, ‘has never looked so principled’.¹⁵⁴ Given the controversial debate about the ‘shot-gun wedding’¹⁵⁵ between commerce and human rights, however, this development has neither been automatic nor inevitable. In large part, the increasingly ‘principled’ approach towards trade, development and investment can be ascribed to the leadership role which the EU has taken up in this regard. Evolving from being a ‘formidable power in trade’ to now also exerting that power *through* trade,¹⁵⁶ the EU has been an adamant promoter of integrating human rights into its CCP. Yet, both the principle and the implementation of this self-declared EU leadership have loomed large, and accusations of ‘double standards’ in regard of the inclusion and invocation of human rights in trade relationships with powerful and less powerful partners have become commonplace, as will be analysed in the rest of this report (see below, section C.2.b)(2)(c)).¹⁵⁷

This development has also taken place at a time when the EU’s initial support for ‘effective multilateralism’ had slowly been waning.¹⁵⁸ Indeed, some EU observers had noted general signs of ‘multilateral exhaustion’¹⁵⁹ since the early 2000s. Faced with the observation that the EU has increasingly abandoned

¹⁴⁹ It is worth noting that the initial attempt to establish an International Trade Organization (ITO), as embodied by the 1944 Havana Charter, contained a specific chapter on labour rights. In spite of the successful UN Conference on Trade and Employment which ensued in Havana (1947-48), the said Charter was never adopted and the ITO never saw the light of day. Nor was the Havana Charter’s right-oriented approach replicated in the subsequent General Agreement on Tariffs and Trade (GATT). For a historical overview, see Richard Toye, ‘Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948’ [2003] 25 *International History Review* 282.

¹⁵⁰ The General Agreement on Tariffs and Trade (GATT 1947), Art. XX (e).

¹⁵¹ International Labour Organization (ILO) and International Institute for Labour Studies (IILS) (2013), *Social Dimensions of Free Trade Agreements*, available online <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf>.

¹⁵² Doumbia-Henry and Gravel (n 136) 189-190.

¹⁵³ David Kleimann, ‘Beyond Market Access?: The Anatomy of Asean’s Preferential Trade Agreements’ (2013) EUI Working Papers LAW No. 2013/01, available online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271989>.

¹⁵⁴ Hafner-Burton (n 146), 4.

¹⁵⁵ Susan Aaronson and Jean-Pierre Chauffour, ‘The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?’, WTO Publications, 2011, available online: <http://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm>.

¹⁵⁶ Sophie Meunier and Kalypto Nicolaidis, ‘The European Union as a conflicted trade power’ [2006] 13 *Journal of European Public Policy* 906.

¹⁵⁷ Päivi Leino, ‘European Universalism?—The EU and Human Rights Conditionality’ [2005] *Yearbook of European Law* 329.

¹⁵⁸ Edith Drieskens and Louise van Schaik, *The EU and Effective Multilateralism. Internal and external reform practices* (Routledge 2014).

¹⁵⁹ Gunther Hellmann, ‘Liberal Foreign Policy and World Order Renewal’, in Seyla Benhabib, David Cameron, Anna Dolidze, Gábor Halmai, Gunther Hellmann, Kateryna Pishchikova and Richard Youngs (eds.) *The Democratic Disconnect. Citizenship and Accountability in the Transatlantic Community* (Transatlantic Academy 2013), 103.

the conduct of multilateral trade agreements in favour of a bilateral ‘Plan B’,¹⁶⁰ it is clear that this analysis also applies to the EU’s approach towards international trade. The first steps in that direction had already materialised with the adoption of the ‘Global Europe Strategy’¹⁶¹ (2006) and the EU’s ensuing insistence on pursuing a ‘deep trade agenda’.¹⁶² Indeed, frustrated with the ‘Singapore hangover’ and the faltering Doha Round,¹⁶³ this bilateral Plan B comes with the advantage of concluding unilateral, bilateral and even regional trade agreements semi-autonomously from the rather cumbersome WTO procedures.¹⁶⁴ In addition to the relative procedural effectiveness of the go-it-alone approach, there is also more flexibility to introduce more normative considerations into the trade negotiations. By the same token, some authors have noted a shift away from multilateral negotiations under the WTO towards an increased use of references to the eight ILO fundamental conventions in bilateral and regional trade agreements.¹⁶⁵

In the years that followed, that shift has increasingly been consolidated with the adoption of a number of trade policy initiatives, in which human rights have also progressively been invoked. First of all, the Treaty of Lisbon now explicitly lists ‘free and fair trade’ amongst the values that the EU must uphold in its relations with the wider world. This formulation can be understood as trade that abides by WTO rules and therefore does not suffer from undue/unfair restrictions (which might entail that they be reformed to some extent, see above section II.A), but also trade that takes into account relevant issues beyond it. In that sense, trade would be expected to contribute to sustainable development, and human rights.¹⁶⁶ Indeed, in 2009 (though before the entry into force of the Lisbon Treaty), the Commission adopted a landmark communication on fair trade and other private trade-related sustainability assurance schemes. In response to a report adopted by the EP on fair trade and development a couple of years earlier,¹⁶⁷ the Commission recognised that ‘consumers can support sustainable development objectives by purchasing decisions’,¹⁶⁸ and conversely pledged to ‘stay engaged’ by developing ‘additional initiatives in one or more policy fields’.¹⁶⁹ In 2010, a communication was adopted on ‘Trade, Growth and World Affairs’, which effectively cemented the trade-human rights nexus, by claiming to ‘encourage [the EU’s] partners to promote the respect of human rights, labour standards, the environment, and good governance’ through trade.¹⁷⁰ In

¹⁶⁰ Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (2nd ed., Palgrave Macmillan 2014), 199.

¹⁶¹ European Commission, ‘Global Europe: Competing in the world’, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 4 November 2006, COM(2006) 567 final.

¹⁶² Gabriel Siles-Brügge, ‘EU trade and development policy beyond the ACP: subordinating developmental to commercial imperatives in the reform of GSP’ [2014] 20 *Contemporary Politics* 42.

¹⁶³ Stephen Hartman, ‘The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs’ [2013] 27 *International Trade Journal* 411.

¹⁶⁴ Jan Vandenberghe, ‘On carrots and sticks: The social dimension of EU trade policy’ [2008] 13 *European Foreign Affairs Review* 561.

¹⁶⁵ Leenknecht, P. and Tortell, L., ‘EU trade policy and international labour standards: The view from the ILO’, 2014, *forthcoming*.

¹⁶⁶ See Marise Cremona and Gracia Marín Durán, ‘The international fair trade movement: actors and regulatory approaches’, in Brigitte Granville and Janet Dine, *The Processes and Practices of Fair Trade: Trust, Ethics and Governance* (Routledge 2013), 153-155.

¹⁶⁷ European Parliament, ‘Report on Fair Trade and Development’, 6 June 2006, (2005/2245(INI)).

¹⁶⁸ European Commission, ‘Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes’, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Brussels 5 May 2009, COM(2009) 215 final, 3.

¹⁶⁹ *Ibid.*, 10.

¹⁷⁰ European Commission, ‘Trade, Growth and World Affairs. Trade policy as a core component of the EU’s 2020 Strategy’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 7 December 2011, COM(2010)612, 12.

2011, then, the Commission adopted its current strategy for instilling corporate social responsibility throughout its policies, thereby announcing to ‘make relevant proposals in the field of trade-and-development’.¹⁷¹ While the subsequent communication on ‘Trade, Growth and Development’¹⁷² still mostly endorsed that announcement in rhetoric, referring heftily to the EU’s human rights agenda, the most recent staff working document concretely links the EU’s trade policy to the eradication of the worst forms of child labour.¹⁷³ In its review of the trade policy instruments at its disposal to that end, the EU briefly reiterates its support of the ‘multilateral agenda’, but pays considerably more attention to the potential of its own unilateral and bilateral trade policy instruments (see below, section C). This potential has been reiterated in the latest communication on the role of the private sector in spurring sustainable growth in developing countries.¹⁷⁴ Reflecting the increasing importance of FDI as an exclusive EU competence, the promotion of the ratification and effective implementation of international labour and environmental conventions is explicitly linked to the trade-development nexus, with particular emphasis on initiatives in the extractive industries and the forest sector (see below, sections C.1.d)(5) and C.1.d)(6)).

B. EU Trade Apparatus

Since the Treaty of Rome (1957), the EU has had the exclusive competence to act in the area of international trade, and since Lisbon, also in the field of foreign direct investment.¹⁷⁵ This means that, as the EU’s executive actor, the Commission and its Directorate-General for Trade (DG Trade) in particular, have the sole right to initiate trade legislation, to negotiate with the trading partner on behalf of the EU, and to speak with that same ‘unified voice’ at the WTO. As a result, the CCP is regarded to be ‘the oldest, most integrated and most powerful external policy domain of the EU’,¹⁷⁶ and DG Trade is considered to have achieved a ‘high degree of institutional autonomy’ and a ‘distinct organization esprit de corps’.¹⁷⁷ Indeed, in a bid to insulate EU trade policies from potential protectionist reflexes by its Member States,¹⁷⁸ the European Court of Justice (ECJ)’s case-law repeatedly confirmed the EU’s necessary ‘scope for manoeuvre’ when negotiating and concluding trade agreements.¹⁷⁹

¹⁷¹ European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 25 October 2011, COM(2011) 681 final, 14.

¹⁷² European Commission, ‘Trade, growth and development. Tailoring trade and investment policy for those countries most in need’, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 27 January 2012, COM(2012) 22 final.

¹⁷³ European Commission, ‘Trade and Worst Forms of Child Labour’, 30 April 2013, SWD(2013) 173 final.

¹⁷⁴ European Commission, ‘A Stronger of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 May 2014, COM(2014) 263 final.

¹⁷⁵ Sieglinde Gestöhl, ‘The European Union’s Trade Policy’ [2013] 11 *Ritsumeikan International Affairs* 1.

¹⁷⁶ Bossuyt, Drieghe and Orbie (n 83).

¹⁷⁷ *Ibid.*

¹⁷⁸ Manfred Elsig, ‘European Union Trade Policy after Enlargement: Larger Crowds, Shifting Priorities and Informal Decision-making’ [2010] 17 *Journal of European Public Policy* 781.

¹⁷⁹ ECJ, 23 November 1999 *Portugal v Council*, C-149/96; and ECJ, 5 October 1994, *Germany v Council* C-280/93 [1994] ECR I-0973. See also Tancredi Antonello, ‘EC Practice in the WTO: How Wide is the ‘Scope for Manoeuvre’?’ [2004] 15 *European Journal of International Law*, 933. See also Joris Larik, ‘Much More Than Trade: The Common Commercial Policy in a global context’ in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011) 13.

When it comes to human rights mainstreaming in trade, it is Directorate D within DG Trade that is responsible for overseeing the EU's sustainable development agenda.¹⁸⁰ In order to better coordinate the trade-human rights nexus, moreover, the EU appointed a trade and human rights officer within DG Trade in 2011. This development is said to have come in response to increasing demands from the EP to better mainstream human rights throughout all of the EU's policies, including trade.¹⁸¹ As will be explained below, however, the Commission works in a triangular relationship with the Council and the EP. Both the entry into negotiations and the conclusion of trade agreements require a positive decision by the Council. The Council authorizes the Commission to negotiate an agreement and defines the general objectives through so called 'negotiating directives'. On a proposal by the Commission and after either obtaining consent from or consulting the EP it subsequently decides on the conclusion of the agreement. When including beyond-trade issues such as human rights in trade agreements, moreover, they also need to be individually ratified by Member States, as these issues do not pertain to the realm of exclusive EU competences. In fact, Member States have been noted to diverge over them.¹⁸² As a result, the EU often concludes interim agreements which can already become enforceable before all Member States have fully ratified the agreement.¹⁸³

As the EU increasingly wandered into the 'new trade' territory services and intellectual property rights,¹⁸⁴ the exclusiveness of its CCP competences had become contested after the ECJ adopted the Opinion that the EU needed to conclude, in close cooperation with its Member States, the General Agreement on Trade in Services ('GATS') and the Agreement on Intellectual Property Rights ('TRIPS').¹⁸⁵ After more than a decade of legal uncertainty with regard to the distribution of competences in these matters, as can be seen from the table below, the Lisbon Treaty effectively extended the EU's exclusive competence into the full range of trade in goods, services, trade-related intellectual property rights and foreign direct investment.¹⁸⁶

Table 1: Comparison between the EU's 'exclusive competence' prior to and after the entry into force of the Lisbon Treaty¹⁸⁷

Trade Issues	EU competence in Trade pre-Lisbon	EU competence in Trade post-Lisbon
Bilateral, regional and multilateral trade agreements	Exclusive competence	Exclusive competence

¹⁸⁰ See European Commission, DG Trade's organigramme, available online <http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145610.pdf>.

¹⁸¹ Thematic evaluation of the European Commission (n 19), Annex 8, p. 10.

¹⁸² Daniela Sicurelli, *The European Union's Africa Policies. Norms, Interests and Impact* (Ashgate 2010).

¹⁸³ Keukeleire and Delreux (n 160) 198.

¹⁸⁴ Sophie Meunier and Kalypto Nicolaidis, 'The European Union as a trade power', in: Christopher Hill and Michael Smith (eds.), *International Relations and the European Union*, (Oxford University Press 2011) 275-298.

¹⁸⁵ Meinhard Hilf, 'The ECJ's Opinion 1/94 on the WTO – No Surprise, But Wise?' [1995] 6 *European Journal of International Law* 245.

¹⁸⁶ Stephan Woolcock, *European Union economic diplomacy: the role of the EU in external economic relations* (Ashgate 2012).

¹⁸⁷ Cleary Gottlieb Steen & Hamilton LLP, 'Trade Policy one year into the Lisbon Treaty', 2010, available online: <<http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07748/20101207ATT07748EN.pdf>>.

Trade Issues	EU competence in Trade pre-Lisbon	EU competence in Trade post-Lisbon
Trade in goods	Exclusive competence	Exclusive competence
Trade in services	Shared competence between the EU and its Member States	Exclusive competence
Trade-related intellectual property rights	Shared competence between the EU and its Member States	Exclusive competence
Foreign Direct Investment	Shared competence between the EU and its Member States	Exclusive competence

Source: Opinion 1/94, Treaty of Lisbon (EU)

At the same time, the expansion of the EU's CCP coverage has also brought about institutional changes, with the introduction of small amendments to the Council's decision-making procedures and a much greater role for the European Parliament in trade-related matters. Save for a number of exceptions which have now been enshrined in the Lisbon Treaty,¹⁸⁸ the Council 'shall act by a qualified majority' when negotiating and concluding international agreements,¹⁸⁹ and has thus retained its supervisory powers in trade policy – including the mandate to authorise the EC to engage in trade negotiations. The most drastic change, however, has come in the form of the newly empowered European Parliament which has been increasingly involved in the conduct of trade affairs. Taking into account the observation that the European Parliament has been adamant in linking trade relations to beyond-trade issues such as human rights,¹⁹⁰ this means that the European Parliament is now well-equipped to ensure 'good governance through trade'.

The Lisbon treaty enhanced the EP's mandate in trade-related affairs in three important ways. First, the EP now has the competence to adopt 'the measures defining the framework for implementing the common commercial policy', together with the Council, under the ordinary legislative procedure.¹⁹¹ This means that all essential EU trade legislation, such as trade preferences and their potential human rights-related aspects, should go through Parliament before it can be adopted by the Council. Parliament, in other words, has hereby gained an additional and important 'power of co-legislation on human rights issues'.¹⁹² Recalling Art. 207 TFEU which stipulates that the CCP must now be pursued in the broader context of the EU's human rights principles as enshrined in Art. 21 TEU, the EP recently set a precedent in

¹⁸⁸ Art. 207(4) subparas 2 and 3 TFEU.

¹⁸⁹ Art. 207(4) TFEU.

¹⁹⁰ Lore Van den Putte, Ferdi De Ville and Jan Orbie, 'The European Parliament's New Role in Trade Policy: Turning Power into Impact', (2014) CEPS Special Report No. 89, available online <<http://www.ceps.eu/book/european-parliament%E2%80%99s-new-role-trade-policy-turning-power-impact>>.

¹⁹¹ Art. 207(2) TFEU.

¹⁹² Lorand Bartels, 'The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements', European Parliament Directorate-General for External Policies of the Union, EXPO/B/DROI/2012-09, February 2014, available online <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET\(2014\)433751_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf)> 21.

this regard when it suspended the 1977 EEC-Syria cooperation on the grounds of human rights violations.¹⁹³

Second, the Parliament must now grant its ‘hard power of consent’¹⁹⁴ to the ratification of all EU trade agreements.¹⁹⁵ Unlike the conclusion of ‘agreements relate[d] exclusively to the common foreign and security policy’,¹⁹⁶ or ‘agreements concerning monetary or foreign exchange regime matters’,¹⁹⁷ where the EP may merely be consulted, this means that the Parliament now has the ‘power to withhold consent to almost all international agreements’.¹⁹⁸ Prior to the entry into force of the Lisbon Treaty, the EP had already effectively exerted pressure on the EU’s interim agreement on sharing banking data with the US via the global network for interbank financial telecommunication (SWIFT) in 2010, thereby strongly evoking human rights-related concerns.¹⁹⁹ Aimed at sharing securitised data under the Terrorist Finance Tracking Program (TFTP) in particular, a competence which prior to Lisbon had pertained to EU community competences and qualified majority voting,²⁰⁰ the SWIFT agreement had raised a number of concerns regarding the much cherished fundamental right to the protection of personal data as enshrined in the EU Charter.²⁰¹ In an important precedent, the EP exerted its new powers for the first time when it rejected the Anti-Counterfeiting Trade Agreement (ACTA) on the basis of human rights-related concerns. Citing the possibility that the agreement might ‘jeopardise citizens’ liberties’, ACTA rapporteur David Martin went on record as stressing ‘the need to find alternative ways to protect intellectual property in the EU’.²⁰² In a similar vein, data protection concerns were the subject of a fierce parliamentary struggle²⁰³ over the conclusion of the Passengers Name Record (PNR) Agreements with the US.²⁰⁴ Further to the National Security Agency (NSA) surveillance revelations, the EP has recently also declined to give its consent to the SWIFT agreement and thereby strengthened its human rights discourse in international agreements even further by taking the view, ‘given that the EU’s core aim is to promote freedom of the individual, that security measures, including counterterrorism measures, must be pursued through the rule of law and

¹⁹³ Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, 2011/523/EU, as amended by Council Decision 2012/123/CFSP of 27 February 2012.

¹⁹⁴ Laura Richardson, ‘The Post-Lisbon Role of the European Parliament in the EU’s Common Commercial Policy: Implications for Bilateral Trade Negotiations’ (2012) College of Europe EU Diplomacy Papers 5/2012, 5.

¹⁹⁵ Art. 207 (2) and (3) TFEU, Art. 218 (6) (a) (v) TFEU.

¹⁹⁶ Art. 218 (6) TFEU.

¹⁹⁷ Art. 219 (3) TFEU.

¹⁹⁸ Bartels (n 192) 21.

¹⁹⁹ See, for instance, European Parliament ‘SWIFT: European Parliament votes down agreement with the US’, Press Release IPR68674, 11 February 2010, available online <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20100209IPR68674+0+DOC+XML+V0//EN>>.

²⁰⁰ Raphael Bossong, ‘The Fight Against Terrorism: A Key Global Objective for the EU?’, in Astrid Boening et al. (eds.), *Global Power Europe – Vol. 2: Global Power Shift* (Springer 2013), 28.

²⁰¹ Art 8 ECHR.

²⁰² See, for instance, European Parliament, ‘European Parliament rejects ACTA’, Press Release, IPR48247, 04 July 2012, available online <<http://www.europarl.europa.eu/news/en/news-room/content/20120703ipr48247/html/European-Parliament-rejects-ACTA>>.

²⁰³ Juan Santos Vara, ‘The role of the European Parliament in the conclusion of the Transatlantic Agreements on the transfer of personal data after Lisbon’ (2013) CLEER Working Papers Centre for the Law of EU External Relations 2013/2, available online <http://www.asser.nl/upload/documents/20130226T013310-cleer_13-2_web.pdf>.

²⁰⁴ See, for instance, European Parliament, ‘Parliament gives green light to air passenger data deal with the US’, Press Release, IPR43404, 19 April 2012, available online <<http://www.europarl.europa.eu/news/en/news-room/content/20120419IPR43404/html/Parliament-gives-green-light-to-air-passenger-data-deal-with-the-US>>.

must be subject to fundamental rights obligations, including those relating to privacy and data protection'.²⁰⁵

Third, whereas prior to the Lisbon Treaty the Parliament had been virtually absent from the negotiations of trade agreements, it is now more prominently involved – a development which has been dubbed to be ‘a degree of parliamentary scrutiny unparalleled in the field of international negotiations’.²⁰⁶ Indeed, the European Commission is legally required to ‘report regularly [...] on the progress of negotiations’²⁰⁷ to the EP’s International Trade Committee (INTA), so that ‘the European Parliament shall be immediately and fully informed at all stages of the procedure’.²⁰⁸ Although not a ‘hard power’ as such, the EP has nonetheless put its ‘soft power of information’ to good use by demanding that third countries alleviate certain human rights concerns as a pre-condition for the EP’s consent to an international agreement.²⁰⁹ A recent successful example has included the EP’s demand for a ‘Reciprocal Dialogue Mechanism on human rights’²¹⁰ with Colombia and a ‘transparent and binding road map on human, environmental and labour rights’²¹¹ in the country.

As ‘unparalleled’ as the EP’s scrutiny in trade-related matters may be, it has not yet achieved its full potential of effectively exerting political leverage over the Commission’s trade policies. This divergence may be explained by an interplay of institutional and ideological factors. In the EU, the EP had little to no means of effectively scrutinising trade and investment policies, especially with regard to their human rights implications, before the entry into force of the Lisbon Treaty. Indeed, the EP’s INTA had only been created in 2004,²¹² while to date no unit within DG Trade deals exclusively with parliamentary affairs.²¹³ By the same token, the EP’s Subcommittee on Human Rights (DROI) was also only ‘reconstituted’ in 2004.²¹⁴ Although the Lisbon Treaty and the EU’s Strategic Framework for Human Rights have recently instigated more EC-EP collaboration in this regard, many respondents noted that this collaboration still remains ‘ad hoc’ without any clear guidance as to how to systematically ensure cooperation on a recurring basis. In certain cases, EU respondents even indicated to be in the mere process of developing a framework for inter-institutional cooperation on human rights-related trade issues.²¹⁵ Given the relative lack of institutional memory in this regard, this finding should perhaps not come as a surprise. In addition, there

²⁰⁵ European Parliament, ‘Resolution on the suspension of the TFTP agreement as a result of US National Security Agency surveillance’, 23 October 2013, 2013/2831(RSP), para. 1.

²⁰⁶ European Commission, ‘What did the Lisbon Treaty change?’, Factsheet, 14 June 2011, available online: <http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_147977.pdf>.

²⁰⁷ Art. 207 (3) TFEU, art 218 (6) (a) (v) TFEU.

²⁰⁸ Art. 218 (10) TFEU.

²⁰⁹ Bartels (n 192) 23.

²¹⁰ European Parliament, ‘Resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru’, (2012/2628(RSP)), 13 June 2012, para 3.

²¹¹ *Ibid.*, para 15.

²¹² Stephan Woolcock, ‘Trade Policy: A Further Shift Towards Brussels’, in Helen Wallace, Mark Pollack and Alasdair Young (eds.), *Policy-making in the European Union* (Oxford University Press 2010) 389.

²¹³ Within the Directorate on ‘Resources, Information and Policy Coordination’, there is a unit responsible for general ‘Policy Coordination and Inter-Institutional Relations’, to which the relations with the European Parliament also pertain. DG Trade’s organogram is available online: <<http://ec.europa.eu/trade/trade-policy-and-you/contacts/people/>>.

²¹⁴ See the homepage of the EP’s DROI Subcommittee, available online: <<http://www.europarl.europa.eu/committees/en/droi/home.html>> .

²¹⁵ Interviews with EU officials, Brussels 18 March 2014.

also seems to be some ‘inter-institutional disagreement’²¹⁶ on the substance of how human rights-related trade policies should be conducted. On the one hand, the Commission and, in its wake, the Council, purportedly ‘consider sanctions as a last resort’, seeing them as ‘more effective when they are used as a latent threat rather than when aggressively enacted’,²¹⁷ thus giving priority to the ‘carrot’ approach. This observation had already been laid out in an earlier Commission communication, when the EC claimed to favour ‘a positive approach by promoting social development through incentives and capacity-building measures, rather than sanctions’.²¹⁸ The EP and civil society at large, on the other hand, are said to be ‘in favour of a stronger, more consistent and clearer use of the human rights clause and related sanctions’,²¹⁹ thereby clearly favouring the ‘stick’ approach. Perhaps unsurprisingly, observers have recently noted that although ‘the Lisbon Treaty has led to a politicisation and plurality of goals of the common commercial policy’,²²⁰ it has not led to more transparency or cross-fertilisation between the Commission, Council and Parliament.

Table 2: Comparison between EU Parliamentary Involvement in Trade-related Matters, prior to and after the entry into force of the Lisbon Treaty²²¹

Trade Issue	EC-EP relations in Trade (Nice)	EC-EP relations in Trade (Lisbon)
Trade policy framework	Commission shall submit proposals to the Council for implementing the common commercial policy (Article 133 (2))	EP and Council shall adopt the measures defining the framework for implementing the common commercial policy (Article 207 (2))
Negotiation of Agreement	Commission shall report to a special committee appointed by the Council (Article 133 (3))	Commission shall report to EP’s INTA (in addition to the special committee) on the progress of negotiations (Article 207 (3))
Conclusion of Agreement	Minor role EP	Council must obtain EP consent (Article 218 (6) (a) (v))

²¹⁶ Thematic evaluation of the European Commission (n 19) Annex 8, 11.

²¹⁷ Benoît-Rohmer et al. (n 111) 60.

²¹⁸ European Commission, ‘The European Union’s role in promoting human rights and democratization in third countries’, Communication from the Commission to the Council and the European Parliament, 8 May 2011, COM(2011) 252 final, 8.

²¹⁹ Benoît-Rohmer et al. (n 111) 59.

²²⁰ Markus Krajewski, ‘New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy’ in Christoph Herrmann, Markus Krajewski, Jörg Philipp Terhechte, *European Yearbook of International Economic Law* (Springer 2013) 84.

²²¹ Cleary Gottlieb Steen & Hamilton LLP (2010), ‘Trade Policy one year into the Lisbon Treaty’, available online: <<http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07748/20101207ATT07748EN.pdf>>.

C. Current EU trade instruments used to promote human rights

The EU's Strategic Framework for Human Rights sets out the commitment to 'develop methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements' by 2014.²²² Although it is indeed the case that the EU's commitment to 'respect for fundamental workers' rights' is affirmed on DG Trade's homepage, whereby special attention is paid to the EU's collaboration with the ILO in order 'to integrate labour considerations into its trade policy',²²³ DG Trade does not yet have an overall (public) strategy paper at its disposal which specifically outlines how it will go about mainstreaming human rights into all its trade policies.²²⁴ Contrary to the EU's endorsement of a wider panoply of human rights, therefore, it remains unclear how it intends to systematically apply a broader definition of human rights standards across all areas of trade policy-making. As will be shown later on, furthermore, human rights seem to remain more visibly present in the trade-related sections of the EU's Cotonou agreements with 78 African, Caribbean and Pacific (ACP) countries, than in the 'purer' trade agreements as such (see below, section 2)

Nevertheless, the EU has a number of trade instruments and tools at its disposal that render the validity of its trade agreements conditional upon human rights provisions – an 'innovation', which is purportedly 'recognised by the human rights community'.²²⁵ In addition to the more general EU tools that may pertain trade elements, such as human rights dialogues and guidelines (see above, section B), there are two specific avenues running through the heart of the EU's trade and human rights nexus. On the one hand, there are the human rights conditionalities which are ingrained in the EU's unilateral or non-reciprocal trade measures, by which the EU has either been granting preferential tariff cuts to developing countries in exchange for the implementation of human rights standards under its unilateral Generalised System of Preferences ('GSP'), or has been imposing restrictions on the trade in certain goods. On the other hand, there are the human rights clauses which are included in the EU's bilateral or regional Free Trade Agreements (and related Framework or Association Agreements). Their geographical scope, however, is much more limited as these human rights clauses have thus far only been applied to lesser developed nations – thereby reinforcing the trade-development-human rights nexus. Indeed, as will be elaborated on in the latter part of this chapter (see below, section 2), Chile, Korea and Mexico are the only three countries in the Organisation for Economic Cooperation and Development (OECD) with which the EU has been able to conclude a human rights-infused trade agreement.²²⁶

As has been explained in the methodological section of this study (see above, section I.B), our analysis will treat both human rights as a whole and labour rights in particular on an equal footing, in order to maintain a certain degree of comparability. In what follows, an overview will thus be made of the EU's practices in

²²² Council of the European Union (n 10) Action 11(a), p. 11.

²²³ European Commission, 'Sustainable development in a nutshell', available online <<http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>>.

²²⁴ Thematic evaluation of the European Commission (n 19) Annex 8, 10.

²²⁵ *Ibid.*, 11.

²²⁶ Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries* (2008) European Parliament Directorate for External Relations, available online <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET%282008%29406991_EN.pdf> 3.

integrating human rights into unilateral trade measures on the one hand, and into reciprocal trade agreements on the other.

1. Unilateral and Non-reciprocal Instruments

a) Generalised System of Preferences

As the oldest trade instrument available in the EU's human rights promotion toolbox, the Generalised System of Preferences ('GSP') provides developing countries with preferential access to the EU market. Drawing on a reasoning similar to the rationale behind the EU's commitment to AfT (see above, section 0), the EU thus aims to contribute to the economic development of less industrialised countries by making it cheaper and less cumbersome for them to export their products to the EU market. Because the GSP scheme is a quintessentially unilateral decision made by the EU, it does not allow third (developing) countries to negotiate its terms,²²⁷ and it thus, at least theoretically, provides the EU with the utmost clout to make its scheme conditional upon the compliance with human rights.

The GSP, in its original form, had already been established during the 1968 United Nations Conference on Trade and Development ('UNCTAD') in New Delhi, and as such preceded the EU's adaptation of its own distinct scheme which would come three years later. Both schemes did, however, from the onset share a common preoccupation with using trade as a vehicle for the economic development of countries. According to Resolution 21 (ii) which was adopted during that UNCTAD II Conference,

the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth.²²⁸

Extending the duration of the GSP beyond the original timespan of 10 years, the enabling clause was subsequently adopted as part of the General Agreement on Tariffs and Trade (GATT) during the Tokyo Round in 1979, which effectively granted permanent validity to the GSP scheme as an exception to the 'Most Favoured Nation' principle under international trade law.²²⁹ This concretely meant that industrial nations were now allowed to grant lower and thus more favourable tariff preferences to developing countries than to their fellow GATT/WTO-members .

²²⁷ Clara Portela, *European Union Sanctions and Foreign Policy: When and why Do They Work?* (Routledge 2010).

²²⁸ See designated UNCTAD information about GSP, available online: <<http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>>.

²²⁹ World Trade Organization, 'Decision on Differential and more favourable treatment reciprocity and fuller participation of developing countries', 28 November 1979, L/4903, available online: <http://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm>.

(1) From cautious incentives to human rights conditionalities in the EU's GSP

Along with 11 other countries,²³⁰ the EU was not only the first global actor to establish its scheme in 1971 (shortly followed by the US in 1974), but it also played a pioneering role in employing the GSP as a trade instrument to effectively make the receiving of economic benefits conditional upon the respect for human rights. Even today, as was recently reiterated in its communication on the nexus between trade, development and growth, the EU proclaims its particular brand of GSP to be 'the flagship EU trade policy instrument supporting sustainable development and good governance in developing countries'.²³¹

Over the last couple of decades, the EU has thus effectively been granting preferential market access to third countries on the condition that they comply with certain human rights criteria. The very first time that such a provision of 'positive conditionality' was included, occurred in 1991. In response to concerns that a number of Latin American countries had been neglecting their international commitments to combat drug trafficking, the EU provided additional incentives to a number of countries in the region in the form of GSP agreements, under which incentives were provided to reward their progress made on the fight against drugs.²³² The possibility of then also employing a provision of 'negative conditionality', by which preferential market access could be withdrawn in the light of evidence of forced labour, was subsequently introduced in the first GSP Regulation which entered into force in 1995.²³³ At this early stage of human rights conditionality, however, forced labour was still rather narrowly defined in reference to the 1930 ILO Convention concerning Forced or Compulsory Labour (No. 29),²³⁴ as well as the 1957 ILO Convention concerning the Abolition of Forced Labour (No. 105).²³⁵ Indeed, as has been noted elsewhere, 'in the first GSP Regulation, the ILO was barely mentioned'.²³⁶

Against the backdrop of the 1995 UN World Summit for Social Development in Copenhagen and the 1998 ILO Declaration on Fundamental Principles and Rights,²³⁷ the EU was prompted to revise its GSP scheme in 2001. Mindful of the criticism which had been expressed vis-à-vis its rather narrow conception of labour rights in the original GSP Regulation, the EU subsequently expanded the GSP's new legal basis to also 'correspond with all the eight fundamental Conventions of the ILO',²³⁸ and to make both the granting of GSP preferences (positive conditionality) and the withdrawal of those preferences (negative conditionality) conditional upon the compliance with all eight Conventions.²³⁹

²³⁰ The UNCTAD Secretariat lists a total of 13 national schemes, including Australia, Belarus, Bulgaria (consolidated under the EU), Canada, Estonia (consolidated under the EU), the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the United States of America. See UNCTAD, 'About GSP', available online <<http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>>.

²³¹ European Commission, (n 172) 13.

²³² Clara Portela and Jan Orbie, 'Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?' [2014] 20 Contemporary Politics 63.

²³³ Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries.

²³⁴ C029 - Forced Labour Convention, 1930.

²³⁵ C105 - Abolition of Forced Labour Convention, 1957.

²³⁶ Jan Orbie, 'Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?', in Richard Whitman, *Normative Power Europe – Empirical and Theoretical Perspectives* (Palgrave 2011) 171.

²³⁷ Evidencing an increasing consensus on the importance of upholding international labour rights, see Portela and Orbie (n 232).

²³⁸ Portela and Orbie (n 232) 65

²³⁹ Most notably, these include the Freedom of Association and Protection of the Right to Organise Convention (No. 87), the Right to Organise and Collective Bargaining Convention (No. 98), the Forced Labour Convention (No. 29), the Abolition of Forced Labour

Shortly after the 2001 revision, however, questions were increasingly raised regarding the legality of its scheme and the compatibility with international trade law.²⁴⁰ Most notably, although the exceptional status of the GSP had already been settled during the aforementioned Tokyo Round of the GATT, there were still some outstanding issues surrounding the explicitly normative dimension of the EU's GSP scheme. Resulting in what has come to be known as a contentious WTO Appellate Body Decision in the 2004 EC – Tariff Preferences case,²⁴¹ the EU was once again forced to thoroughly reform its scheme in 2005.²⁴²

Since that reform,²⁴³ the EU's GSP has consisted of three distinct arrangements, which have slightly been amended following the most recent 2014 reform:²⁴⁴ the general GSP, which is open to a broad group of developing countries; the GSP+ (also known as the 'special incentive arrangement'), which is open to 'vulnerable' countries that have ratified and implemented 27 international conventions on human rights and sustainable developments, as listed in Annex II to the GSP Regulation; and the Everything But Arms ('EBA') initiative, which provides duty-free access to the EU market for all exports coming from countries listed by the United Nations Development Programme ('UNDP') as 'least developed countries' ('LDC') on the Human Development Index ('HDI') – except for the trade in arms and ammunitions. In all cases, preferences may be suspended for serious and systematic violations of human rights. Indeed, pursuant to preamble 24 of the GSP Regulation,

The reasons for temporary withdrawal of the arrangements under the scheme should include serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights, so as to promote the objectives of those conventions.

(2) Monitoring, evaluation and withdrawal

The EU, similarly adhering to its institutional division of competences, ascribes the bulk of its exclusive competence to the Commission. To this end, the Commission 'shall be assisted by the Generalised Preferences Committee'.²⁴⁵ Pursuant to the provisions of the new GSP Regulation, this Committee is mandated to 'examine any matter relating to the application of this Regulation, raised by the Commission or at the request of a Member State'.²⁴⁶ Hitherto established by the 2008 GSP Regulation,²⁴⁷ the GSP

Convention (No. 105), the Minimum Age Convention (No. 138), the Worst Forms of Child Labour Convention (No. 182), the Equal Remuneration Convention (No. 100) and the Discrimination (Employment and Occupation) Convention (No. 111).

²⁴⁰ Lorand Bartels 'The WTO Legality of the EU's GSP+ Arrangement' [2007] 10 *Journal of International Economic Law*, 869; Schneider (n 80).

²⁴¹ For a detailed overview of the WTO Appellate Decision, see Kevin Moss, 'The Consequences of the WTO Appellate Body Decision in EC-Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa' [2006] 38 *International Law and Politics* 665-705.

²⁴² Bartels (n 240).

²⁴³ Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences.

²⁴⁴ Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008.

²⁴⁵ Commission Delegated Regulation (EU) No 1083/2013 of 28 August 2013, establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences, Art 39(1).

²⁴⁶ *Ibid.*

²⁴⁷ Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, Art 27.

Committee is composed of representatives of the Commission, EEAS, EP's INTA committee and the individual Member States, and meets on a regular basis to discuss the economic, social and political impacts of the scheme.²⁴⁸ A novelty introduced by the Lisbon Treaty is that the Commission may now adopt GSP-related legislation by means of delegated acts. This development was purportedly highly welcomed by EU policy-makers across the board. To put it in the words of one respondent, 'delegated acts are an act of beauty: because of the sole requirement to attain an absolute majority in Council, one would need a nuclear weapon to block it'.²⁴⁹

Pursuant to the GSP Regulation, the Commission thus retains its first-mover advantage with the prerogative to 'monitor the status of ratification of the international conventions on human and labour rights, environmental protection and good governance and their effective implementation, by examining the conclusions and recommendations of the relevant monitoring bodies established under those conventions'.²⁵⁰ Ensuring more system-wide cooperation and coherence, furthermore, the GSP Regulation also stipulates that:

[e]very two years, the Commission should present to the European Parliament and the Council a report on the status of ratification of the respective conventions, the compliance of the beneficiary countries with any reporting obligations under those conventions, and the status of the implementation of the conventions in practice.²⁵¹

As confirmed by one interviewee, both the Commission and the EEAS are in the process of preparing such 'GSP reports' by January 2016.²⁵² In practice, EU GSP preferences from either the general or specialised scheme, have been withdrawn on only three occasions: in 1997, Myanmar was omitted from the list of beneficiaries following allegations of forced labour practices. In 2007, Belarus was deemed to have violated ILO Conventions 87 (freedom of association) and 98 (collective bargaining). Three years later, Sri Lanka was found to be in violation of the International Covenant on Civil and Political Rights ('ICCPR'), the Convention Against Torture ('CAT') and the Convention on the Rights of the Child ('CRC'). In addition, there have been three more instances when an official investigation had been launched by the EU to evaluate allegations of human rights violations: Pakistan in 1997 on the basis of child labour practices, El Salvador in 2008 concerning its effective implementation of said ILO Convention 87, and Bolivia in 2012 on the grounds of insufficiently implementing the Single Convention on Narcotic Drugs. In view of the EU's much more limited track record in suspending GSP benefits, therefore, it perhaps comes as no surprise that one observer employed a modified maxim to describe the role of EU sanctions in EU Foreign Policy: 'when all you have are carrots, every problem looks like a rabbit'.²⁵³

²⁴⁸ Interview with EU official, Brussels 12 May 2014.

²⁴⁹ Ibid.

²⁵⁰ Commission Delegated Regulation (EU) No 1083/2013 (n 245), para. 14.

²⁵¹ Ibid.

²⁵² Interview with EU official, Brussels, 12 May 2014.

²⁵³ Stefan Lehne, 'The Role of Sanctions in EU Foreign Policy' (Carnegie Endowment for International Peace 2012) 1.

(3) Preliminary assessment

As one respondent noted, the GSP tends to trigger some ‘strongly diverging partisan views’. Whereas some regard it as a ‘springboard for the promotion of human rights’,²⁵⁴ others have debunked the instrument for being ‘an empty shell’.²⁵⁵ In light of its sometimes dubious track record, the EU’s GSP has not remained devoid of criticism with regard to its effective promotion of human rights throughout its schemes. As a first criticism, scholars from across several disciplines have accused the EU of employing ‘double standards’,²⁵⁶ even towards countries which have been the subject of serious ILO criticism,²⁵⁷ thereby giving rise to the question whether there exists a ‘dichotomy between norms and interests’.²⁵⁸ Second, the procedure behind the granting and withdrawing of GSP preferences has been noted to be ‘lacking in transparency’.²⁵⁹ Adding nuance to this criticism, some have recently documented the general perception amongst ILO officials and workers’ representatives that the *withdrawal* of GSP preferences after ILO and EU commissions of inquiries had been established, was based on rather clear motivations. By contrast, however, the *attribution* of GSP benefits on the basis of ILO findings ‘below the level of a commission of inquiry’ has been called into question as ‘becoming judgemental’.²⁶⁰ Third, the EU has also been called upon for its reluctance to employ sanctions in the context of its GSP scheme,²⁶¹ and this is in spite of the observation that the EU has been imposing a wide panoply of sanctions with increasing frequency in recent years.²⁶²

In spite of the fact that GSP schemes only affect a small portion of EU trade, coherence and transparency nevertheless remain important signallers of credibility in external action. As has been argued elsewhere, the impact of GSP schemes extends far beyond the economic effects as a country’s eligibility is an ‘important marker’²⁶³ for endorsing a third country’s human rights record. In a similar fashion, the loss of GSP beneficiary status following allegations of human rights violations does not only convey the message that a country is ‘potentially bad business’,²⁶⁴ but may also ‘name and shame the human rights enforcement problem’²⁶⁵ to the extent that it may actually have an impact.²⁶⁶

b) Specific measures

In addition to employing non-reciprocal GSP measures, the EU also adopts unilateral Regulations by which it imposes import and export limitations on the trade in certain goods, either due to their harmful nature or to their country of origin. Concretely, this means that the EU may either place restrictions on (i) the trade in goods with specific countries that have been subject to wider sanctions under the Common

²⁵⁴ Interview with EU official, Brussels, 12 May 2014.

²⁵⁵ Ibid.

²⁵⁶ Elena Fierro, *European Union's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 378.

²⁵⁷ Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' [2009] 14 *European Foreign Affairs Review* 663, 679.

²⁵⁸ Carbone and Orbie (n 6) 5.

²⁵⁹ Bartels (n 240) 8

²⁶⁰ Leenknecht and Tortell (n 165) 6.

²⁶¹ Vandenberghe (n 164)

²⁶² Clara Portela, *European Union Sanctions and Foreign Policy* (Routledge 2010).

²⁶³ Portela (n 262), 204.

²⁶⁴ Ibid.

²⁶⁵ Emilie Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' [2008] 62 *International Organization*, 689.

²⁶⁶ Kryvoi Yaraslau, 'Why European Union Sanctions Don't Work' [2008] 17 *Minnesota Journal of International Law* 239.

Foreign and Security Policy (CFSP) framework, the so-called ‘country-specific measures’; or on (ii) the trade in specific goods that have clear human rights-related implications, also known as ‘issue-specific measures’. Given that the overall competence to adopt country-specific measures still lies within the CFSP framework, however, the focus of this study will be placed more heavily on the issue-specific measures as part of the CCP framework.

c) Country-specific Measures

The EU may employ sanctions against a third country by either implementing binding Resolutions from the UN Security Council, or by adopting its own sanctions on the basis of an autonomous EU decision. The practice of employing EU sanctions against third countries, outside of the UN Security Council framework, has undergone fundamental changes since the Treaty of Lisbon entered into force. Ever since, In order to clarify some of these changes, the Council adopted guidelines on the implementation and the evaluation of restrictive measures.²⁶⁷ In doing away with the former pillar structure of EU decision-making, the Lisbon Treaty brought an end to the hitherto two-step procedure which required both a CFSP act and a Council Regulation in order to adopt (trade-related) restrictive measures against a third country on account of human rights violations.²⁶⁸

Instead, the Lisbon Treaty now foresees a single-step mechanism under the designated title on ‘restrictive measures’,²⁶⁹ which provides a legal basis for the EU to resort to ‘the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries’,²⁷⁰ provided that the decision is adopted in conformity with the specific objectives of the CFSP as laid out in the Treaties.²⁷¹ Those specific objectives are based on the general provisions on the EU’s external action which, as has been elucidated before, includes advancing ‘the universality and indivisibility of human rights and fundamental freedoms’.²⁷² To this end, it is the Council who may adopt ‘the necessary measures’, by way of a qualified majority after receiving a joint proposal from both the Commission and the High Representative. Parliament here, shall simply be informed. In addition, the Council may resort to sanctions against ‘natural or legal persons and groups or non-State entities’.²⁷³ Once adopted, the Council’s decision will ‘have to be applied by all persons and entities doing business in the EU, including nationals of non-EU countries, and also by EU nationals and entities incorporated or constituted under the law of an EU Member States when doing business outside the EU’.²⁷⁴ Given the economic powerhouse that the EU is, country-specific measures can thus be a tangible manifestation of the EU’s economic leverage when

²⁶⁷ Council of the European Union, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’, 15 December 2009, 17464/09.

²⁶⁸ Council of the European Union, ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’, 7 June 2004, 10198/1/04.

²⁶⁹ Art 215 Title IV TFEU.

²⁷⁰ Art 215 (1) TFEU.

²⁷¹ Chapter 2 of Title V TEU, on the specific provisions of the CFSP.

²⁷² Art 21 TEU.

²⁷³ Art 215 (2) TFEU.

²⁷⁴ European External Action Service, ‘Sanctions or restrictive measures’, 2008, available online <http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf>, 5.

pursuing a broader foreign policy agenda. The study at hand will not, however, assess the effectiveness of this leverage, as has abundantly been discussed elsewhere.²⁷⁵

Across the wide spectrum of restrictive measures to be taken, the EU may thus impose trade sanctions against countries that face allegations of human rights violations – otherwise known as economic and/or financial sanctions, including arms embargoes. At the time of writing, restrictive measures have been applied to 29 countries²⁷⁶ and sanctions have been imposed on two non-state entities.²⁷⁷ When analysing the trade-related components of these restrictive measures in particular, it emerges that, quite often, the embargoed goods in question correspond to some of the EU's issue-specific trade restrictions (see below, section d)). In the case of the Democratic Republic of Congo, for instance, the 'illicit trade of natural resources'²⁷⁸ has been included in the long list of restrictive measures; while Member States are specifically banned from trading in diamonds with countries such as Iran²⁷⁹ and the Democratic Republic of Korea.²⁸⁰ Save for some exceptions when implementing UN Security Council Resolutions, however, the EU seems to shy away from explicitly mentioning a country's human rights situation when adopting restrictive measures against that country.

The changes under Lisbon may have particular implications for the CFSP-CCP nexus as, in light of the EU's exclusive competence to act in the realm of trade, this now means that 'the Lisbon Treaty makes it possible for natural or legal persons to seek redress through the Court in respect of restrictive measures affecting them under the CFSP'.²⁸¹ Considering the fact that European courts have been particularly active in striking down EU sanctions against legal persons or entities,²⁸² this avenue might also materialise with regard to the trade-related components of restrictive measures – possibly adding more fuel to the post-Lisbon reality of having a more politicised EU trade policy, including a stronger demand to effectively enforce human rights through trade instruments (see above, section 0). In light of the EU's shift towards increasingly using targeted sanctions, however, Clara Portela has recently identified a trend of 'leaving non-military trade flows unaltered'.²⁸³ From a narrow EU perspective, excluding trade from country-specific measures may indeed be seen as beneficial, as 'it does not disadvantage European firms, avoiding

²⁷⁵ For a general overview of the most recent literature on the effectiveness of sanctions, see Alex Vines, 'The effectiveness of UN and EU sanctions: lessons for the twenty-first century' [2012] 88 *International Affairs*, 867. For a recent assessment of the EU's sanctions in particular, see Clara Portela, 'The EU's Use of 'Targeted' Sanctions. Evaluating Effectiveness' (2014) CEPS Working Document 391, available online <<http://www.ceps.be/system/files/WD391%20Portela%20EU%20Targeted%20Sanctions.pdf>>.

²⁷⁶ Afghanistan, Belarus, Bosnia and Herzegovina, Burma/Myanmar, Central African Republic, China, Democratic Republic Congo, Côte d'Ivoire, Egypt, Eritrea, Republic of Guinea, Haiti, Iran, Iraq, North Korea, Lebanon, Liberia, Libya, Moldova, Russian Federation, Serbia and Montenegro, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, United States, Zimbabwe. See the most recent EEAS overview which was updated on 26 May 2014, available online <http://eeas.europa.eu/cfsp/sanctions/docs/measure_en.pdf>.

²⁷⁷ Al Qaeda and Terrorist Groups (Foreign Terrorist Organisations). See *Ibid*.

²⁷⁸ Council Decision 2010/788/CFSP of 20 December 2010 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP', Art 3.

²⁷⁹ Council of the European Union, 'Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran', preamble 10 and Art 4(c).

²⁸⁰ Council of the European Union, 'Council Decision 2013/183/CFSP of 22 April 2013 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Decision 2010/800/CFSP', Art 2.

²⁸¹ Portela (n 262) 25.

²⁸² Monika Heupel, 'Multilateral sanctions against terror suspects and the violation of due process standards' [2009] 85 *International Affairs* 307.

²⁸³ Portela (n 275).

conflicts with the industries that suffer losses as a result of the restrictions, and it obviates defining humanitarian exceptions'.²⁸⁴ In addition, the EU might also opt for more 'trade-neutral' sanctions for the benefit of enhancing the scope of issue-specific measures, which have not been annulled like its country-specific counterpart, and may therefore rely on more 'stringent interpretations of prohibitions'.²⁸⁵ Issue-specific measures, in other words, seem to provide the EU with more economic and legal leverage to pursue its broader foreign policy objectives, including human rights promotion.

d) Issue-specific Measures

As opposed to country-specific measures, which are adopted within a broadly defined legal and policy framework by multiple actors, issue-specific measures fall more neatly within the realm of exclusive EU competences. Conversely, it is the Commission who plays a pioneering role in mainstreaming human rights into issue-specific measures, which are 'framed through particular initiatives rather than distinct policy frameworks, programming processes and policy dialogue',²⁸⁶ though they may actually partake – explicitly or not – in the implementation of international agendas or instruments such as ILO conventions or the Rio process. Whereas this can create well-documented tensions with other fields of obligation, notably stemming from WTO rules,²⁸⁷ over the past decade, the EU has increasingly resorted to the adoption of specific measures in order to mitigate the human rights-related implications of trading in harmful goods, ranging from banning the trade in the rather clear-cut instruments of torture, military equipment and dual-use goods; to placing restrictions on the trade in materials linked to the EU's international environment commitments.

(1) Regulation 1236/2005 on instruments of torture

In 2005, the Council of the European Union adopted Regulation 1236/2005,²⁸⁸ which restricts the trade in goods that could be used for capital punishment, torture or other inhuman treatment. As noted elsewhere, it is deemed to be 'an unprecedented and landmark piece of legislation by the human rights community'.²⁸⁹ Referring to the human rights clause as an essential element in all EU agreements with third countries (see below, section 2.b)),²⁹⁰ the Regulation prohibits 'any export of goods which have *no* practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, [...] irrespective of the origin of such equipment'.²⁹¹ By the same token, the Regulation also prohibits the import of such goods.²⁹² Even in the case of 'goods that *could* be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment',²⁹³ export authorisation should still be granted.²⁹⁴ Reflecting the EU's longstanding commitment to the fight against

²⁸⁴ Ibid.

²⁸⁵ Ibid. 36.

²⁸⁶ Thematic evaluation of the European Commission (n 19), Annex 8, 11.

²⁸⁷ On the competition between different transnational normative regime claiming ultimate authority, see Neil Walker, 'The Idea of Constitutional Pluralism' [2002] 66 *Modern Law Review* 317.

²⁸⁸ Council of the European Union, 'Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment', 30 July 2005.

²⁸⁹ Thematic evaluation of the European Commission (n 19), Annex 8, 13.

²⁹⁰ Council Regulation (EC) No 1236/2005 (n 288) Preamble, para. 1.

²⁹¹ Ibid. Art 3 (1), emphasis added.

²⁹² Ibid. Art 4 (1).

²⁹³ Ibid. Chapter III, emphasis added.

²⁹⁴ Ibid. Art 5.

torture in a multilateral context, furthermore, the Regulation requires the ‘competent authority’ in charge of granting that authorisation to take into account ‘available international court judgments’ in this regard, as well as the ‘findings of the competent bodies of the UN’.²⁹⁵

As one of the most salient human rights issues which has been galvanised by EU-wide support,²⁹⁶ the fight against torture had already featured prominently on the EU’s human rights agenda before the adoption of the Regulation on instruments of torture. Indeed, it purportedly ‘came about because of a foreign policy decision to demonstrate the EU’s anti-torture stance in a concrete way by banning the export of goods which could be used in torture’.²⁹⁷ Pressed by Parliament, the EU Council had adopted the EU Guidelines on Torture in 2001, which were subsequently revised in 2008 and 2012 (see above, section II.C.1).²⁹⁸ That same year, torture had also been an EU priority at the UN Human Rights Fora – a priority which has since been endorsed for the 2012, 2013 and 2014 sessions.²⁹⁹ In addition, the issue has also visibly been present as part of the European Instrument for Democracy and Human Rights (EIDHR, see below, section IV.B.2.e)) under which the ‘prevention of torture and the rehabilitation of torture victims constitute a major priority for funding’, accounting for an average of €12 million over the last five years.³⁰⁰ More recently, the eradication of torture has been taken up as one of the overall priorities of the EU Strategic Framework for Human Rights,³⁰¹ thereby also gaining an explicit reference to the planned review³⁰² of Regulation 1236/2005 in order to ‘ensure improved implementation’.³⁰³ In response to implementation concerns raised by the European Parliament³⁰⁴ and CSOs such as Amnesty International and the Omega Research Foundation,³⁰⁵ the Commission recently adopted a proposal for a Regulation to amend the existing one.³⁰⁶ With negotiations still underway at the time of writing, the Commission reportedly introduced its

²⁹⁵ Ibid. Art 6(2).

²⁹⁶ Jan Wouters, Laura Beke, Anna-Luise Chané and Kolja Raube, 'A comparative study of EU and US approaches to human rights in External Relations' (2014) European Parliament Directorate for External Policies, EXPO/B/DROI/2013/27, forthcoming.

²⁹⁷ Thematic evaluation of the European Commission (n 19) Annex 8 13.

²⁹⁸ Council of the European Union (n 97).

²⁹⁹ Council of the European Union, ‘Council Conclusions on EU priorities at the UN Human Rights Fora’, 10 February 2014, available online <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/135514.pdf> para 21.

³⁰⁰ European Commission, ‘Torture’, available online <<http://www.eidhr.eu/highlights/torture>>.

³⁰¹ Council of the European Union (n 10) Action 17(a), (b) and (c)

³⁰² For a thorough legal review, see Michel Quentin and Emanuela Marrone, ‘The European Union Trade Control Regime of items which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment Comment of the Legislation: article-by-article’ (2014) ESU Liège University, available online <http://local.droit.ulg.ac.be/jcms/service/file/20140120133213_Vademecum-torture-12.pdf>

³⁰³ Council of the European Union (n 10) Action 11(d)

³⁰⁴ European Parliament, ‘Resolution on implementation of Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment’, 12 August 2011, P7_TA(2010)0236.

³⁰⁵ Amnesty International, ‘European Union: Stopping the Trade in Tools of Torture’, 2007, available online <<http://www.amnesty.eu/static/documents/2007/Finaltoolsoftorturereport.pdf>>; Amnesty International, ‘From Words to Deeds: Making the EU Ban on the Trade in ‘Tools of Torture’ a Reality’, 2010, available online <<http://www.amnesty.org/en/library/asset/EUR01/004/2010/en/fb4ff4cc-9a20-44dc-8212-ebd9f4727f7b/eur010042010en.pdf>>; and Amnesty International, ‘No More Delays. Putting an End to the EU Trade in ‘Tools of Torture’’, 2012, available online <<http://www.amnesty.org/fr/library/asset/ACT30/062/2012/en/66235abe-7eb8-4e6d-9516-04fb494e50d6/act300622012en.pdf>>.

³⁰⁶ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment’, 13 January 2014, COM(2014) 01 final, 2014/0005(COD).

Implementing Regulation 775/2014 on 16 July 2014, in order to expand the list of goods governed by the Regulation.³⁰⁷

(2) Council Common Position 2008/944/CFSP on the export of military equipment

In 2008, the Council of the European Union adopted its Common Position 2008/944/CFSP,³⁰⁸ thereby laying out common rules regarding the trade in military equipment and technology.³⁰⁹ In doing so, it replaced the earlier 1998 Code of Conduct on Arms Exports,³¹⁰ which had already defined common criteria for Member States, on the basis of which they could grant or deny licenses for arms exports. Given that its criteria and mechanisms had also been implemented by third non-EU countries, the Code of Conduct purportedly ‘contributed significantly to the harmonization of national [and international] arms export policies’.³¹¹ In the years that followed its adoption, its implementation was monitored by means of annual reports. Further to the tenth and last round of annual reporting,³¹² the Common Position was adopted in 2008. It introduced a number of tools for them to share information, to consult with each other and to arrive at ‘greater transparency’ in their export control policies.³¹³ Intending ‘to help Member States apply the Common Position’,³¹⁴ furthermore, the Council adopted a user’s guide. As was the case with the Code of Conduct, the Common Position also provides for the annual publication of an EU Report,³¹⁵ while Member States are in turn required to both circulate an annual report amongst other Member States ‘in confidence’,³¹⁶ and to publish a national report on the state of their own arms exports to feed into the annual EU report.³¹⁷ The latest report to date was adopted in January 2014.³¹⁸

The Common Position already expanded on the common criteria employed by Member States to decide whether or not to grant arms export licenses. Although the number of criteria has remained unchanged at

³⁰⁷ Amnesty International, ‘EU must close all loopholes in the torture trade’, 29 July 2014, available online <<http://www.amnesty.org/en/news/eu-must-close-all-loopholes-torture-trade-2014-07-29>>.

³⁰⁸ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

³⁰⁹ See Mark Bromley, ‘The Review of the EU Common Position on Arms Exports: Prospects For Strengthened Controls’ (2012) Non Proliferation Papers 7, available online <<http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>>; Paul Holtom and Mark Bromley, ‘The limitations of European Union reports on arms exports: the case of central Asia’ (2010) SIPRI Insights on Peace and Security No. 2010/5, available online <<http://books.sipri.org/files/insight/SIPRIInsight1005.pdf>>; Mark Bromley, ‘The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain’, (2008) SIPRI Policy Paper No. 21, available online <<http://books.sipri.org/files/PP/SIPRIIPP21.pdf>>; Mark Bromley and Michael Brzoska, ‘Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms Exports’ [2008] 13 European Foreign Affairs Review 333.

³¹⁰ Council of the European Union, ‘European Union Code of Conduct on Arms Exports’, 5 June 1998.

³¹¹ European External Action Service, ‘Arms Export Control’, available online <http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm>.

³¹² Council of the European Union, ‘Tenth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports’.

³¹³ Ibid. Preamble, para 3.

³¹⁴ Council of the European Union, ‘User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment’, 29 April 2009, 9241/09, 2.

³¹⁵ Ibid art. 8 (2).

³¹⁶ Ibid., art. 8 (1).

³¹⁷ Ibid., art. 8 (3).

³¹⁸ Council of the European Union, ‘Fifteenth Annual Report according to article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports’ of military technology and equipment

eight vis-à-vis the Code of Conduct,³¹⁹ their scope has changed. Cognisant of the commitment of the Strategic Framework for Human Rights to ‘ensure that the current review of Council Common Position 2008/944/CFSP on Arms Exports takes account of human rights and International Humanitarian Law’,³²⁰ four criteria in particular stand out. First, criterion one establishes the need for Member States to respect international obligations and commitments, and thereby in particular refers to ‘the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations’.³²¹ Second, criterion two explicitly links the conduct of exporting arms to possible human rights concerns, by enshrining the obligation of ‘respect for human rights in the country of final destination as well as respect by that country of international humanitarian law’.³²² It does so by requiring an assessment of ‘the recipient country’s attitude towards relevant principles’ of both international human rights law and international humanitarian law.³²³ Should there be a ‘clear risk’ that the military equipment in question ‘might be used’ for either ‘internal repression’³²⁴ or ‘in the commission of serious violations of international humanitarian law’, no export license shall be granted. With regard to ‘countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe’, furthermore, Member States are urged to exercise special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the military technology or equipment’. Third, criterion five establishes the need to be cognisant of the ‘national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.’³²⁵ Although defence and security interests help define the common criteria, however, it is also made clear that ‘this factor cannot affect consideration of the criteria on respect for human rights’. Fourth, criterion eight obliges Member States to also take into account, ‘in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development Reports, whether the proposed export would seriously hamper the sustainable development of the recipient country’.³²⁶ In this equation, Member States are required to not only look at the proportions of country’s military and social expenditure, but to also include any existing links with either EU or bilateral development aid.

³¹⁹ The criteria entail, respectively, ‘international obligations’ (1); ‘human rights’ (2); ‘international situation’ (3); ‘regional stability’ (4); ‘security of friends and allies’ (5); ‘attitude to terrorism’ (6); ‘risk of diversion’ (7); and ‘sustainable development’ (8).

³²⁰ Council of the European Union (n 10) Action 11(e).

³²¹ Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 8 December 2008, art. 2(1).

³²² *Ibid.*, art. 2(2).

³²³ *Ibid.*, art. 2(2).

³²⁴ Internal repression is further refined in art. 2(2) as including, ‘*inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights’.

³²⁵ Council Common Position 2008/944/CFSP (n 314) art. 2(5).

³²⁶ *Ibid.* art. 2(8).

(3) Renewable Energy Directive 2009/28/EC

Intensifying its efforts to integrate the ILO's eight fundamental conventions into its unilateral trade measures, the Commission adopted the Renewable Energy Directive (RED) in 2009.³²⁷ Cognisant of 'the severity of biofuels-related social impacts that have been identified in developing countries over the years',³²⁸ the RED puts forth 'social sustainability criteria'³²⁹ and obliges the Commission to report to the European Parliament and the Council every two years on the progress made. Most notably, the RED requires reporting:

'on the impact on social sustainability in the Community and in third countries of increased demand for biofuel, on the impact of Community biofuel policy on the availability of foodstuffs at affordable prices, in particular for people living in developing countries, and wider development issues. Reports shall address the respect of land-use rights. They shall state, both for third countries and Member States that are a significant source of raw material for biofuel consumed within the Community, whether the country has ratified and implemented each of the following Conventions of the International Labour Organisation:

- Convention concerning Forced or Compulsory Labour (No 29),
- Convention concerning Freedom of Association and Protection of the Right to Organise (No 87),
- Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98),
- Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100),
- Convention concerning the Abolition of Forced Labour (No 105),
- Convention concerning Discrimination in Respect of Employment and Occupation (No 111),
- Convention concerning Minimum Age for Admission to Employment (No 138),
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)'.³³⁰

In its first progress report, the Commission briefly and somewhat unremarkably noted that 'whilst most non EU countries have ratified the fundamental conventions, enforcement is lower than in the EU or in the US which has not ratified many such conventions'. For this reason, it continues, 'efforts across the board must continue to encourage countries to fully apply these conventions'.³³¹ Leaving aside questions

³²⁷ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2203/30/EC.

³²⁸ Stavros Afionis and Lindsay Stringer, 'European Union leadership in biofuels regulation: Europe as a normative power?' [2012] 32 *Journal of Cleaner Production* 116.

³²⁹ Art. 17 para 7.

³³⁰ *Ibid.*

³³¹ European Commission, 'Renewable energy progress report', Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 27 March 2013, COM(2013) 175 final, 12.

of effectiveness,³³² the EU has in any case embarked on a ‘path not yet taken’³³³ by introducing social sustainability criteria in the renewable energy debate. In doing so, it has thus reaffirmed its role as a normative power in global environmental politics.³³⁴ Perhaps unsurprisingly, the EU’s recent emphasis on social sustainability was ‘not easily accommodated’³³⁵ within the WTO legal framework and has once again given rise to questions about the potential ‘barriers to trade’ these standards might generate.³³⁶

(4) Regulation 428/2009 on the trade in dual-use goods

Shortly after the adoption of the RED, the Council adopted Regulation 428/2009 on the control of dual-use items,³³⁷ which are defined as ‘items, including software and technology, which can be used for both civil and military purposes’, as well as ‘all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices’.³³⁸ Dual-use items, in other words, are rather harmless goods which are usually used for peaceful or civilian purposes, but which may also be used for the proliferation of Weapons of Mass Destruction (WMD). As a result, the Regulation foresees the possibility for Member States to ‘prohibit or impose an authorization requirement on the export of dual-use items [...] for reasons of public security or human rights considerations’.³³⁹

Conversely, the Regulation thus sits with the EU strategy for combating the proliferation of WMD.³⁴⁰ On a larger scale, the EU’s export controls also fit within the broader realm of international commitments and cooperation against proliferation, including UN Security Council Resolution 1540; international agreements such as the Chemical Weapons Convention (CWC), the Biological and Toxin Weapons Convention (BTWC) and the Nuclear Non- Proliferation Treaty (NPT); as well as multilateral export control regimes such as the Wassenaar Arrangement, the Nuclear Suppliers Group (NSG), the Australia Group and the Missile Technology Control Regime (MTCR).³⁴¹

Pursuant to the obligation to review the implementation of the Regulation and present proposals for amendments,³⁴² the Commission recently adopted a communication on the review of its export control

³³² Olivier De Schutter, ‘Note on the Impacts of the EU Biofuels Policy on the Right to Food’, United Nations Office of the High Commissioner for Human Rights, Geneva, 23 April 2013, available online <http://www.srfood.org/images/stories/pdf/otherdocuments/20130423_biofuelsstatement_en.pdf> 6.

³³³ Johan Westberg and Francis Johnson, ‘The Path Not Yet Taken: Bilateral Agreements to Promote Sustainable Biofuels under the EU Renewable Energy Directive’ (2013) Stockholm Environment Institute Working Paper 2013-02, available online <<http://www.sei-international.org/mediamanager/documents/Publications/Climate/SEI-WP-2013-02-Biofuels-EU-RED.pdf>>.

³³⁴ Afionis and Stringer (n 328) 114-123.

³³⁵ Carsten Daugbjerg and Alan Swinbank, ‘Globalization and new policy concerns: the WTO and the EU’s sustainability criteria for biofuels’ [2014] *Journal of European Public Policy*, DOI: 10.1080/13501763.2014.927520, 1.

³³⁶ Robert Ackrill and Andrian Kay, ‘EU Biofuels Sustainability Standards and Certification Systems – How to Seek WTO-Compatibility’ [2011] *62 Journal of Agricultural Economics* 551.

³³⁷ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

³³⁸ *Ibid.*, Art. 2(1).

³³⁹ *Ibid.*, Art. 8(1).

³⁴⁰ Council of the European Union, ‘EU strategy against proliferation of Weapons of Mass Destruction ‘Fight against the proliferation of weapons of mass destruction’, 10 December 2003, 15708/03.

³⁴¹ European Commission, ‘Export controls: international commitments and cooperation against proliferation’, available online <http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152180.pdf>.

³⁴² Council Regulation No 428/2009 (n 337), Art. 25.

policy.³⁴³ In this Communication, the Commission sets out a number of policy options to modernise EU export controls and to adopt the current system to ‘rapidly changing technological, economic and political circumstances’.³⁴⁴ Amongst these circumstances, the first priority is to ‘adjust to an evolving security environment’,³⁴⁵ which now necessitates the development of a ‘human security approach’, i.e. an approach that puts ‘people at the heart of EU export control policy [...] by recognising the interlinkages between human rights, peace and security’.³⁴⁶ As a ‘major producer and exporter of dual-use items’,³⁴⁷ the EU thus not only has an important role to play in counter-proliferation export controls at large, but also plays a pioneering role by explicitly asserting that ‘security and human rights are inextricably interlinked’.³⁴⁸

(5) Raw materials and the Extractive Industry

Drawing on the observation that multinational corporations (MNCs) have an ever greater impact on human rights protection, the international community has been establishing international rules since the 1970s to mitigate the potential negative effects of their involvement on the economic development of countries.³⁴⁹ One of the most vulnerable industries in this regard has been the extractive industry, which mostly comprises energy, gas, logging, mining and oil firms and has increasingly been the object of human rights litigation.³⁵⁰ Drawing on the observation that ‘a small number of private companies benefit from the exploitation of these [extractive] resources, while public revenues are small or misused and local populations remain poor’,³⁵¹ it has become clear that ‘transparency and accountability are essential throughout the process, and particularly in relation to public spending plans for all levels of government’.³⁵² Indeed, following a growing discussion in the 1990s about the propensity of resource-rich countries to foster corruption, human rights abuses and protracted development as a whole, the need to address the so-called ‘resource curse’³⁵³ through trade has increasingly become part of the international regulatory framework.

Conversely, the EU recently pledged to step up its efforts in inducing ‘responsible business practices’ by paying ‘specific attention’ to the practices of businesses, and especially in industries that are particularly

³⁴³ European Commission, ‘The Review of export control policy: ensuring security and competitiveness in a changing world’, Communication from the Commission to the Council and the European Parliament, 24 April 2014, COM(2014) 244 final.

³⁴⁴ *Ibid.*, 2.

³⁴⁵ *Ibid.*, 5.

³⁴⁶ *Ibid.*, 6, fn 9.

³⁴⁷ *Ibid.*, 2.

³⁴⁸ *Ibid.*, 6.

³⁴⁹ John Ruggie, ‘Business and Human Rights: the Evolving International Agenda’ [2007] 101 *The American Journal of International Law* 819.

³⁵⁰ Jonathan Drimmer, ‘Human rights and the extractive industries: Litigation and compliance trends’ [2010] 3 *Journal of World Energy Law and Business* 121; Caroline Kaeb, ‘Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks’ [2008] 6 *Northwestern Journal of International Human Rights* 327; Michael Watts, ‘Righteous oil? Human rights, the oil complex, and corporate social responsibility’ [2005] 30 *Annual Review of Environment and Resources*, 373.

³⁵¹ Oxfam International, ‘Lifting the Resource Curse: How Poor People Can and Should Benefit from the Revenues of Extractive Industries’ (2009) Briefing Paper 134, available online <<http://www.oxfam.org/sites/www.oxfam.org/files/bp134-lifting-the-resource-curse-011209.pdf>>, 1.

³⁵² *Ibid.*

³⁵³ See, for an authoritative overview of the concept, Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993); Paul Collier, ‘The Political Economy of Natural Resources’ [2010] 77 *Social Research* 1105.

prone to human rights violations.³⁵⁴ Reaffirming its belief that the ‘opportunities and risks of private investment for development are particularly high’ in the extractive industries,³⁵⁵ both the Commission and the EEAS recently adopted a joint communication on the responsible sourcing of minerals and pledged to arrive at an integrated EU approach.³⁵⁶ In addition, the Commission, under DG Trade’s auspices, also adopted a proposal for a Regulation on an EU system to ensure due diligence in the supply chain of European importers.³⁵⁷

(a) Kimberley Process Certification Scheme (KPCS)

One of the earliest attempts to regulate trade in the extractive industry dates back to when the UN established the international Kimberley Process Certification Scheme (KPCS) in 2000.³⁵⁸ In an effort to halt the trade in so-called ‘blood diamonds’ (owing their name to the fact that they have caused a series of civil wars and human rights violations),³⁵⁹ the KPCS regulates the diamond trade by obliging traders to provide certificates of origin for their diamonds. In addition, trade flows are controlled, signatories to the KPCS cannot trade with countries who have not signed the Process, and the world’s diamond production and trade are closely monitored.³⁶⁰ The EU, as an important diamond producer, subsequently adopted Regulation 2368/2002 to establish the common criteria all trading Member States should adhere to.³⁶¹

This Regulation has undergone a number of amendments over the last decade,³⁶² and the Commission most recently adopted a proposal for an amended Regulation on the inclusion of Greenland in the KPCS.³⁶³ Harmonising the certificates of origin as required by the KPCS, moreover, the EU also developed a common ‘European Community Kimberley Process certificate’, and recently updated its guidelines on the implementation of its Regulation.³⁶⁴ From a human rights perspective, however, the Regulation only recognises in its preamble ‘the devastating impact of conflicts fuelled by the trade in conflict diamonds on

³⁵⁴ European Commission, ‘A Stronger of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 May 2014, COM(2014) 263 final, 12.

³⁵⁵ Ibid.

³⁵⁶ European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, ‘Responsible sourcing of minerals originating in conflict-affected and high-risk areas. Towards an integrated EU approach’, 5 March 2014, JOIN(2014) 8 final.

³⁵⁷ European Commission, ‘Setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas’, Proposal for a Regulation of the European Parliament and of the Council, 5 March 2014, COM(2014) 111 final, 2014/0059 (COD).

³⁵⁸ UN General Assembly, ‘The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts’, 29 January 2001, Resolution 55/56.

³⁵⁹ Franziska Bieri, *From blood diamonds to the Kimberley Process: How NGOs cleaned up the global diamond industry* (Ashgate Publishing 2010).

³⁶⁰ See designated the Kimberley Process’ designated website: available online < <http://www.kimberleyprocess.com/>>.

³⁶¹ Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds.

³⁶² European External Action Service, ‘Legislation implementing the KPCS in the EC/EU’, 2008, available online <http://eeas.europa.eu/blood_diamonds/docs/legislation_en.pdf>.

³⁶³ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2368/2002 as regards the inclusion of Greenland in implementing the Kimberley Process certification scheme’, 18 June 2013, COM(2013) 427 final, 2013/0198 (COD).

³⁶⁴ European Commission, ‘Guidelines on Trading with the European Union (EU). A practical guide for Kimberley Process Participants and companies involved in trade in rough diamonds with the EU’, January 2014, available online <http://eeas.europa.eu/blood_diamonds/docs/guidelines-on-trading-with-the-european-community-012014_en.pdf>.

the peace, safety and security of people in affected countries’, to then acknowledge ‘the systematic and gross human rights violations that have been perpetrated in such conflicts’.³⁶⁵

(b) Extractive Industries Transparency Initiative (EITI)

Shortly after the Kimberley Process had entered into force, the Extractive Industries Transparency Initiative (EITI) was launched at the 2002 World Summit on Sustainable Development in Johannesburg. As a voluntary multi-stakeholder initiative, its aim was to bring together business, civil society and government actors committed to fostering more transparency in the extractive industries by disclosing information about the payments made from extractive companies to resource-rich governments. Although the initiative had achieved some considerable success across continents, it had been subject to the criticism that its geographical coverage was narrow (i.e. predominantly present in developing countries) and its enforcement mechanisms were weak. In addition, EITI was also scorned for setting a relatively high threshold for the participation of CSOs, and for only applying to a limited part of the value chain. As a result, the initiative underwent a thorough review process from 2011 through 2013.³⁶⁶ At the 2013 EITI Global Conference in Sydney, conversely, a global transparency standard was adopted which uncovers in greater detail the financial flows coming from extractive companies to resource-rich governments.³⁶⁷ In addition to the publication of reciprocal information on company-government payments in a designated EITI Report, the overall process is now also closely monitored by a heterogeneous group of stakeholders from civil society, companies and the home government.³⁶⁸

In the past couple of years, the EITI has increasingly been acknowledged as a viable soft law instrument to foster more transparency in the extractive industry. More recently still, the US adopted its own hard law instrument with the entry into force of Section 1504 of the 2010 US Dodd-Frank Wall Street Reform Consumer Protection Act, which requires all extractive industry companies that are publicly listed in the US to disclose information on their financial transaction flows.³⁶⁹ Shortly after, the EU revised two of its designated Directives, thereby equally introducing an obligation for extractive industry companies to and loggers of primary forests to disclose the payments made to resource-rich governments.³⁷⁰ In order to ensure a broader coverage, the Commission simultaneously reviewed its Directive on financial statements

³⁶⁵ Council Regulation (EC) No 2368/2002 (n 361) Preamble, para 2.

³⁶⁶ For a comprehensive overview of the EITI, its potential and its pitfalls, see Gisela Grieger, ‘The Extractive Industries Transparency Initiative: state of play’, European Parliamentary Research Service Briefing, 140758REV1, 24 June 2014, available online <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140758/LDM_BRI%282014%29140758_REV1_EN.pdf>.

³⁶⁷ Sam Bartlett and Dyveke Rogan (eds), *The EITI Standard* (The EITI International Secretariat, 2013), available online <http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf>.

³⁶⁸ For a clear explanation of how EITI exactly works, see the designated ‘EITI factsheet’, available online <http://eiti.org/files/document/2014-07-30_EITI_Factsheet_English.pdf>.

³⁶⁹ Title XV of the Dodd-Frank Wall Street Reform and Consumer Protection Act contains several specialised disclosure provisions. See explanatory note on the Dodd-Frank homepage, available online <<https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>>.

³⁷⁰ When explaining why it revised its Directives, the Commission itself explicitly referred to the US Dodd-Frank Act as a catalyzing factor in its press release. See European Commission, ‘New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions’, MEMO/13/541, 12 June 2013, available online <http://europa.eu/rapid/press-release_MEMO-13-541_en.htm>.

(‘Accounting Directive’),³⁷¹ as well as its Directive on transparency requirements for listed companies (‘Transparency Directive’).³⁷² While the former ‘regulates the information provided in the financial statements of all limited liability companies which are registered in the European Economic Area (EEA)’, the latter ‘includes all companies which are listed on EU regulated markets even if they are not registered in the EEA and incorporated in a third country’.³⁷³ What is more, extractive companies are now also obliged to disclose the payments they have made on both a ‘country-by-country’ and a ‘project-by-project basis’. The main reason behind such hefty disclosure requirements, according to the Commission, is to:

provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources, and also to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in these same countries. The information disclosed on payments to governments will be publicly available to all stakeholders either through the stock market information repository or the business registry in the country of incorporation (in the same way as financial statements are made available).³⁷⁴

It remains to be seen whether the revised Directives, which will enter into force in July 2015, will stand the human rights-test of time. Preliminary assessments from civil society expressed their enthusiasm for this ‘credible EU process’, seeing it as ‘an encouraging example of the EU institutions maintaining an open, transparent and regular dialogue with representative associations and civil society’.³⁷⁵ Publish What You Pay, the leading CSO network in advocating for more accountability in the extractive industries, equally applauded what they deemed to be a ‘historic’ decision.³⁷⁶

From a human rights perspective, however, the broader EITI agenda still remains vulnerable to three broad strands of criticism. First, it does not explicitly aim to improve the human rights situation in resource-rich countries that are known to be vulnerable to the ‘resource curse’, but instead focuses on the rather narrow realm of promoting transparency of revenue and payments. At best, this means that the EITI focuses on the broader questions of tackling corruption in a lot of the host countries,³⁷⁷ without necessarily looking at the broader human rights implications. Indeed the Accounting Directive, as well as the Transparency Directives, each ‘respect fundamental rights and observes the principles recognised, in particular, by the

³⁷¹ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

³⁷² Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.

³⁷³ European Commission (n 370).

³⁷⁴ *Ibid.*

³⁷⁵ Open Society Foundations, ‘EU Transparency Legislation Paves the Way for a Global Standard’, 22 April 2013, available online <<http://www.opensocietyfoundations.org/voices/eu-transparency-legislation-paves-way-global-standard>>.

³⁷⁶ Publish What You Pay, ‘Publish What You Pay applauds historic EU Parliament transparency vote as Canada announces similar plans’, 12 June 2013, available online <<http://www.publishwhatyoupay.org/resources/publish-what-you-pay-applauds-historic-eu-parliament-transparency-vote-canada-announces-si>>.

³⁷⁷ Liz David-Barrett and Ken Okamura, ‘The Transparency Paradox: Why do Corrupt Countries Join EITI?’ (2013) European Research Centre for Anti-Corruption and State-Building, Business School, University of Oxford Working Paper No 38, available online <<http://eiti.org/files/The-Transparency-Paradox.-Why-do-Corrupt-Countries-Join-EITI1.pdf>>.

Charter of Fundamental Rights of the European Union’,³⁷⁸ yet do not acknowledge any further linkage with human rights as such. Second, the EITI does not take a rights-based approach to the analysis of revenues and expenditure within the extractive industries, and thus runs the risk of turning a blind eye to the possibility that the revenues in question, as transparent as they may be, might have been used to finance human rights abuses. Third, it does not allow enough room for empowerment of the host country to take action in the case of human rights violations. Its enforcement potential, in other words, remains somewhat limited.³⁷⁹ With these limitations in mind, a recent review highlighted the need to enhance the EITI ‘to include an explicit human rights mandate and analysis [which] should ensure both the promotion and protection of human rights, including economic, social and cultural rights’.³⁸⁰ Indeed a human rights-based approach, as increasingly employed in the EU’s development policies (see below, section IV.A.4), might be able to provide some solace in this regard.

(6) EU Forests and the Fight against Illegal Logging

In recent years, the international community has begun to pay considerable attention to the human rights implications of forestry policies, which have become marred by illegal logging. Defined as the harvesting, processing and trading of timber and wood in violation of laws, illegal logging often occurs in contexts where wider governance problems are at play – including corruption and a lack of law enforcement.³⁸¹ In addition, the forest sector is also reportedly more vulnerable to labour rights violations.³⁸² As a result, the ILO has been adopting guidelines on safety,³⁸³ labour inspection,³⁸⁴ and labour conditions in forestry work.³⁸⁵ In a similar vein, a growing number of CSOs have increasingly rung the alarm about a number of human rights violations in the mismanagement of forests.³⁸⁶

³⁷⁸ Charter of Fundamental Rights of the European Union, Preamble, para. 57 and para. 28.

³⁷⁹ For a comprehensive assessment of the EITI from a human rights perspective, see Institute for Multi-Stakeholder Integrity and International Human Rights Clinic, (2013), ‘Working Draft, Extractive Industries Transparency Initiative’, MSI Evaluation Report’, available online <<http://www.msi-integrity.org/wp-content/uploads/2013/04/EITI-Working-Evaluation-Report-FINAL.pdf>> 4-9.

³⁸⁰ *Ibid.*, 9.

³⁸¹ International portal on illegal logging, ‘What is illegal logging?’, available online <<http://www.illegal-logging.info/topics/what-illegal-logging>>.

³⁸² See International Labour Organization, ‘Forestry, 2013, available online <http://www.ilo.org/ipecc/areas/Agriculture/WCMS_172421/lang-en/index.htm>.

³⁸³ International Labour Office, ‘Safety and Health in Forestry Work’, 1998, available online <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107793.pdf>.

³⁸⁴ International Labour Organization, ‘Guidelines for labour inspection in forestry’, 2005, available online <<http://www.ilo.org/public/english/standards/reim/gb/docs/gb292/pdf/melif-gdln.pdf>>.

³⁸⁵ International Labour Organization, ‘Labour Conditions in Forestry in Indonesia’, 2010, available online <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_126142.pdf>.

³⁸⁶ Environmental Investigation Agency, ‘The Laundering Machine. How Fraud and Corruption in Peru’s Concession System are Destroying the Future of its Forests’, 2014, available online <<http://eia-international.org/wp-content/uploads/The-Laundering-Machine.pdf>>; Greenpeace India, ‘Countering Coal? Community Forest Rights and Coal Mining Regions of India’, 2012, available online <<http://www.greenpeace.org/india/Global/india/report/Countering-coal.pdf>>; Human Rights Watch, ‘Wild Money. The Human Rights Consequences of Illegal Logging and Corruption in Indonesia’s Forestry Sector’, 2009, available online <<http://www.hrw.org/sites/default/files/reports/indonesia1209webwcover.pdf>>; Human Rights Watch, ‘The Dark Side of Green Growth. Human Rights Impacts of Weak Governance in Indonesia’s Forestry Sector’, 2013, available online <http://www.hrw.org/sites/default/files/reports/indonesia0713webwcover_1.pdf>; Seymour Frances, ‘Forests, Climate Change and Human Rights: Managing Risk and Trade-Offs’ (2008) Center for International Forestry Research, available online <<https://www.cbd.int/doc/meetings/tk/redd-ilc-01/other/redd-ilc-01-cifor-en.pdf>>.

In response to calls to protect the rights of (often indigenous) people in forest-related policies,³⁸⁷ the UN launched its collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (UN-REDD) in 2008. Targeting mainly developing countries, UN-REDD aims *inter alia* to support the involvement of Indigenous Peoples and other forest-dependent communities. To this end, it assists with the implementation of national and international processes, whilst also developing guidelines to the advancement of forest management. Interestingly, it emphasises that its mission ‘must be carried out in accordance with the human rights based approach in a manner that fulfils the requirements set forth in the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) and other UN conventions and declarations on rights and participation’.³⁸⁸

The EU’s commitment to combat deforestation, and the illegal logging of timber in particular, lies at the intersection of international environmental and trade policies. Mindful of not only the economic impact of illegal logging, the EU has repeatedly pointed out the social impact – thereby acknowledging that ‘illegal logging is often linked to conflicts over land and resources, the disempowerment of local and indigenous communities and armed conflicts’.³⁸⁹ In collaboration with the most prominent multilateral players in this regard,³⁹⁰ the EU thus participates in a variety of fora on Multilateral Environmental Agreements (MEA) and Processes in order to discuss the forest-related elements of the EU’s trade and environmental policies. As is the case for international trade agreements as a whole, it is the Commission that represents the EU during MEA fora when clear trade-related components to a policy are being discussed. An example of such MEA in which the Commission participates is the International Tropical Timber Organization (ITTO, see below, section (b)). In other cases, when the competence does not exclusively befall on the EU to act, the Commission collaborates in tandem with the EU Council.³⁹¹

The policy expression of the EU’s commitment to the international environmental agenda can be found in the framework on forest policies that has been developed since the ‘Rio Forest Principles’ were adopted by the international community in 1992.³⁹² More than twenty years later, and parallel to the developments on the international scene, the EU has also increasingly linked its international environmental agenda,

³⁸⁷ See, for an overview of references to forest-related policies in the context of the Rights of Indigenous Peoples, Fergus MacKay, *Indigenous Peoples and United Nations Human Rights Bodies. A Compilation of UN Treaty Body Jurisprudence, the Recommendations of the Human Rights Council and its Special Procedures, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples, Volumes I (1993-2004), II (2005-2006), III (2007-2008) and IV (2009-2010)* (2013) Forest Peoples Programme, available online <<http://www.forestpeoples.org/tags/indigenous-peoples-and-united-nations-human-rights-bodies-series-compilations-un-treaty-body-ju>>.

³⁸⁸ UN-REDD Programme Secretariat, ‘The UN-REDD Programme Strategy 2011-2015’, 2011, available online <<http://www.unep.org/forests/Portals/142/docs/UN-REDD%20Programme%20Strategy.pdf>>.

³⁸⁹ European Commission, ‘EU Timber Regulation applicable from 3 March 2013’, available online <http://ec.europa.eu/environment/forests/pdf/EUTR_Leaflet_EN.pdf>.

³⁹⁰ Usually cited as encompassing the Conference on Environment and Development (UNCED), the Intergovernmental Panel on Forests (IPF), the Intergovernmental Forum on Forests (IFF), the United Nations Forum on Forests (UNFF), the Committee on Forestry (COFO) of the UN Food and Agriculture Organization (FAO) and the International Tropical Timber Organization (ITTO). See, for instance, the historical overview of international forest policy on the UNFF’s homepage, available online <<http://www.un.org/esa/forests/about-history.html>>.

³⁹¹ See European Commission, ‘International forest issues’, available online <<http://ec.europa.eu/environment/forests/finternational.htm>>.

³⁹² UN General Assembly, ‘Report of the United Nations Conference on Environment and Development. Annex III, Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests’, 14 August 1992, A/CONF.151/26 (Vol. III).

including biodiversity and forestry, to its overall vision of ensuring ‘a decent life for all’ – one in which human rights have also come to play a central role.³⁹³ Conversely, the logging of forests has equally become an area of concern in the EU’s strategy on embracing the private sector’s role to achieve inclusive and sustainable growth, as well as in the EU’s recent revision of the Accounting and Transparency Directives to advance the broader EITI agenda (see above, section (5)(b)). As has been noted earlier, however, the Directives in question do not explicitly refer to human rights in their respective legal provisions.

(a) Forest Law Enforcement, Governance and Trade (FLEGT)

The first milestone in the EU’s fight for better forest management was laid down with the adoption of the Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT) in 2003,³⁹⁴ which proposes measures to tackle both the demand-side of illegal logging (i.e. the reduction of the consumption of illegally harvested timber in the EU market), as well as the supply-side of the problems surrounding the mismanagement of forests (i.e. governance reforms and capacity-building). Mindful of its commitment to sustainable development, therefore, the EU intends to put forward ‘equitable and just solutions to the illegal logging problem which do not have an adverse impact on poor people; helping partner countries to build systems to verify timber has been harvested legally; promoting transparency of information; capacity building for partner country governments and civil society; and promoting policy reform’.³⁹⁵ The reason behind this commitment is explicitly grounded in the EU’s proclaimed intent to promote human rights. Indeed, almost a decade before the all-encompassing Strategic Framework for Human Rights would be adopted, the EU had already acknowledged that ‘in some forest-rich countries, the corruption fuelled by profits from illegal logging has grown to such an extent that it is undermining the rule of law, principles of democratic governance and respect for human rights’.³⁹⁶

Such relatively strong wording had come in response to a paradigm shift on the global scene where, since the early 1980s, the international community had been attempting to arrive at a multilateral solution to foster global governance in the forestry sector. Most notably, the International Tropical Timber Agreement (ITTA) and its implementation body, the International Tropical Timber Organization (ITTO), had been created in 1983. Replaced by the subsequently revised ITTA in 1994, it was ultimately superseded by the most recently reviewed 2006 ITTA, which has currently been ratified by 62 parties.³⁹⁷ The failure of the

³⁹³ European Commission, ‘A Decent Life for All: From Vision to Collective Action’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2 June 2014, COM(2014) 335 final. In its communication, the Commission identified 17 priority areas including (i) poverty; (ii) inequality; (iii) food security and nutrition and sustainable agriculture; (iv) health; (v) education; (vi) gender equality and women’s empowerment; (vii) water and sanitation; (viii) sustainable energy; (ix) full and productive employment and decent work for all; (x) inclusive and sustainable growth; (xi) sustainable cities and human settlements; (xii) sustainable consumption and production; (xiii) oceans and seas; (xiv) biodiversity and forests; (xv) land degradation, including desertification and drought; (xvi) human rights, the rule of law, good governance and effective institutions; and (xvii) peaceful societies. See, for a discussion of these priorities, Wouters, Beke, D’Hollander and Raube (n 67).

³⁹⁴ EU Commission, ‘Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan’, Communication from the Commission to the Council and the European Parliament, 21 May 2003, (COM)2003 251 final.

³⁹⁵ *Ibid.*, 3.

³⁹⁶ *Ibid.*

³⁹⁶ *Ibid.*, 4.

³⁹⁷ UNCTAD, United Nations Conference for the Negotiation of a Successor Agreement to the International Tropical Timber Agreement, ‘International Tropical Timber Agreement, 2006’, TD/TIMBER.3/12, 1 February 2006.

1992 Rio Earth Summit to arrive at globally binding commitments and systematic monitoring mechanisms, however, had reportedly generated disappointment in EU circles.³⁹⁸ Subsequently, Rio somewhat came to represent the same shift towards a unilateral ‘plan B’ in international forest governance, as Singapore would come to represent for international labour rights governance a couple of years later. Indeed, as has been noted elsewhere, ‘the EU decided to proceed unilaterally, by linking the improvement of forest law enforcement and governance (FLEG) to regulation of trade (T), but in ways shaped by the need to comply with WTO rules, as well as to obtain the consent of developing countries themselves’.³⁹⁹ Shortly after the FLEGT Action Plan had entered into force, the Council and the Commission therefore adopted two subsequent Regulations on the establishment of a voluntary licensing scheme for third countries to take part in.⁴⁰⁰

By entering into a so-called voluntary partnership agreement (VPA), the EU and the contracting third countries or regional organisations pledge to ensure that only legally harvested timber would be imported from and exported to the EU market.⁴⁰¹ This scheme comes with a number of advantages. First, because of its voluntary nature, and as opposed to the older unilateral requirements for eco-labelling which had hitherto been in place,⁴⁰² VPAs are deemed to be compatible with WTO regulation. Second, and perhaps more importantly, VPAs also enable the EU to pursue a more ‘normative’ approach towards international forestry governance, as they allow a more active role for CSOs on the ground. Indeed,

the VPAs were also designed to win the active cooperation of developing country stakeholders by promoting ‘equitable and just solutions’ for all concerned interests; engaging local communities and NGOs in forest sector governance reform; and providing capacity-building support for civil society and the private sector as well as for public fiscal, law enforcement, and forestry authorities.⁴⁰³

As can be seen from the table below, the Commission has recently been negotiating and concluding VPAs with a number of developing countries where the forestry sector is viewed to be particularly harmful. At the time of writing, six countries have signed a VPA with the EU, including Cameroon,⁴⁰⁴ the Central African

³⁹⁸ Benjamin Cashore, Graeme Auld, Steven Bernstein and Constance McDermott, ‘Can Non-state Governance ‘Ratchet Up’ Global Environmental Standards? Lessons from the Forest Sector’ [2007] 16 *Review of European Community & International Environmental Law* 158-172.

³⁹⁹ Christine Overdevest and Jonathan Zeitlin, ‘Assembling an experimentalist regime: Transnational governance interactions in the forest sector’ [2014] 8 *Regulation and Governance* 36.

⁴⁰⁰ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community; Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.

⁴⁰¹ Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, preamble 2.

⁴⁰² Duncan Brack, ‘Combating Illegal Logging: Interaction with WTO Rules’ (2009) Chatham House Energy, Environment and Resources Briefing Paper 2013/1, available online <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/0513bp_brack.pdf>.

⁴⁰³ Overdevest and Zeitlin (n 399).

⁴⁰⁴ Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), signed 6 October 2010.

Republic,⁴⁰⁵ Ghana,⁴⁰⁶ Indonesia,⁴⁰⁷ Liberia,⁴⁰⁸ and the Republic of Congo.⁴⁰⁹ Nine more countries are currently negotiating VPAs with the EU, including Côte d'Ivoire, the Democratic Republic of Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam. Another eleven countries have reportedly expressed their interest in concluding a VPA with the EU, including Bolivia, Cambodia, Colombia, Ecuador, Guatemala, Myanmar/Burma, Papua New Guinea, Peru, the Philippines, Sierra Leone and the Solomon Islands. The EU FLEGT initiative, in other words, seems to be here to stay.

Table 3: Overview of EU Voluntary Partnership Agreements under FLEGT

Concluded VPAs (6)	VPAs under negotiation (9)	Expressed interest in VPAs (11)
<ul style="list-style-type: none"> •Cameroon •Central African Republic •Ghana •Indonesia •Liberia •Republic of Congo 	<ul style="list-style-type: none"> •Côte d'Ivoire •Democratic Republic of Congo •Gabon •Guyana •Honduras •Laos •Malaysia •Thailand •Vietnam 	<ul style="list-style-type: none"> •Bolivia •Cambodia •Colombia •Ecuador •Guatemala •Myanmar/Burma •Papua New Guinea •Peru •Philippines •Sierra Leone •Solomon Islands

Source: EU FLEGT Facility homepage. Available on < <http://www.euflegt.efi.int/vpa-countries>>.

Some observers have recently hailed the FLEGT initiative as a best practice example of transnational forest governance, at a time when the sector is increasingly dominated by a myriad of actors and regulatory schemes. Indeed, the FLEGT initiative may be able to address this so-called problem of regime complexity through its distinctively experimentalist design which:

accommodate[s] local diversity and foster[s] recursive learning from decentralized implementation experience, that make it possible to build up a flexible and adaptive transnational governance regime from an assemblage of interconnected pieces, even in situations where interests diverge and no hegemon can impose its own will.⁴¹⁰

⁴⁰⁵ Voluntary Partnership Agreement between the European Community and the Central African Republic on forest law enforcement, governance and trade in timber products into the Community, signed 28 November 2011.

⁴⁰⁶ Voluntary Partnership Agreement between the European Community and the Republic of Ghana on forest law enforcement, governance and trade in timber products into the Community, signed 20 November 2009.

⁴⁰⁷ Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union, 30 September 2013.

⁴⁰⁸ Voluntary Partnership Agreement (n 405).

⁴⁰⁹ Voluntary Partnership Agreement (n 404).

⁴¹⁰ Overdevest and Zeitlin (n 399).

By the same token, this experimentalist design might, at least theoretically, also address the problem of regime complexity in human rights governance by allowing for tailor-made approaches and adopting to local needs. In the respective VPAs at hand, there at least seems to be a clear trend towards an increasingly comprehensive integration of human rights. Indeed, whereas the VPAs concluded with Cameroon and Congo illustrate that both have incorporated more references to national labour laws and ILO standards than the VPA with Ghana, it is the recent VPA with Indonesia which encompasses the most comprehensive references to human rights protect at large. However, several NGO reports have highlighted serious flaws which impact the effectiveness of VPAs (and in particular their expected positive impact on human rights), notably where forestry legislations are poorly enforced, such as in Indonesia.⁴¹¹

Additionally, with negotiations underway for the conclusion of a new generation of VPAs at a time when the current FLEGT Action Plan is undergoing an external evaluation, however, the EU's commitment to human rights through its FLEGT is still bound to be put to the test. Indeed many of the countries the EU is currently negotiating with, cannot fall back on strong human rights records on the ground. Concluding a VPA with a country such as Vietnam, for instance, may pose a problem to the credibility of the EU as a human rights actor if the resulting VPA were not to adequately address some existing human rights concerns.⁴¹² As the EU acknowledges in its preliminary review of the FLEGT Action Plan, it is indeed necessary to continue to combat the trade in illegally logged timber, because it is 'often made possible by factors such as unfair and insecure rights to own and access forests, corruption that undermines law enforcement, and the exclusion from decision-making of communities that depend on forests. Good governance of forests is therefore vital to the many people who directly depend on them and to the economies of timber-trading countries'.⁴¹³

(b) EU Timber Regulation

In a move similar to the US, who in 2008 had revised its Lacey Act and in doing so had become the first country to ban the trade in illegally logged goods,⁴¹⁴ the EU adopted its own Timber Regulation in 2010. As one of the actions set out in the aforementioned FLEGT Action Plan, the Regulation lays down the obligations for traders of timber and timber products.⁴¹⁵ Aimed at halting the trade in illegally harvested timber and timber products, the Regulation's main provisions include (i) the prohibition to place illegally harvested timber and timber products on the EU market; (ii) the obligation for EU traders to exercise 'due diligence' when placing timber products on the internal market for the first time; and, once the products have been placed on the EU market, (iii) the requirement for traders to keep track of their customers and suppliers.⁴¹⁶ In an Annex attached to the Regulation, the EU furthermore elucidates the wide range of

⁴¹¹ See Human Rights Watch (n 386); Environmental Investigation Agency, 'Landmark EU/Indonesia timber agreement now legally binding' (2014) available online <eia-international.org/landmark-euindonesia-timber-agreement-now-legally-binding>.

⁴¹² Nathan Iben, *Plentiful forest, happy people?: The EU's FLEGT approach and its impact on human rights and private forestry sustainability schemes* (University of Nairobi 2013), available online <<http://hdl.handle.net/11295/42852>>.

⁴¹³ European Commission, 'Combating illegal logging – Lessons from the EU FLEGT Action Plan', 2014, available online <http://ec.europa.eu/europeaid/sites/devco/files/brochure-FLEGT-lessons-summary-2014_en.pdf>, 2.

⁴¹⁴ Sierra Club, 'The Lacey Act. Protecting Forests, Communities, and Our Climate', 2011, available online <<http://action.sierraclub.org/site/DocServer/lacey-act-fact-sheet.pdf?docID=15361>>.

⁴¹⁵ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

⁴¹⁶ European Commission, Factsheet on the EU Timber Regulation, available online <http://ec.europa.eu/environment/forests/pdf/EUTR_Leaflet_EN.pdf>.

timber and timber products at hand – applying to both imported and exported goods. As a legally binding measure for all Member States, the Regulation entered into force in March 2013. The correct implementation and enforcement by the Member States is being tracked by specifically appointed private entities, known as ‘monitoring organisations’.⁴¹⁷ To this end, the Commission also adopted a specific delegated regulation on their recognition and withdrawal,⁴¹⁸ and adopted an implementing regulation on the Timber Regulation’s due diligence requirements.⁴¹⁹

Although the Regulation acknowledges that ‘illegal logging is a pervasive problem of major international concern’, in the sense that it ‘poses a significant threat to forests as it contributes to the process of deforestation and forest degradation [...], threatens biodiversity, and undermines sustainable forest management and development’,⁴²⁰ it does not explicitly refer to the EU’s commitment to uphold human rights. Neither do the accompanying delegated and implementing regulations. Indeed, legally speaking, although the term ‘illegal logging’ is also used to imply a violation of certain human and labour rights standards, the Timber Regulation has nevertheless been found to be quite silent on these issues. Instead, some observers have recently concluded that ‘the importance of the common interest or values protected by it are not considered to be of equal importance to human life’.⁴²¹

⁴¹⁷ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Art. 9.

⁴¹⁸ Commission Delegated Regulation (EU) No 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.

⁴¹⁹ Commission implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.

⁴²⁰ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market’, preamble 3.

⁴²¹ Dylan Geraets and Bregt Natens, ‘The WTO Consistency of the European Union Timber Regulation’ [2014] 48 *Journal of World Trade* 451.

2. Bilateral and Reciprocal Instruments

The EU's Common Commercial Policy is chiefly carried out by way of international agreements. Already in the 1957 Treaty of Rome, the then European Economic Community (EEC) had received the exclusive competence to conclude trade agreements. As indicated above, since the entry into force of the Lisbon Treaty, this competence comprises virtually the full range of trade in goods, services, trade-related intellectual property rights and foreign direct investment.⁴²²

EU international trade policy has been implemented through multilateral agreements, via accession to the GATT and membership in the WTO. However, partly as a result of the stalemate in which multilateral trade talks now find themselves, culminating with the 2003 Cancún debacle, and in spite of its Treaty-imposed preference for multilateralism⁴²³ the EU decided in the mid-2000s to reshuffle its cards and to abandon the 'multilateralism first' doctrine which it had followed to show its commitment to the Doha round.⁴²⁴ The EU thus placed again so-called 'free trade agreements' (FTAs, i.e. particular trade liberalisation regimes negotiated bilaterally with select partner countries) at the centre of the CCP,⁴²⁵ while continuing to officially declare completion of the Doha round a priority.

Prior to this sea change, the EU already had a policy of concluding FTAs, though in certain contexts only, that is, on a geographical/regional basis, as part of deep and broad partnerships with Neighbourhood or ACP countries. As a result of this new orientation, the EU is now concluding or negotiating FTAs with other strategic partners based on economic considerations alone, with Brazil, Russia, India, China and South Africa (the so-called 'BRICS' countries) as the main prospective candidates for further FTAs.⁴²⁶ For example, new FTAs have recently been concluded with South Korea (2011), Singapore (2013, yet to enter into force), while others are currently being negotiated with *e.g.* India, Canada, ASEAN Countries, Japan, Mercosur, and most importantly the US. A self-standing investment agreement (see below section d)) is also being negotiated with China.

It is therefore not easy to make sense of the broad network of trade agreements concluded by the EU, as these potentially belong to very different contexts, from purely trade relationships to much broader partnerships of which trade is only one aspect. It must also be noted that not all agreements concluded by the EU concerning trade necessarily accord trade preferences in the sense of cheaper market access for a range of goods and services. Many of them simply provide for trade cooperation, typically an agreement between the parties to stimulate trade amongst themselves, to cooperate towards a reduction of (tariff or non-tariff) barriers to trade, etc. In this connection, moreover, one should emphasise that many instruments are called 'trade' agreements somewhat abusively, as they are, in fact, development agreements.⁴²⁷ Buying fully into the trade-development nexus, a very large number of agreements were concluded with developing or emerging countries, and in the total of agreements concluded by the EU, a comparatively low number was signed with developed countries. Remarkably, the EU still does not have a

⁴²² Woolcock (n 186).

⁴²³ Art. 21 (1) para. 2 TEU.

⁴²⁴ Gabriel Siles-Brügge, *Constructing EU Trade Policy – A Global Idea of Europe* (Palgrave-Macmillan 2014), 1

⁴²⁵ European Commission (n 161), 8-10.

⁴²⁶ See Jan Wouters, 'L'Union européenne et l'Organisation mondiale du Commerce: concurrents ou partenaires?' [2011 – Published 2013] *Annuaire de droit européen* 121.

⁴²⁷ See European Commission (n 172).

trade agreement in place with, e.g. the US, Canada, Japan or Australia, as it is only after the change of strategy regarding trade liberalisation outlined above that the EU started to seriously negotiate trade deals also with developed countries. Moreover, in the comprehensive agreements concluded with developing or emerging countries, trade, trade liberalisation and enhanced market access are frequently presented specifically as a way to ensure the economic (and, since more recently, sustainable) development of the partner country. For example, the recent Economic Partnership Agreement between the EU and the Forum of the Caribbean Group of African, Caribbean and Pacific States ('CARIFORUL'), of which the trade pillar is being applied provisionally pending full ratification (see below, section b)(2)(a)), includes as its very first objective to 'contribut[e] to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement'⁴²⁸ and defines itself as a 'Trade Partnership for Sustainable Development.'⁴²⁹ To that end it then sets out to establish generous trade preferences on a wide range of products.⁴³⁰ The 2010 EU-Vietnam Framework Agreement on Comprehensive Partnership and Cooperation (yet to enter into force) states even more clearly 'that trade plays a significant role in development and that trade preferential programmes help to promote the development of developing countries, including Vietnam.'⁴³¹

In an attempt to simplify, one could distinguish four types of agreements which partake, in one way or another, to the EU's network of agreements with third countries which comprise a trade component (preferential or not).⁴³² This typology is of course heuristic, and the categories identified are rather loosely defined, but as indicated, a clear dividing line is the fact that the trade component can be more or less diluted in other types of objectives.⁴³³ Annex II below shows an overview of the types of agreements signed by the EU, country per country. To keep a degree of objectivity in the discussions, this report will only address agreements which are currently in force, unless otherwise stated.

The first type of instrument are **exclusive trade agreements**, in which trade is the sole issue at hand (Art. 207 TFEU). These agreements focus on trade cooperation and often establish full or limited free trade areas in which no or reduced tariffs apply. Important components of these agreements are also efforts to reduce non-tariff barriers to international trade, as well as provisions relating to the liberalisation of other aspects of economic life, such as investment, or other 'trade-related issues' such as intellectual property rights. Let us note from the outset that the trend linking trade and investment is supposed to intensify as the EU has received, since the entry into force of the Lisbon treaty, exclusive competence in the field of foreign direct investment (FDI).

⁴²⁸ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 15 October 2008, Art. 1(a).

⁴²⁹ *Ibid.*, Title I.

⁴³⁰ *Ibid.*, Arts. 15 ff.

⁴³¹ *Ibid.*, Art. 1 (5)

⁴³² See Keukeleire and Delreux (n 160), 203.

⁴³³ A tendency can be observed in terms of inflation of agreements, which include an increasing number of issues which are often located 'beyond the border' of the partner, be they trade-related (like intellectual property rights regulations) or not (like political dialogue on societal issues), showing a strategy of the EU towards 'deep integration' with its international partners. See Peter Holmes, 'Deep integration in EU FTAs' (2010) University of Sussex Economics Department Working Paper Series 7/2010, <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=wps7-2010-holmes/pdf&site=24>>.

A second type of agreement are **trade and economic cooperation agreements** (Arts 207, 211, 212 and 218 TFEU), which in excess of trade also contain provisions for economic cooperation, including development and non-development aspects, between the EU and the partner, mostly in the form of assistance from the EU in financial or technical form. One can note an evolution towards increased complexity in the latest trade agreements concluded by the EU, as well as a generalised shift towards ‘deep integration’ of respective economies by way of agreements that address an increasingly wide range of issues.⁴³⁴

A third type of agreement are so-called **association agreements** (art 217 TFEU), which designate a group of treaties through which the EU has formalised a comprehensive relationship with a partner, over the long term and over a wide variety of items ranging from trade to political dialogue on a broad range of topics, development, and cooperation in numerous fields such as migration, culture, social affairs, the fight against crime and drug trafficking, etc. Association agreements therefor set up ‘an all-embracing framework to conduct bilateral relations.’⁴³⁵ Epitomising the depth of such relationships, and contrary to the above agreements which generally establish Committees with limited standing and competences, all association agreements also have an institutional component as they set up a permanent institutional framework to manage the cooperation on a daily basis.⁴³⁶ In many cases, association agreements have been a stepping stone to candidacy to the EU and were thereby conducive to even more comprehensive agreements, where that was possible given the geographic conditions attached to candidate status.

Agreements of the fourth type are those which are concluded in the framework of the EU’s dedicated policy of establishing **wide-ranging partnerships** with its southern or eastern neighbours (Art. 8 TEU), members of the ACP group of countries, or candidate countries. These agreements, due to the strategic position of the partners involved, look way beyond the simple stimulation of trade and can be regarded as truly integrative in a number of respects. In the case of agreements with candidate countries, instruments are designed to prepare accession by integrating the EU *acquis* and values (the so-called ‘Copenhagen Criteria’). In the case of the neighbourhood policy, the goal is to ‘achieve the closest possible political association and the greatest possible degree of economic integration,’ by way of financial support, economic integration (which includes trade and market access), easier travel to the EU and technical and policy support. It is notably implemented through ‘Action Plans’, which ‘set out the partner country’s agenda for political and economic reforms, with short and medium-term priorities of 3 to 5 years’ and ‘reflect the country’s needs and capacities, as well as its and the EU’s interests.’⁴³⁷ These types of agreements can therefore be considered as ‘enhanced’ association agreements, and many of them are labelled that way.

⁴³⁴ See Jean-Pierre Chauffour and Jean Christophe Maur, ‘Landscape’, in Jean-Pierre Chauffour and Jean Christophe Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank 2011), 46-49.

⁴³⁵ See <<http://eeas.europa.eu/association/>>.

⁴³⁶ See <http://eeas.europa.eu/association/docs/agreements_en.pdf>.

⁴³⁷ See generally <http://eeas.europa.eu/enp/index_en.htm>.

New agreements of these different kinds are being negotiated with a number of countries. Negotiations are more or less protracted depending on the partner and the interests at stake and therefore completion dates are more or less remote.⁴³⁸

Taken together, the EU now has an agreement of one of these kinds with a vast collection of countries spanning the entire planet. This network of agreements is incredibly complex as it must be emphasised here that, contrary to for instance the US, the EU does not rely on a blueprint strictly fixed in advance when negotiating trade and other agreements. Although as indicated above families of agreements can be discerned, although successive versions of trade agreements form 'generations',⁴³⁹ and although agreements concluded among countries of the same region frequently bear a striking resemblance, the EU usually starts negotiating each new agreement from a clean slate. It has been argued that by doing so the EU gave some of its partner a sense of exclusivity regarding its relationship with the EU, which notably resulted in ever more creative names for agreements such as 'Partnership and Cooperation Agreement'; 'Stabilisation and Association Agreement'; Framework Agreement for trade and economic cooperation; 'Framework Agreement on Comprehensive Partnership and cooperation'; 'Political Dialogue and Cooperation Agreement'; 'Economic Partnership, Political Coordination and Cooperation Agreement'; 'Economic Partnership Agreement.' However, it was also argued that, behind these semantic niceties, few genuine innovations were in fact brought into many such agreements.⁴⁴⁰

⁴³⁸ See European Commission, 'Overview of FTA and other trade negotiations', 31 July 2014, available online <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf>.

⁴³⁹ See European Commission, 'EU-Korea trade agreement: one year on', Press Release, 27 June 2012, available online <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=814>>, describing the EU-Korea FTA as being part of the 'next generation' of agreements.

⁴⁴⁰ Keukeleire and Delreux (n 160), 204.

Table 4: EU trade agreements in force: Distribution by type and region

Pure trade agreements	Trade and economic cooperation agreements	Association agreements	Enhanced association agreements
<ul style="list-style-type: none"> • Colombia • Peru • Turkmenistan • Switzerland • South Korea (FTA) • Central Africa (Interim EPA, Cameroon only) • Eastern and Southern African States (Interim EPA) • Pacific states (Interim EPA, Papua New Guinea and Fiji only) 	<ul style="list-style-type: none"> • Brazil • EFTA • Mercosur • Andean Community • Paraguay • Argentina • Central America • Mexico • Bangladesh • ASEAN • Indonesia • Laos • Vietnam • China • Sri Lanka • Mongolia • Pakistan • India • South Korea (Framework Agreement) • Cariforum (EPA) • Gulf Cooperation Council • Yemen • Canada 	<ul style="list-style-type: none"> • Kazakhstan • Kyrgyzstan • Tajikistan • Uzbekistan • Russia • Chile • South Africa • Turkey 	<ul style="list-style-type: none"> • Morocco • Egypt • Algeria • Tunisia • Armenia • Azerbaijan • Georgia • Moldova • Ukraine • Montenegro • Bosnia • Macedonia • Albania • ACP Countries • Jordan • Israel • Lebanon

a) *The human rights component in EU trade agreements*

As indicated above, trade can be a powerful lever for normative objectives and an avenue to foster societal change in partner countries.⁴⁴¹ Therefore, Art. 21 (3) TEU explicitly encompasses trade as part of the action of the EU ‘on the international scene’, and trade policy must consequently ‘be guided’ by the range of EU values, in which human rights feature prominently. Human rights have however been part and parcel of the negotiation of international agreements well before Lisbon, including agreements having a trade dimension. As early as the 1970s, the EU found itself in the situation of having close relationships and legally binding treaty obligations, notably of a financial nature, towards governments which were violating human rights.⁴⁴² As a matter of fact, before linking trade and human rights as a matter of principle and in pursuance of its ‘normative power’, the EU first sought to establish this link as a way to suspend its relations with rogue governments and thereby avoid contributing – possibly through direct financing – to human rights violations.

The solution found was to abandon the politically neutral stance so far adopted in relation to trade agreements,⁴⁴³ and to include clauses specifically referring to human rights in these instruments. The wording, scope and effectiveness of these treaty provisions has evolved significantly over time, and below

⁴⁴¹ Hafner-Burton (n 146) 3-4.

⁴⁴² *Ibid.*, 51.

⁴⁴³ *Ibid.*, 72.

we briefly outline this evolution before moving to a comparative assessment of the human rights provisions which can be found in the EU trade agreements currently in force.

b) The 'essential elements' clause

(1) A journey into creative legal drafting

The first mention of human rights in an EU trade agreement can be found in Art. 5 of the 1989 Lomé IV Convention with ACP Countries.⁴⁴⁴ This clause, already quite detailed, is however not meant to be an operative provision giving the EU a way out in cases of human rights violations by one of its ACP partners. It rather emphasises the fact that development – the main aim of the Convention, though it includes trade provisions – ‘entails respect of and promotion of all human rights.’

As indicated, this type of clause does not provide any kind of ‘stick’ to the EU in case one of the other parties violated human rights, which is what the EU was trying to achieve.⁴⁴⁵ All it did was more precisely define one of the ‘objectives and principles of cooperation’. Therefore, the EU adapted its reference to human rights in further agreements to move towards a formulation which, in full compliance with international treaty law, would progressively give it the possibility to suspend its obligations under international agreements (for instance the granting of trade preferences) and take other ‘appropriate measures’, thereby flanking these agreements with hard ‘human rights conditionality,’ as the terminology goes.⁴⁴⁶

In short, the legal reasoning was to include in the treaties explicit language making respect for human rights (and other values such as democracy) an ‘essential element’ on which the reciprocal obligations of the parties were premised, so that human rights violations of a certain scale by one of them could amount to a material breach of the treaty and justify suspension or other counter-measures.⁴⁴⁷ The typical ‘essential element’ clause was given quite a number of different formulations since it was first attempted

⁴⁴⁴ See Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989.

⁴⁴⁵ Fierro (n 256) 211.

⁴⁴⁶ However, the objective of such clauses as stated was broader than simply providing a shield to the EU. Namely, according to the Commission, such clauses would present several advantages:

- it makes human rights the subject of common interest, part of the dialogue between the parties and an instrument for the implementation of positive measures, on a par with the other key provisions;
- it enables the parties, where necessary, to take restrictive measures in proportion to the gravity of the offence [...]. In the spirit of a positive approach, it is important that such measures should not only be based on objective and fair criteria, but they should also be adapted to the variety of situations that can arise, the aim being to keep a dialogue going;
In the selection and implementation of these measures it is crucial that the population should not be penalized for the behaviour of its government;
- it allows the parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a “material breach” of the agreement in line with the Vienna Convention ; constituting grounds for suspending the application of the agreement in whole or in part in line with the procedural conditions laid down in Article 65. The main condition involves allowing a period of three months between notification and suspension proper, except in “cases of special urgency”, plus an additional period of grace if an amicable solution is being sought.

See European Commission (n 24), 7-8.

⁴⁴⁷ See in this regard ECJ, 3 December 1996, Portugal v. Council, C-268/94 and Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969, Art. 60. This article reads: ‘1. 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. [...] 3. A material breach of a treaty, for the purposes of this article, consists in: [...] (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.’

in the 1990 EU-Argentina Cooperation Agreement, in which it read '[c]ooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina.'⁴⁴⁸ The actual words 'essential element' were only added to the clause a few years later, in the 1992 Framework Agreement for Cooperation with Brazil.⁴⁴⁹

By way of comparison, Art. 1 (1) of the new 2010 EU-Korea Framework Agreement (yet to enter into force) now complements several mentions of human rights in the preamble and reads as follows:

[t]he Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement⁴⁵⁰

Whereas Art. 1 (1) of the 2013 EU-Colombia/Peru Free Trade Agreement adopts a more direct and less detailed formulation: '[r]espect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.'⁴⁵¹

Annex I to this report provides an overview of all essential elements clauses present in the most important EU agreements currently in force and which contain a trade dimension. This overview allows us to discern clear patterns in the drafting of the essential elements clause, along two kinds of factors. First, as indicated above, the typical drafting of the clause has evolved over time, which makes sense from the perspective of constantly trying to improve the language of agreements, notably in regard to past practice linked to similar clauses. Second, one can also clearly group these clauses on a geographical or regional basis, evidencing the fact that the EU, in its international relations and treaty negotiation practices, works very much on the basis of regional policies addressing blocs of countries. The temporal and geographical patterns have in many cases actually developed in parallel, as many agreements with countries of the same regional bloc were negotiated and concluded around the same time. For example, most of the agreements concluded with members of the former USSR were concluded in the second half of the 1990s and many of them look very much alike (see below). However, it may happen that certain countries belonging to a bloc negotiate a new agreement whereas other countries of the bloc do not wish so, or are slower in the negotiations, creating parallel treaty regimes in respect of the same issue and in the same region. For example, the Andean Community is currently split between Colombia and Peru which are under a brand new 2012 FTA, and Ecuador and Bolivia, whose trade relations with the EU are still only governed

⁴⁴⁸ See Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, Signed 2 April 1990, Art. 1 (1)

⁴⁴⁹ European Commission (n 24), 7.

⁴⁵⁰ See Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 10 May 2010.

⁴⁵¹ See Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June 2012.

by the 'old' 1993 Cooperation Agreement which applied to all members of the Cartagena Agreement and does not grant trade preferences.

As Lorand Bartels notes, though a number of standard formulations now seem to have emerged in regard of the various phrases of the essential elements clauses,⁴⁵² proper drafting ensuring the legal options described above was probably never achieved. The intention of the parties is however well known at this stage, and the end result is therefore undeniable, even if we have seldom seen these clauses in action (see below).⁴⁵³ The aim of securing a way out for the EU is all the more attained as, alongside the essential elements clause, the EU has also progressively adopted the practice of including 'non-execution' clauses expressly delineating the consequences to be attached to a violation of the 'essential elements' of the treaties.

Non-execution clauses have historically taken two forms: the 'Baltic' clause, which was notably included in agreements with Baltic states prior to their accession, and which authorised a party to suspend the application of the agreement with immediate effect in case of a serious breach of essential provisions. Given the lack of flexibility afforded by this formulation, the Baltic clause was progressively abandoned, and its concurrent, the 'Bulgarian' clause, became the standard, allowing either party to 'take appropriate measures' in case of breach by the other party, after proper consultation of that party and/or referral to a committee established by the treaty. Most non-execution clauses now dispense with this last condition 'in cases of special urgency,'⁴⁵⁴ which are said to correspond (either in the clause itself, or in an interpretative declaration of the parties) to correspond to grave violations of the essential elements or the agreements. This means that, in cases of grave human rights violations by one party, the other is allowed to immediately take measures in response. In this regard, it is almost always specified that the measures chosen must be those which 'least disturb' the normal operation of the agreement, and sometimes as well that those measures must be 'proportional', making suspension of the whole agreement an unlikely outcome.⁴⁵⁵

So far, the so-called Cotonou Agreement between the EU and the ACP countries,⁴⁵⁶ which is described more in-depth below (see section IV.C.5.a)), can be said to have the most complex set of clauses ensuring human rights conditionality. Not only does it have the longest ever 'essential element' clause,⁴⁵⁷ it also sets up a detailed process of political dialogue around the essential elements,⁴⁵⁸ explicitly in order to pre-empt situations in which a party might deem it justified to activate the non-execution clause.⁴⁵⁹ As discussed in more detail below, in this case, the essential elements clause and the overall conditionality

⁴⁵² Lorand Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements' (2012) German Institute for Human Rights and Misereor, available online <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf>, 10.

⁴⁵³ *Ibid.*, 13.

⁴⁵⁴ European Commission (n 24446), 8.

⁴⁵⁵ See in respect of Euro-Mediterranean Countries: Lorand Bartels, 'A Legal Analysis of The Human Rights dimension of the Euro-Mediterranean Agreements' [2012] 1 GREAT Insights 7.

⁴⁵⁶ 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, 22 June 2000.

⁴⁵⁷ *Ibid.*, Art 9 (2)

⁴⁵⁸ *Ibid.*, Annex VII

⁴⁵⁹ *Ibid.*, Art 96.

mechanism goes well beyond the reactive purpose of ensuring a way out for the EU in case of human rights violations. It is a genuine tool for proactively promoting human rights and other values in partner countries, meant to be applied on an ongoing basis, outside of and before any situation of human rights violations, combining ‘strong elements of both coercion and persuasion’.⁴⁶⁰ In the same vein, a number of Association Agreements (notably adopted in the framework of the Eastern Neighbourhood Policy and with Southern Asia countries) also take this more proactive stance towards linking trade agreements with human rights issues by having a chapter on ‘Cooperation on matters relating to democracy and human rights’ (see Annex II).

Since 1995 and the inception of the policy on the systematic inclusion of respect for democratic principles and human rights in agreements between the Union and third countries, the EU has included such clauses as an almost absolute rule in its international agreements.⁴⁶¹ In this regard, an increasingly followed method to place respect for human rights at the centre of all treaty relations between the EU and particular partners is to conclude ‘Framework Agreements’ which contain a comprehensive essential elements clause, a non-execution clause, and possibly a dispute settlement mechanism.⁴⁶² Thematic agreements are then subsequently concluded and ‘hooked’ onto the framework agreement, making the human rights apparatus included therein also applicable to treaty relations in the thematic fields. A recent examples includes the 2010 EU-Korea Framework Agreement.⁴⁶³ However, the most early and prominent example of this practice is the Cotonou Agreement. As a response to the planned expiry of the trade preferences granted directly to ACP countries by the Cotonou Agreement in December 2007,⁴⁶⁴ Art. 35 thereof mandates the parties to conclude ‘Economic Partnership Agreements’ on a regional basis to regulate their trade relations. The (interim) EPAs in force so far, namely with Cariforum States,⁴⁶⁵ with Central African countries (to date only applicable to Cameroon),⁴⁶⁶ with Eastern and Southern African countries,⁴⁶⁷ and with Pacific States (to date only applicable to Papua New Guinea and Fiji)⁴⁶⁸ all specify that nothing in the Agreement shall be construed so as to prevent the adoption by the EU of any measure under, notably, Art. 96 of the Cotonou Agreement (the non-execution clause).⁴⁶⁹ One (the Cariforum agreement) even

⁴⁶⁰ Hafner-Burton (n 141) 607.

⁴⁶¹ In the early nineties, a number of agreements were concluded which contained an essential elements clause, but no non-execution clause: see Argentina, Brazil, Andean Community Framework Agreement, Vietnam.

⁴⁶² The Council would have made this a policy preference. See Bartels (n 192) 6-7.

⁴⁶³ See above (n 448).

⁴⁶⁴ See World Trade Organization, Ministerial Conference, ‘European Communities – The ACP-EC Partnership Agreement’, Doha, 14 November 2001, WT/MIN(01)/15, 2, by which Art. I (1) of the GATT 1947 (MFN) clause, is waived until 31 December 2007. See also Bonapas Onguglo and Taisuke Ito, ‘How to make EPAs WTO compatible? Reforming the rules on regional trade agreements’ (2003) ECDPM Discussion Paper No. 40, available online: <<http://ecdpm.org/wp-content/uploads/2013/11/DP-40-Make-EPAs-WTO-Compatible-Reforming-Rules-Regional-Trade-Agreements1.pdf>>.

⁴⁶⁵ EU-Cariforum EPA (n 428).

⁴⁶⁶ Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed 15/01/2009.

⁴⁶⁷ Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, signed 29/08/2009.

⁴⁶⁸ Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, signed 30/07/2009.

⁴⁶⁹ It would have been even clearer to include again in each EPA a clear reference to the essential elements and to the consequences of their breach, but apparently this was a contentious point, and whereas the EU was in favor of inclusion the clause was dropped in some cases. Whether or not this allows or evacuates the possibility of trade sanctions is debatable. See, in the

specifies expressly that this includes trade sanctions, and two (the CARIFORUM and the Pacific States Agreement) additionally restate that the EPA is based on the same essential elements as the Cotonou Agreement by referencing its Art. 9. Outside of the Cotonou ambit, the 2001 EU-Korea Framework Agreement' essential elements and non-execution clauses are made expressly applicable to the subsequent EU-Korea Free Trade Agreement.⁴⁷⁰ The new 2010 EU-Korea Framework Agreement, yet to enter into force, further reinforces that link.⁴⁷¹

(2) Critical assessment of FTA conditionality

This might all seem like a well-oiled and steady policy, but significant exceptions and ambiguities in respect of certain types of agreements and practices threaten the effectiveness and coherence of EU conditionality altogether. Criticism of human rights clauses has to do with their inclusion (or not) in agreement, their drafting and scope, and their effective implementation. We address these three lines of criticism in that order below.

(a) Exceptions to generalised conditionality

The most notable and far-reaching exception to the inclusion of essential elements clauses in all agreements concerns sectoral trade agreements, which provide for trade liberalisation or cooperation only in respect of certain products or services. Hundreds of such agreements have been concluded over the years by the EU with many countries, some of which have problematic human rights records, and some of which concern sectors which are prone to human rights violations. We have identified such agreements notably in respect of the following sectors: wood, timber and forestry products; fish and fisheries products; agricultural products; industrial products; wine and spirits; steel and iron; textiles; oil seeds; and aviation. The concern is alleviated by the fact that many sectoral agreements are in the form of protocols to broader agreements which are conditional on respect for human rights. However, many others are self-standing and do not have any conditionality component. For example, the recent and innovative agreements introducing a Forest Law Enforcement, Governance and Trade scheme with a number of developing countries, the so-called VPAs (see above, section 1.d)(6)(a)), though they address sustainable development and a number of human rights (rights of indigenous peoples, right to information), do not include an 'essential elements clause'.⁴⁷² Likewise, fisheries Partnership Agreements, for example, have traditionally not contained an essential elements clause, though some have in their preamble a non-operational reference to an agreement in which essential elements are spelled out, such as the Cotonou Agreement.⁴⁷³ However, in 2013 protocols to such agreements with Morocco and Côte d'Ivoire may indicate a changing course as they include a reference to the relevant clauses of, respectively, the EU-Morocco Association Agreement and the Cotonou Agreement.⁴⁷⁴

case of the EPA with West Africa, 'West Africa, EU Reach Trade Deal', 13 February 2014, available online <<http://www.ictsd.org/bridges-news/bridges/news/west-africa-eu-reach-trade-deal>>.

⁴⁷⁰ See Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 06/10/2010, Art. 15.14.

⁴⁷¹ Above (n 450) Art. 43 (3).

⁴⁷² See for instance Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union (FLEGT), signed 27/07/2011.

⁴⁷³ See for example, Fisheries Partnership Agreement between the European Community and the Republic of Côte d'Ivoire, signed 18/04/2008.

⁴⁷⁴ Bartels (n 192) 7.

A second potential far-reaching *caveat* to the generalised conditionality policy of the EU concerns the provisional application of the trade provisions of broader agreements. Many agreements containing 'beyond trade' issues are mixed agreements and therefore require the ratification of all Member States before entering into force, which can take time. On the contrary, trade being an exclusive competence of the EU, this allows for creating legal obligations in that field without the intervention of the Member States. Therefore, many comprehensive agreements foresee that, pending complete entry into force following ratification by EU Member States, the provisions pertaining to trade will be applied provisionally. This is sometimes done by way of an 'interim agreement' between the EU and the partner at hand, in which the trade provisions of the broader agreement are repeated, and in which essential elements clauses are included as well (see e.g. the clauses contained in the interim agreements with Bosnia or with Turkmenistan, Annex II). However, sometimes the provisional application takes place without having recourse to an interim agreement and may derive from a provision of the broader agreement itself, or from a decision of the parties to that effect. The 2012 EU-Iraq Partnership and Cooperation Agreement, for example, provides that as soon as Iraq and the EU have ratified it, certain trade provisions, but also the essential elements and the non-application clause, will enter into force and be applied.⁴⁷⁵ It is thus very clear that the provisional application of the agreement encompasses human rights conditionality, but this is not so in all cases of provisional application.

For example, the 2012 EU-Central America Association Agreement provides that 'Part IV of this Agreement may be applied by the European Union and each of the Republics of the CA Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. [...]'⁴⁷⁶ Here, the provisional application clause only refers to 'Part IV', that is, the trade pillar of the agreement, whereas the essential elements clause is contained in Part I on General and Institutional Provisions and the non-execution clause is contained in Part V on General and Final Provisions. This creates significant uncertainty as to the applicability of human rights conditionality during the provisional application phase. While one might argue that general provisions inform operational chapters of the agreement and that therefore 'Part IV' cannot be read in isolation of Parts I and V. This interpretation might be consistent with Art. 31 (1) of the Vienna Convention on the Law of Treaties which states that treaty provisions ought to be interpreted in light of their context, meaning the preamble, the annex, but also 'other agreements relating to the treaty', which might encompass the other essential elements clause. Yet, one might argue just as validly that the text of the agreement does not require any interpretation as the meaning is clear and strictly restricts the provisions amenable to provisional application to the trade chapter. In any event, this ambiguity risks creating significant confusion and to severely water down the dissuasive or promotional effect that the essential elements clause might have, if any.

Even despite these potentially enormous gaps, the quasi-unflinching resolve of the EU to include essential elements and non-execution clauses in almost all its international agreements must be saluted, as it has

⁴⁷⁵ Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed 11/05/2012, Art. 117.

⁴⁷⁶ Agreement establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, signed 29/06/2012, Art. 353 (4).

seriously complicated a number of trade negotiations with developing and developed countries alike,⁴⁷⁷ notably because some of them did not see under what pretext trade issues absolutely had to be conditioned on human rights, the two issues belonging, according to them, to clearly distinct fields.⁴⁷⁸ Australia, for example, declined in 1997 to sign an agreement containing the standard EU essential elements clause.⁴⁷⁹ In the developing world, the negotiations between the EU and India are also clung to the issue of the inclusion of a human rights clause,⁴⁸⁰ amongst other stumbling blocks.⁴⁸¹

(b) Criticism related to drafting and scope

Another line of criticism concerns the fact that there exist slight variations in the drafting of the clauses, which may alter their scope and create uncertainty and inconsistencies as to the (largely hypothetical) situations which might trigger them.

First of all, the list of what constitutes ‘essential elements’ varies from one agreement to the next. Whereas ‘democratic principles’ and (fundamental) ‘human rights’ are always included, in other instances (the principles of) ‘the rule of law’, ‘respect for the principles of international law’ or even (the principles of) ‘market economy’ find their way onto the list. An analysis of these additional mentions clearly evidences that such additional mentions were included in consideration of events, situations or developments which have affected the partner country (though not necessarily always).⁴⁸² Principles of market economy are indeed invariably essential elements of agreements concluded with former Soviet countries. Inclusion of the rule of law is a bit more widespread, but is especially present in agreements with countries where organised crime is reportedly more prevalent, such as the Balkans or Colombia. Finally, respect for the principles of international law are associated with ‘full cooperation with the ICTY’ and is included in agreements with former Yugoslav States (see generally Annex II for a comparison of such references). Whereas it is certainly true that the principles of the rule of law and respect for international law may require additional efforts in certain regions, there is no reason why these principles are not essential to the relations of the EU with *all* its partners. The inclusion of the principles of market economy as essential elements is also rather dubious as it is clearly of another nature than the other principles. The plausible argument that market economy is somehow conducive to the realisation of human rights, notably the right to property or the right to set up a business, does not evacuate the question whether this limitation of the economic orientation of a partner country does not conflict with, e.g., the principle of self-determination.⁴⁸³ But beyond the questions surrounding the substantive merits of this reference, it must

⁴⁷⁷ Tamara Takács, ‘Human rights in trade: the EU’s experience with labour standards conditionality and its role in promoting labour standards in the WTO’, in Jan Wetzel, (ed.), *The EU as a ‘Global Player’ in the Field of Human Rights* (Routledge 2012), 99.

⁴⁷⁸ Fabienne Zwagemakers, ‘The EU’s Conditionality Policy: A New Strategy to Achieve Compliance (2012) IAI Working Paper 12/03, available online <<http://www.iai.it/pdf/DocIAI/iaiw1203.pdf>>, 14; Chauffour and Maur (n 434), 15.

⁴⁷⁹ Emilie Hafner-Burton, ‘The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe’, [2009] 7 *Perspectives on Politics* 33

⁴⁸⁰ Gauri Khandekar, ‘The EU and India: A Loveless Arranged Marriage’, (2011) FRIDE Policy Brief No. 90, 2, available online <http://www.fride.org/download/pb_90_eu_and_india.pdf>.

⁴⁸¹ Jan Wouters, Idesbald Goddeeris, Bregt Natens, Filip Ciortuz, ‘Some Critical Issues in EU-India Free Trade Agreement Negotiation’, (2013) GGS Working Paper No. 102, available online <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp102-wouters-goddeeris-natens.pdf>/

⁴⁸² Fierro (n 256), 218 ff.

⁴⁸³ See Art. 1 (1) of the International Covenant on Economic, Social and Cultural Rights, which provides: ‘All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Admittedly, this reference to market economy also includes a mention of the documents of the 1990

be noted that this essential element is not consistently applied across countries which have a history of planned economy. Neither the 1995 nor the 2012 cooperation agreements with Vietnam, for example, include such reference. How can it be justified that the EU would not mind entering agreements with planned economy countries (including China, with which the EU is currently negotiating an investment agreement), whereas for others it makes it a point of principle that they would uphold the principles of market economy?

Moreover, the notion of human rights itself can be subject to variable interpretations and its plasticity can play out in various ways.⁴⁸⁴ The long-lasting debate regarding the different ‘generations’ of rights and notably the extent to which labour rights are human rights seemed settled (at least for what concerns ‘core’ labour standards). The EU’s consecration of a notion of ‘universal, indivisible and interdependent’ human rights should also leave little doubt in this respect, but the recent ‘sustainable development chapters’ containing provisions on labour rights inclusion in EU trade agreements has puzzled many observers of EU practice.⁴⁸⁵ Uncertainty of this sort about the exact scope of the essential elements clause is perhaps the reason why it is often proposed to expand the areas it is meant to cover. Very recently, for instance, the Commission proposed to make ‘Inclusion of human trafficking in the Human Rights Clauses’ a priority of the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, even though in its own assessment essential elements clauses encompass human trafficking.⁴⁸⁶

Hesitations regarding the exact scope of the essential elements clauses also stem from the considerable variation in the references to international instruments that are used to substantiate the notion of ‘human rights’. Whereas some agreements do not refer to any specific instrument, most do refer to ‘human rights as laid down in/proclaimed by/set out in/established by/defined in the Universal Declaration of Human Rights’ (see Annex II). Others use geographically relevant regional instruments such as, for members of the OSCE, the Helsinki Final Act, and the Charter of Paris for a New Europe, or for members of the Council of Europe, the European Convention of Human Rights, which broadens the scope of the clause to certain rights that are not addressed in the Universal Declaration but well are in these regional instruments. Agreements outside of the ambit of the Organization for Security and Co-operation in Europe (OSCE) or the Council of Europe do not include references to specific instruments next to the UDHR, but an innovation was introduced in the 2010 EU-Korea Framework Agreement which lists as essential elements human rights ‘as laid down in the Universal Declaration of Human Rights and *other relevant international human rights instruments*’.⁴⁸⁷ This formulation may be interpreted as the admission that, in other agreements, the reference to human rights is strictly limited to those enumerated in the Universal Declaration of Human Rights (UDHR) and other specifically mentioned agreements, whereas for South Korea, the list could be expanded to include any human right potentially ‘relevant’ to a situation covered

CSCÉ Bonn Conference, in which the relevant countries took part (through the participation of the former USSR or Yugoslavia). However, adding to the ambiguity, this reference to CSCÉ documents also includes the 1975 Helsinki final act, which restates the provision of the ICESCR quoted above.

⁴⁸⁴ See generally Andrew Williams, *EU Human Rights Policies – A Study in Irony* (Oxford University Press 2004).

⁴⁸⁵ Bartels (n 452), 33.

⁴⁸⁶ European Commission, ‘The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016’, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 19 June 2012, COM(2012) 286 final, 12.

⁴⁸⁷ Above (n 448), Art. 1 (1) (emphasis added).

by the agreement. An author argues that a plausible reading however is to link the clause to the instruments binding on the parties,⁴⁸⁸ though technically ‘relevant’ is a broader term than, for example, ‘binding’ or even ‘applicable’. The same author also argues that a reference to relevant instruments makes the agreement ‘future proof’, as it also potentially includes any relevant instrument to be adopted in the future.⁴⁸⁹

The more or less erratic substantiation of standards of conditionality may additionally, as can be expected, affect the legitimacy of the Union’s efforts to link human rights and trade and other issues in international agreements, as different parties may be subject to limited or expansive conditionality according to the wording of the clause.⁴⁹⁰ Several arguments can however put forward to explain variations. First of all, agreements are negotiated and it is natural that depending on the negotiation dynamics and other interests of the parties, the scope of the essential elements would be an element of the negotiation. An author argues that South Korea felt (rightly or wrongly, see below) that it did not have a particularly problematic human rights record, and therefore had no reason to take issue with the clause as currently drafted.⁴⁹¹ A second explanation could be related to the scope and ambitions of the various agreements, ranging from strictly trade issues to sweeping political and economic cooperation. It might be argued that the wider the scope of the mutual obligations, the stricter and more expansive the wording of the conditionality. However, the analysis of the different clauses present in the EU’s international agreements contained in the table in Annex II cannot confirm this hypothesis and rather evidence similarities based on temporal or regional patterns, and not based on the agreements’ material scopes.

(c) Criticism of the monitoring and application of human rights clauses

Another popular line of criticism of these clauses has to do with their implementation: the EU went through great lengths to insert a conditionality tool in all its agreements, but does it actually use it? The first critique is that the EU does not activate conditionality often enough, and regularly leaves human rights violations by partner countries unpunished. The European Parliament has made an issue of this, insisting that if ‘negative’ conditionality mechanisms were put in place, they would only be credible if activated.⁴⁹² Indeed, progress in human rights has been noted to take place when, after a suspension of benefits, the partner country saw again the prospect of regaining them under certain conditions linked to human rights.⁴⁹³

⁴⁸⁸ Young Lo Ko, ‘A Common Institutional Framework for EU-Korea Relations’, in James Harrisson (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Oxford University Press 2013).

⁴⁸⁹ Bartels (n 192), 9.

⁴⁹⁰ Already in 1995, the development of Guidelines on human rights clauses was meant to counter the fact that the use of different clauses and mechanisms can appear as discriminatory practice. See European Commission (n 24), 11.

⁴⁹¹ Ko (n 488).

⁴⁹² See European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights (2008/2031(INI)), in which it [c]onsiders that failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union’s human rights strategy, sanctions policy and credibility’, para. 21.

⁴⁹³ Lorand Bartels, ‘The Application of Human Rights Conditionality in the EU’s Trade Agreements and Other Trade Arrangements with Third Countries’ (2008) European Parliament Directorate for External Relations, available online <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET%282008%29406991_EN.pdf>, 18

A second critique is that the EU would be triggering the clause selectively, and therefore unfairly.⁴⁹⁴ Voices have raised to denounce double standards in this regard: the EU would be quick to activate conditionality against harmless partners, whereas it would be much more reluctant to do so in regards to more powerful countries.⁴⁹⁵ And indeed, the essential elements clause has so far only been activated against ACP countries (see Annex II and Table 6 below, section IV.C.5.a)).⁴⁹⁶

Essential elements have thus sparsely been invoked, they have not always led to proper sanctions proper but rather to consultations, and the sanctions when applied did not involve the lifting of trade preferences but rather ‘suspension of meetings and technical co-operation programmes’.⁴⁹⁷ Moreover, essential elements clauses were only triggered in situations where drastic changes had taken place in the country in question, such as a coup, flawed elections, or brutal occurrences of grave human rights violations.⁴⁹⁸ Therefore, conditionality is normally not activated when human rights violations take place as a rule in a country, unless the situation gravely and suddenly deteriorates.⁴⁹⁹ This is difficult to reconcile with the Strategic Framework and Action’s plan statement that ‘when faced with violations of human rights, the EU will make use of the full range of instruments at its disposal, including sanctions or condemnation. The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries’.⁵⁰⁰

This raises the question of the monitoring of the human rights situation in countries with which the EU has an agreement containing an essential elements clause. No agreement has so far established an organ specifically dedicated to the monitoring of the human rights situation of the parties, though this has sometimes been done subsequently after the entry into force of the agreement. For the rest, human rights issues can of course be addressed as part of the political dialogue foreseen by the agreement, if any, by the general committee in charge of overseeing and managing the agreement, or by parliamentary committees which are established by a number of agreements.⁵⁰¹ Actually, as shown in Annex II, when a party considers taking appropriate measures, the general committee must under the non-execution clause in most cases receive information and mediate between the parties. However, an exception to such role is normally foreseen for cases of ‘special urgency’, which are generally understood as including grave

⁴⁹⁴ Fierro (n 256), 309.

⁴⁹⁵ Zwagemakers (n 478), 5.

⁴⁹⁶ Keukeleire and Delreux (n 160), 207; Johanne Dohlie Saltnes, ‘The EU’s Human Rights Policy – Unpacking the literature on the EU’s implementation of aid conditionality’ (2013) Arena Working Paper 2/2013, available online <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp2-13.pdf>>. Sanctions in the form of a suspension of technical meetings foreseen under the EU-Uzbekistan Cooperation Agreement were taken against Uzbekistan in 2005, though the Common Position does not explicitly trigger the non-execution clause under that agreement. See Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan.

⁴⁹⁷ European Commission and Special Representative of the European Union for Common and Security Policy (n 9), which contains in its Annex II a ‘summary of the measures that may be taken in response to serious human rights violations or serious interruptions of democratic process’, and which, surprisingly, does not list the lifting of trade preferences, but mentions ‘trade embargoes’.

⁴⁹⁸ European Commission, ‘Using EU Trade Policy to promote fundamental human rights – Current policies and practices’, Non-Paper, 2012, available online <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf>, fn. 7-8-9.

⁴⁹⁹ Bartels (n 493), 11.

⁵⁰⁰ Above (n 10), p. 3.

⁵⁰¹ Lorand Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ [2013] 40 Legal Issues of Economic Integration 297, 301.

violations of essential elements. Civil society has traditionally had a role in monitoring human rights in all countries of the world, and in some EU agreements, it is given a formal or informal role with regard, notably, to human or labour (see below) rights. General standing organs involving civil society have also been set up by a number of Agreements (see Annex II).⁵⁰² There are finally no standard procedures to investigate alleged human rights violations in a partner country, contrary to FTAs concluded by other nations, under which a right of individual petitions may be recognised to the effect of inviting the relevant authority to investigate certain violations of human rights or other standards specified in the agreement.⁵⁰³ The lack of a similar mechanism has been lamented by one author stating

[t]here is no reason why the EU, with its commitment to promoting human rights in the world, should not follow best practice, and introduce into its trade agreements a mechanism whereby individuals, civil society and the other EU institutions are able to require the Commission (or the EEAS) to investigate whether third countries are complying with human rights conditions to which they have committed in the context of a free trade agreement or unilateral trade preferences. Of course, this does not mean that these actors would have any role in the formal decision to suspend the agreement.⁵⁰⁴

It must be concluded that, in general the conditionality policy lacks any proper ‘operational mechanism’ for implementation, monitoring of human rights situations and evaluation of the effectiveness of sanctions. All this is supposed to take place through local diplomatic missions which lack time and resources to conduct such ground work.⁵⁰⁵ Action 11 (a) of the 2012 Strategic Framework for Human Rights, which promises to ‘Develop [a] methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements’ might in this regard provide a welcome basis for regularly assessing the human rights situation of partner countries and evaluating the course that it is taking as well as the necessity or not of sanctions. Another author is more critical and notes that the overly integrative ambitions of EU FTAs, coupled with the sheer volume of the issues they address dilutes their operational nature, making their enforcement nearly impossible:

European PTAs are marred by considerable legal inflation. They ambitiously cover a wide range of topics, going much beyond the multilateral commitments entered into by the partners within the framework of the World Trade Organisation, but they are mostly unenforceable – if not entirely devoid of substance. The Union, in other words, seems to be using trade agreements to promote its views on how countries of the world should be run, and it is able to enlist its trade partners to do this, albeit in a noncommittal or semi-committal way. Trade policy therefore provides a vehicle for declaratory diplomacy.⁵⁰⁶

⁵⁰² Bartels (n 192), 10-11.

⁵⁰³ See e.g. North American Agreement on Labor Cooperation (NAALC), signed 14 September 1993, Art. 16 (3).

⁵⁰⁴ Bartels (n 192), 19.

⁵⁰⁵ Zagemakers (n 478), 5.

⁵⁰⁶ Henrik Horn, Petros Mavroidis and André Sapir, ‘Beyond the WTO – An anatomy of EU and US preferential trade agreements (2009) Bruegel Blueprint 7, available online <<http://www.bruegel.org/download/parent/238-beyond-the-wto-an-anatomy-of->

Indeed, essential elements clauses seem to be considered chiefly as ‘political’ clauses by the Council,⁵⁰⁷ and many observers have pointed out that, in comparison with the US approach, which takes a binding approach towards a small and clearly defined number of standards, the EU’s essential policies clauses are ‘aspirational’ and aimed at fostering dialogue.⁵⁰⁸ In any event, another author has warned against the temptation to activate essential elements clauses for the sole purpose of showing some muscle and/or avoiding the accusation of double standards. Indeed, apparently trade and other sanctions are only effective in certain contexts, and are completely useless in others. Therefore, risking to apply sanctions just to see them fail would harm rather than bolster the credibility of the Union’s conditionality policy.⁵⁰⁹ In this regard, one must be prepared to accept that the removal of trade benefits is perhaps not an argument that is convincing enough to induce change on its own. The example of the little effective GSP+ sanctions taken, for example, against Belarus or Myanmar may corroborate this hypothesis (see above), and may explain why a violation of essential elements have never given rise to sanctions of that sort. Moreover, as conditionality is becoming an ever more contentious issue, all the more on the part of a post-colonial power,⁵¹⁰ and as at least some partner countries are resisting it very assertively,⁵¹¹ the EU should probably tread quite lightly at the time of contemplating sanctions for fear of fuelling conflict rather than fostering social change.⁵¹² The EU must finally be mindful of not doing more harm than good by activating sanctions as these could hit the local population more painfully than the government. And indeed, the EU has made it a rule that its sanctions and restrictive measures must comply with international law and fundamental rights, and must not entail an undue economic or humanitarian cost.⁵¹³ This is why the conduct of human rights impact assessments has been rightly suggested before deciding on sanctions.⁵¹⁴

[eu-and-us-preferential-trade-agreements/file/663-beyond-the-wto-an-anatomy-of-eu-and-us-preferential-trade-agreements-english/>](#), vi.

⁵⁰⁷ See Council of the European Union, ‘Common approaches on the use of political clauses’, 2 June 2009, 10491/1/09.

⁵⁰⁸ Chauffour and Maur (n 434), 15.

⁵⁰⁹ Bartels (n 493), 18. The ECJ (*Mugraby*, 6 September 2011, T-292/09) has indeed explicitly confirmed that they EU retained discretion in applying sanctions for human rights violations and was in no way obliged to invoke the essential elements clause. See para. 40: ‘as regards the alleged failure by the Commission to act with respect to the suspension of the various Community assistance programmes in Lebanon, it must be held that, contrary to the applicant’s assertions, Article 2 of the Association Agreement is not intended to permit or indeed to impose the recourse to and adoption of measures if the parties to that agreement fail to comply with the clause relating to fundamental rights contained in that article. Article 2 of the Association Agreement contains a provision on human rights, which provides that the relations between the parties and all the provisions of the agreement itself are to be based on respect of democratic principles and fundamental human rights.’

⁵¹⁰ Jan Wetzel, ‘Introduction’, in Wetzel (n 477), 12.

⁵¹¹ See for example the assertion that the relationship of the EU with ACP countries has evolved from one of cooperation to one of coercion: Stephen R Hurt, ‘Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention’ [2003] 24 Third World Quarterly 161.

⁵¹² Meunier and Nicolaidis (n 156) 921.

⁵¹³ See Council of the European Union, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’, 15 June 2012, 11205/12 2012, 5.

⁵¹⁴ Bartels (n 452), 31.

c) *Sustainable development chapters*

In addition to the above provisions relating to human rights, the EU has included in the recently negotiated agreements so-called 'sustainable development chapters.' This partakes of a more general strategy aimed at promoting sustainable development at home and abroad, as expressly provided notably by Art. 3 (3) and (5) and Art. 21 (2) (d) and (f) TEU, and Art. 11 TFEU.

Trade policy is meant to be part and parcel of this strategy, in recognition of the supposed virtuous circle that international instruments fostering responsible trade may induce regarding sustainable development. This was made explicit notably by the 2006 Global Europe Strategy, which states:

In considering new FTAs, we will need to work to strengthen sustainable development through our bilateral trade relations. This could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection. We will also take into account the development needs of our partners and the potential impact of any agreement on other developing countries, in particular the potential effects on poor countries' preferential access to EU markets. The possible impact on development should be included as part of the overall impact assessment that will be conducted before deciding to launch FTA negotiations.⁵¹⁵

Sustainable development has been mentioned in EU trade agreements for a long time already,⁵¹⁶ but since the 2008 EU-Cariforum agreement inclusion of a specific chapter setting out cooperation and commitments in relation to sustainable development has been systematic. So far, sustainable development chapters are to be found in the following instruments currently in force with Cariforum, Central America, Peru and Colombia, and South Korea.

Sustainable development chapters are or should also be included in agreements whose entry into force is pending, such as the EU-Singapore FTA, or those which are being negotiated, namely forthcoming EPAs with Central Africa⁵¹⁷ or Eastern and Southern Africa.⁵¹⁸ One should also point to a very recent initiative adopted after and outside of the framework of the relevant trade agreement but which is clearly related to the potentially negative effects of trade liberalisation on labour rights: the Global Sustainability

⁵¹⁵ European Commission (n 161), 9. See also Council of the European Union, 'Renewed EU Sustainable Development Strategy', 26 June 2006, 10917/06, 20: 'The Commission and Member States will increase efforts to make globalisation work for sustainable development by stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. In this context, the EU should be working together with its trading partners to improve environmental and social standards and should use the full potential of trade or cooperation agreements at regional or bilateral level to this end.', as part of the overall objective 'To actively promote sustainable development worldwide and ensure that the European Union's internal and external policies are consistent with global sustainable development and its international commitments'. The Commission furthermore states in its 2002 Communication entitled 'A Global Partnership for Sustainable Development': 'Bilateral and regional agreements must underpin sustainable development, and the European Union must ensure that its multilateral and bilateral policies are mutually consistent. This also means addressing regulatory issues such as the environment, social development, competition, and investment in a bilateral context. The European Union is promoting deep integration and regulatory convergence through regional trade agreements between industrialised and developing countries, and between the developing countries themselves.' European Commission, 'Towards a global partnership for sustainable development', Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 21 February 2002, COM(2002) 82 final, 8.

⁵¹⁶ See for example the prominent presence of sustainable development in the 2000 Cotonou Agreement (n 456), Art. 9.

⁵¹⁷ Above (n 466), Art. 60.

⁵¹⁸ Above (n 467), Art. 53.

Compact which the EU, the ILO and Bangladesh have jointly adopted in July 2014 in response to the collapse of the Rana Plaza garment factory. The EU-Bangladesh co-operation agreement dates back from 2001 and does not contain specific labour rights provisions. The Global Sustainability Compact might be filling this gap as Bangladesh commits therein, in cooperation with the ILO, to ensure respect for labour rights as outlined in ILO Conventions; ensure structural integrity of building and occupational safety and health; and ensure responsible business conduct by all stakeholders engaged in the garment industry. The EU, for its part, will contribute technical and financial assistance in the process.⁵¹⁹

This section will however focus on sustainable chapters contained in – and operating in the framework of – EU trade agreements. While these chapters undoubtedly share common traits, they also diverge in several respects. In the following paragraphs, we will seek to paint an honest picture of such commonalities and divergences.

(1) The definition of sustainable development

The first variation to be observed is with regard to the definition of ‘sustainable development’ as understood in those chapters. Sustainable development is an open-ended and encompassing concept which potentially covers economic, social and environmental matters. The Cotonou Agreement, though it cannot be said to contain a ‘sustainable development chapter’ in the strict sense, famously spells out a particularly broad and multifaceted definition of the principle, centred on human rights.⁵²⁰ It is therefore logical that (interim) EPAs signed with ACP countries refer to that definition as part of their objectives or essential elements. The EU-Cariforum EPA additionally contains the following definition:

The Parties understand this objective to apply in the case of the present Economic Partnership Agreement as a commitment that:

- (a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations;
- (b) decision-taking methods shall embrace the fundamental principles of ownership, participation and dialogue.⁵²¹

As indicated above, the EU-Cariforum EPA is also particular in that it explicitly seeks to implement a ‘trade partnership for sustainable development,’ and indeed that objective occupies a central place in the agreement. Other recent agreements currently in force do not contain a proper definition of the term, but rather focus on the operationalisation of the broad principle by reference to domestic and international instruments, and through commitments related to the environmental and social impacts of trade.

⁵¹⁹ See ‘Staying engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh’, Joint Statement by Bangladesh, the EU and the ILO, 8 July 2013, available online <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf>.

⁵²⁰ Above (n 456), Art. 9, which is also the ‘essential elements’ clause.

⁵²¹ Above (n 428), Art. 3 (2).

(2) Obligations and commitments: overlap with the essential elements clause?

In terms of the commitments and operational provisions they contain, all recent trade agreements in force seem to revolve around a common core composed of several elements (not always in the same order):

- A reference to the following instruments:
 - o The Rio Declaration on Environment (Colombia/Peru) and Development and Agenda 21 on Environment and Development of 1992 (Central America, South Korea, Colombia/Peru)
 - o The Johannesburg Plan of Implementation on Sustainable Development of 2002 (Central America, South Korea)
 - o The 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work (Central America, South Korea, Cariforum)
 - o The Cotonou Agreement (Cariforum)
 - o The Millenium Development Goals (Colombia/Peru)
- A reaffirmation by the parties of their general commitment to promote trade in a way that fosters sustainable development (Central America, South Korea)
- The reaffirmation that States have the freedom to define their own level of social and environmental protection, and that social and environmental standards should not be used for protectionist purposes, though parties should strive to ensure high social and environmental standards (Central America, South Korea, Cariforum, Colombia/Peru)
- A commitment to strive towards high levels of social and environmental protection by
 - o Implementing the ILO Conventions and other multilateral instruments applicable to the parties (Central America, South Korea, Cariforum)
 - o Respecting, promoting and realising in their laws and practice the core labour standards and associated ILO Conventions proclaimed in the ILO Declaration of Fundamental Principles and Rights at Work of 1998, namely
 - the freedom of association and the effective recognition of the right to collective bargaining;
 - the elimination of all forms of forced or compulsory labour;
 - the effective abolition of child labour;
 - the elimination of discrimination in respect of employment and occupation. (Central America, South Korea, Cariforum, Colombia/Peru)
 - o Implementing a list of multilateral environmental agreements (Central America, Colombia/Peru)
- A commitment to cooperate to develop trade schemes and trade practices favouring sustainable development, notably in respect of particular themes such as forestry, fisheries, climate change (Central America, Colombia/Peru), fair trade and corporate social responsibility (South Korea, Colombia/Peru), biological diversity (Colombia/Peru), migrant workers (Colombia/Peru).
- A commitment not to lower or fail to apply social and environmental standards with a view to encouraging trade or attracting investment (Central America, South Korea, Cariforum, Colombia/Peru)

Through these commitments, notably as they relate to labour rights, significantly enhance the specificity and level of detail of human rights components in trade agreements, some have wondered whether they did not also create some counter-productive overlap. Sustainable development chapters would indeed create confusion and lead into thinking that the essential elements clause and its general reference to ‘human rights’ should be interpreted narrowly as only applying to limited political situations.⁵²² The reality is that sustainable development chapters add quite little ‘hard law’ to the existing human rights components of trade agreements, as they mostly reaffirm the parties’ commitments to instruments that are already binding upon them, and for the rest introduce obligations of means in the form of ‘striving’ towards maintaining or enhancing protection of labour rights.⁵²³

(3) A promotional and dialogue-based approach to labour rights promotion

The added value of sustainable development chapters does therefore not lie in additional commitments properly said, but rather in a different kind of commitment, as it is expressly recognised that those provisions do not seek to ‘harmonise’ social and environmental standards between the partners, but rather to foster dialogue and cooperation to achieve sustainable trade in the long run.⁵²⁴

This soft character was called a ‘weakness’ by some authors.⁵²⁵ However, in contrast to the essential elements clauses, sustainable development chapters contain detailed monitoring processes and bodies which allow for implementing the commitments contained therein. First of all, the general joint committees and councils in charge of overseeing the whole agreement, which are generally competent to discuss any issue in relation to the agreement, are also entitled to discuss sustainable development issues.⁵²⁶

However, as indicated the main innovation of sustainable development chapter resides in monitoring and the specialised bodies which some agreements set up to meet regularly for the purpose of overseeing and advising on the implementation of the sustainable development chapter.⁵²⁷ The EU-Korea, Colombia/Peru and Central American agreements set up ministerial contact points, specialised committees/boards of senior officials for the purpose of implementing the trade and sustainable development chapter. Likewise, they seek to ensure ongoing dialogue with civil society and social partners. The EU-Korea agreement establishes Domestic Advisory Groups for each party composed of civil society, business, social partners and other experts from relevant stakeholder groups, which meet at an annual Civil Society Forum⁵²⁸ whereas the Colombia/Peru and Central American agreements mandate each party as well as the

⁵²² Bartels (n 452), 33-34.

⁵²³ Bartels (n 501) 309.

⁵²⁴ See EU Korea FTA (n 470), Art. 13.1 (3).

⁵²⁵ Karin Lukas and Astrid Steinkellner, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements* (Ludwig Boltzmann Institute of Human Rights 2010) available online <http://media.arbeiterkammer.at/wien/PDF/studien/Studie_Nachhaltigkeit_englisch.pdf>, 5.

⁵²⁶ See e.g. the EU-Korea FTA (n 470), Art. 15.1 (3) (g): ‘The Trade Committee shall [...] consider any [...] matter of interest relating to an area covered by this Agreement.’ Or the EU-Cariforum EPA (n 428), Art. 227 (2): ‘the Joint CARIFORUM-EC Council shall generally be responsible for the operation and implementation of this Agreement and shall monitor the fulfilment of its objectives. It shall also examine any major issue arising within the framework of this Agreement, as well as any other bilateral, multilateral or international question of common interest and affecting trade between the Parties.’

⁵²⁷ EU-Korea FTA (n 470), Art. 13.12, Colombia/Peru FTA (n 451), Art. 280.

⁵²⁸ EU-Korea FTA (n 470), Art. 13.13. Also, sustainable development issues can be addressed by the Civil Society Forum. See <<http://portal.eesc.europa.eu/eu-korea-dag/Civil-Society-Forum/Meetings/Pages/The-2nd-SC-Forum.aspx>>.

subcommittee/board to meet with existing national advisory groups (or to create new ones) and civil society regularly.⁵²⁹ The EU-Cariforum establishes a Consultative Committee tasked with promoting

dialogue and cooperation between representatives of organisations of civil society, including the academic community, and social and economic partners. Such dialogue and cooperation shall encompass all economic, social and environmental aspects of the relations between the EC Party and CARIFORUM States, as they arise in the context of the implementation of this Agreement.⁵³⁰

Dialogue at official level is therefore central and civil society is an essential actor in the implementation and monitoring of sustainable development chapters, which coincides with the dialogue-orientated approach to international commitments adopted by the EU (see above). The question is whether this approach is effective and whether improvement can be witnessed in the fields covered by those chapters. In the framework of the EU-Korea agreement, the EU Domestic Advisory Group has already voiced quite severe criticism regarding South Korea's compliance with a number of ILO Conventions, notably on freedom of association and the right to collective bargaining.⁵³¹ It is still too early probably to foresee whether this criticism will be taken up seriously in future practice and also in the context of other agreements.

Beyond monitoring and dialogue, the question may be asked of what the consequences of non-compliance might be. As was shown above, parties undertake a number of commitments which, if most of them only contain obligations of means ('strive towards'-types of formulations), still may be amenable to clear violations. One may for example think of the non-lowering of standards clauses. A blatant relaxation of labour standards for the purpose of gaining competitive advantage on international markets may be analysed as a violation of the sustainable development chapter. In such cases, except for the EU-Cariforum agreement,⁵³² the other party is generally barred from having recourse to the general dispute settlement mechanism foreseen for disputes regarding application of the agreement (and which includes a binding arbitral mechanism), and the adoption of 'appropriate measures' under the general non-execution clause also seems out of the question.⁵³³ Disagreements or disputes regarding obligations arising out of the sustainable development chapter therefore have to be subject to consultations between governments or involving the sub-committee/board and, failing a satisfactory settlement at the end of the consultations

⁵²⁹ Colombia/Peru FTA (n 451), Art. 281-282, Central American Association Agreement (n 476), Art. 294 and 295 (creation of a Civil Society Dialogue Forum).

⁵³⁰ Above (n 428), Art. 232.

⁵³¹ Letter by Thomas Jenkins to Karel de Gucht, Brussels, 13 January 2014, DB-REX/2014/D/109, available online <<http://portal.eesc.europa.eu/eu-korea-dag/About-DAG/Adopted%20Documents/Letter%20to%20Mr%20Karel%20De%20Gucht%20%20Art%2013-%20Korea%20-FTA.docx>>.

⁵³² Above (n 428), Art. 203 (1): 'This Part [on dispute avoidance and settlement] shall apply to any dispute concerning the interpretation and application of this Agreement.' Art. 213 (3) on appropriate measures in cases of non-compliance with a ruling however excludes the lifting of trade preferences in the framework of cases concerning the sustainable development chapter.

⁵³³ EU Korea FTA (n 470), Art. 13.16 ('For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15.');

EU-Colombia/Peru FTA (n 451), Art. 285 (5) ('This Title is not subject to Title XII (Dispute Settlement).');

EU Central American Association Agreement (n 476), Art. 355 (6) ('if one Party considers that another Party has failed to fulfil one or more obligations under Part IV of this Agreement [Trade, containing the sustainable development chapter], it shall exclusively have recourse to, and abide by, the dispute settlement procedures established under Title X (Dispute Settlement) and the mediation mechanism, established under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement or other alternative mechanisms foreseen for specific obligations in Part IV of this Agreement.')

See also Bartels (n 501), 310.

stage, a panel of experts may be convened to examine the matter and submit non-binding recommendations.

This ‘promotional’ approach to sustainable development in EU trade agreements, and the dialogue-based remedies in case of non-compliance, have been criticised as being too soft, especially in comparison with measures available under North-American agreements for example,⁵³⁴ such as the right to individual petition to national contact points and the possible imposition of fines in cases of breach of the agreement.⁵³⁵ However, a recent study has found that the sustainable development chapter was proving particularly contentious in the negotiation of new FTAs, notably with ASEAN, indicating that their provisions were far from regarded as meaningless by negotiators.⁵³⁶ And indeed, recent studies have shown that a harder approach to compliance with labour rights standards was not necessarily correlated with better labour rights practices. On the contrary, the authors of the research surprisingly find that an opposite correlation might exist, namely that FTAs whose labour rights provisions are implemented through dialogue (notably through involvement of civil society) might be more conducive to actual improvement, though they admit that more research may be needed to confirm this finding as many factors can impact such correlations.⁵³⁷

d) *Investment agreements and provisions*

Since the entry into force of the Lisbon treaty, the EU has received exclusive competence over foreign direct investment under Art. 207 TFEU. This means that the EU can, without the intervention of Member States, conclude international agreements pertaining to FDI with third countries. This will not necessarily be the case as agreements dealing with FDI will most likely be ‘mixed’ agreements, like the ‘trade’ agreements presented above. And actually, a great number of these existing agreements already did address investment issues.⁵³⁸ For instance, as shown in Annex II, many PCAs provide that parties will cooperate to stimulate reciprocal investment. Likewise, Association Agreements seeking to implement the four freedoms between the EU and its partner provide for the freedom of establishment, or the free movement of services, which almost inevitably imply liberalising investments to some extent.

What the new competence will allow the EU to do is to agree with a third country on measures to *protect* EU investors which have invested in that partner country. This protection would cover certain economic/political risks, such as expropriation, but also unfair or unexpected treatment on the part of the other government. In doing so, the EU would be far from entering uncharted territory, as international investment law has, since the second half of the 20th century, become one of the most vibrant fields of

⁵³⁴ Lukas and Steinkellner (n 525), 11-12.

⁵³⁵ NAALC (n 503), Annex 39, and *Social Dimensions of Free Trade Agreements* (International Labour Organization and International Institute for Labour Studies 2013), available online <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf>, 31 ff.

⁵³⁶ Ludo Cuyvers, ‘The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?’ (2013) UNU-CRIS Working Papers W-2013/10, available online <<http://www.cris.unu.edu/fileadmin/workingpapers/W-2013-10.pdf>>, 24.

⁵³⁷ Axel Marx, Jadir Soares and Wouter Van Achter, ‘Towards a Fair Globalization? The evolution of the protection of the rights of freedom of association and collective bargaining over the last 30 years in selected countries’ (2014) Leuven Centre for Global Governance Studies Working Paper No. 144, available online <http://ghum.kuleuven.be/ggs/publications/working_papers.html>, 21. For what regards FTA elements which may positively impact labour rights practices, see *Social Dimensions of Free Trade Agreements* (n 535), chapter 4, 97 ff.

⁵³⁸ Jan Bisschoff, ‘Just a little BIT of ‘Mixity’? The EU’s role in the field of international investment protection law’ [2011] 48 Common Market Law Review 1527.

international (economic) law. Unlike for trade, no comprehensive multilateral agreement has ever been concluded in the field of investment,⁵³⁹ and the international legal regime for investment is almost exclusively made up of bilateral investment treaties (BITs) which are now in excess of 3000 instruments signed by nearly all countries.⁵⁴⁰ BITs all of course differ in a number of respects, but for such a wide network of agreements, they present remarkably consistent patterns, to the point that some authors have wondered whether this near-universal process of adopting like instruments did not amount to custom formation.⁵⁴¹ And indeed, it can be affirmed that – notwithstanding differences in wording – the near totality of BITs contains the following core of provisions:

- A guarantee against arbitrary and uncompensated expropriation (notably ‘indirect’ expropriation, meaning that the host government has taken measures which are so detrimental to the investment that they deprive it of any economic value);
- An obligation of ‘fair and equitable treatment’ of the investor on the part of the host state;
- An obligation of the host state to afford ‘full protection and security’ to the foreign investment against outside interference;
- Non-discrimination clauses in the form of national treatment (the investor may not be treated less favourably than national enterprises) and MFN clauses (the investor may not be treated less favourably than investors from other foreign countries);
- A dispute settlement mechanism notably allowing the investor to directly sue the host state before international arbitral tribunals in case of breach of one of the provisions of the BIT.

BITs may also contain other clauses such as a more or less wide definition of what constitutes an eligible investment under the agreement, provisions regarding double taxation or the repatriation of profits to the home state; umbrella clauses allowing any dispute – even of a private contractual nature – to fall into the scope of the BIT, etc. What is important to note is that BITs afford a very high level of protection to investors while not imposing on them any obligations.

If many studies have found that flows of FDI into a country had – under certain conditions⁵⁴² – positive effects on its economic growth⁵⁴³ or its prevailing social conditions, including human rights in general and labour rights in particular,⁵⁴⁴ the same cannot be said of the effect of BITs on fostering such effects of FDI. Observers have first been quite hesitant as to whether or not the existence of a BIT between two states

⁵³⁹ Plurilateral agreements with a small number of countries, such as the North-American Free Trade Agreement between the US, Canada and Mexico (NAFTA, signed 17 December 1992), of larger multilateral agreements on a certain theme, like the Energy Charter Treaty (signed December 1994, to which the EU is a party), have however seen the light of day.

⁵⁴⁰ For exact figures, see below (n 563).

⁵⁴¹ Jan Wouters, Sanderijn Duquet and Nicolas Hachez, ‘International Investment Law – The Perpetual Search for Consensus’ in Olivier De Schutter, Johan Swinnen and Jan Wouters, *Foreign Direct Investment and Human Development – The Law and Economics of International Investment Agreements* (Routledge 2013) 26 ff.

⁵⁴² See for example the negative impact that large-scale foreign investment in large tracts of agricultural lands can negatively impact the right to food of local populations. UN General Assembly, Human Rights Council, ‘Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge’, Report of the Report of the Special Rapporteur on the right to food, Olivier De Schutter, 28 December 2009, A/HRC/13/33/Add.2.

⁵⁴³ See Liesbeth Colen, Miet Maertens and Jo Swinnen, ‘Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence’ [2009] 3 Human Rights and International Legal Discourse 177.

⁵⁴⁴ See Layna Mosley, *Labor Rights and Multinational Production* (Cambridge University Press 2011).

increased FDI flows between them.⁵⁴⁵ Second, it has also not been demonstrated that, in their current shape, BITs are regulating FDI flows in such a way as to foster their positive effects on economic and human development.⁵⁴⁶ Quite the opposite is often argued to take place, namely first that BITs would only impose obligations pertaining to investor protection on the host state and typically do not contain any language relating to the host state's human rights obligations, to the home state's obligation to oversee the impact of its investors' activities abroad, or as to the responsibilities of businesses regarding, for instance human rights or the environment. This has led to situations in which, thanks to the liberalisation induced by BITs, foreign investors were able to enter into weakly regulated zones and to pursue unhindered their economic bottom line without regard for their negative impacts on local populations. In this regard, though it is not an investment agreement in the strict sense, the EU-Cariforum EPA contains a 'behaviour of investors' clause, through which the contracting parties commit to take measures (notably enact and enforce domestic legislation) to prevent investors of the other party from committing acts of corruption, or from operating their businesses in ways detrimental to labour conditions or the environment.⁵⁴⁷ While these obligations are on the host state and not directly on the investor, they may still represent a welcome innovation if taken seriously by the parties.

A second line of criticism lies with the fact that investor protections imposed on host states are so stringent and so readily enforceable through direct arbitration, with potentially staggering damages to pay to the investor in case the tribunal finds a breach of the BIT,⁵⁴⁸ that this would have a so-called chilling effect on host states which would want to take affirmative regulations in pursuance of human rights or environmental protection, for fear that these may for example surprise the legitimate expectations of an investor regarding its profits and thereby amount to a breach of the fair and equitable treatment standard.⁵⁴⁹ And actually, a number of investors have not hesitated to challenge unfavourable legislations taken in the general interest by the host states, claiming enormous damages, such as the infamous case of Italian and Luxembourg mining investors who challenged the South African Black Empowerment Act aiming to ensure fair participation of historically disadvantaged populations in the exploitation of mineral resources and thereby requiring partial divestment from the foreign investors.⁵⁵⁰ These tactics have sometimes been successful, and it has been the case that certain host states have backed down and

⁵⁴⁵ See Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... And They Could Bite' (2003) World Bank Policy Research Working Paper No. 3121, available online <http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf>

⁵⁴⁶ Olivier De Schutter, 'Introduction – Foreign direct investment and human development', in De Schutter, Swinnen and Wouters (n 541), 23.

⁵⁴⁷ See EU-Cariforum EPA (n 428), Art. 72.

⁵⁴⁸ The oft-cited example is the case *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, according to which the Czech Republic was condemned to pay several hundred million dollars of damages and interests to an American investor, even though another tribunal had in parallel decided exactly otherwise on the same case (*CME v. Czech Republic*, UNCITRAL).

⁵⁴⁹ See *Tecmed Tecnicas Medioambientales S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154, which states: 'The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.'

⁵⁵⁰ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

amended the challenged measure.⁵⁵¹ This concern is aggravated by the fact that the arbitral mechanism presiding over the settlement of disputes between investors and host states is not perceived to be suitable to address the many general interest questions which are entailed by investment disputes, such as whether or not a piece of regulation taken by a democratically accountable government should or should not be repealed. Investment tribunals are indeed modelled on the commercial system of arbitration between commercial firms, and the mode of selection of arbitrators does not guarantee either that they will be knowledgeable about the many ‘beyond investment’ issues entailed by investor-state disputes, nor that they will be free of any bias towards the position or interests of international investors.⁵⁵²

In response to this increasingly loud and widespread criticism a new generation of BITs is emerging, in which a better balance is pursued between the interests of the investor and the host state, in which sustainable development and other concerns are explicitly mentioned as legitimate regulatory objectives not amenable to hurt the legally protected interests of investors, in which the impartiality and independence of arbitrators is better protected, etc.⁵⁵³ The EU is therefore stepping into a highly contested and divided field, with deeply entrenched interests of businesses, civil society and third states.

The EU is now negotiating FDI agreements with a number of countries, under two forms: either self-standing agreements only concerning FDI, or chapters of wider agreements addressing other issues (notably trade) alongside it. No such agreement is yet in force or has even been signed,⁵⁵⁴ but the news was recently spread that EU and Canadian negotiators had agreed on the final text of a Comprehensive Economic and Trade Agreement (‘CETA’).⁵⁵⁵ Other negotiations are currently ongoing with notably Singapore, China, as well as the US in the framework of the Transatlantic Trade and Investment Partnership.

The exercise of this new competence of course begs the question of the fate of the hundreds of agreements with third countries which EU Member States have concluded prior to the entry into force of the Lisbon Treaty. EU member states were very reluctant to see their existence abruptly put into question, as notably they are considered to be the ‘gold standard’ for the protection of investors and arguably put EU investors in very favourable positions.⁵⁵⁶ Moreover, the termination of existing BITs would not only have posed legal issues vis-à-vis the partner countries,⁵⁵⁷ but would also have shaken the legal certainty

⁵⁵¹ In the case above, the claimants discontinued the case after they reached a favourable settlement with South Africa, reducing the level of the required divestment. See *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010, para. 79.

⁵⁵² See Nicolas Hachez and Jan Wouters, ‘International investment dispute settlement in the 21st century: does the preservation of the public interest require an alternative to the arbitral model?’ in Freya Baetens, *International Investment Law within International Law – Integrationist Perspectives* (Cambridge University Press 2013).

⁵⁵³ See Wouters, Hachez and Duquet (n 541), 49 ff.

⁵⁵⁴ The EU-Cariforum EPA (n 428) has a chapter dedicated to ‘commercial presence’ which contains a number of protections for investors, such as national treatment and most-favoured nation treatment (see Arts. 68 and 70). Those protections are however only in respect of certain sectors liberalised by the agreement, and are not directly litigable by the investor.

⁵⁵⁵ ‘Final text brings CETA closer to fruition’, 5 August 2014, available online <<http://www.newswire.ca/en/story/1394512/final-text-brings-ceta-closer-to-fruition>>.

⁵⁵⁶ Nikos Lavranos, ‘In Defence of Member States’ BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs - A Member State’s Perspective’ [2013] 2 *Transnational Dispute Management* 7.

⁵⁵⁷ As their binding effect under international law was arguably left unaffected by the change in competences distribution within the EU. See Vienna Convention on the Law of Treaties (n 447), Art. 27.

of existing treaty regimes, under which investments had been made, and on the effects of which investors are still currently counting. To settle this question, a transitional regulation was passed in 2012⁵⁵⁸ which states that existing treaties may remain (and concluded treaties may enter) into force until the EU itself concludes a BIT with the same third country.⁵⁵⁹ However, if the continued application of an existing treaty poses an obstacle to the negotiation of new BITs by the EU, the Member State concerned will have to collaborate with the Commission to remove the difficulty. Now, waiting for the Commission to adopt new BITs, Member States may wish to amend existing treaties, or conclude new ones. This is possible provided the envisaged treaty will not:

- (a) be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States;
- (b) be superfluous, because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU;
- (c) be inconsistent with the Union's principles and objectives for external action as elaborated in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union; or
- (d) constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union.⁵⁶⁰

In any event, the Commission is associated to the negotiations and will have to give its approval prior to conclusion.⁵⁶¹

The EU still has the potential, with this power to override BITs which in many respects embody the flow of criticism enumerated above, and to replace them with innovative and human rights-friendly instruments, to properly revolutionise international investment law. As EU BITs amount to more than 1200,⁵⁶² the EU has the possibility of replacing nearly one third of the total regime.⁵⁶³ This is a huge opportunity/responsibility which the Commission (responsible for negotiating agreements under art. 207 TFEU) does not seem to be willing to take on fully. First of all, it has indicated that it would not necessarily seek to replace all Member States BITs currently in force, but that it would only select partners in respect to which economic criteria, as well as criteria relating to the rule of law and political climate, are fulfilled. Second, the Commission has indicated that it would not work on the basis of a 'Model BIT', the principles

⁵⁵⁸ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

⁵⁵⁹ *Ibid.*, Art. 3.

⁵⁶⁰ *Ibid.*, Art. 9.

⁵⁶¹ *Ibid.*, Art 10 and 11.

⁵⁶² European Commission, 'Towards a comprehensive European international investment policy', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 7 July 2010, COM(2010) 343 final.

⁵⁶³ At the end of 2011, the total number of BITs and other investment-protecting treaties in application in the world was 3196. See UNCTAD, *World Investment Report 2013*, available online <http://unctad.org/en/publicationslibrary/wir2013_en.pdf>, 101 and 230.

of which it could spread rapidly in the international investment legal regime, perhaps initiating a change of paradigm. Rather, the Commission will stick to its policy of negotiating from scratch with every partner,⁵⁶⁴ though it has been argued (even by Commission officials) that convergent Brussels practice would give rise to an ‘unwritten’ or ‘invisible’ Model BIT.⁵⁶⁵ Third, the Commission gets its negotiating mandate from the Council,⁵⁶⁶ which has indicated its desire that a common EU investment policy should *increase* the level of protection of the EU investor abroad (while underlining the social and environmental aspects of investment),⁵⁶⁷ even if the EP (which will have to assent to the new treaties) has stated its disagreement with such an approach notably by stating that

the request made by the Council in its conclusions on the Communication – that the new European legal framework should not negatively affect investor protection and guarantees enjoyed under the existing agreements – could create a risk of having any new agreement opposed, and could lead to the necessary balance between investor protection and the protection of the right to regulate – in an era of increased inward investment – being put at risk; considers, moreover, that such a formulation of the evaluation criterion may contradict the meaning and spirit of Article 207 TFEU.

⁵⁶⁸

The Parliament therefore urged to include, next to clauses protecting investors, language also protecting policy space, social and environmental standards, and modifying the current dispute settlement mechanism. In the next paragraphs, we will briefly examine how the Commission has decided to tackle these thorny challenges, and where it is taking its comprehensive strategy. In so doing, we will focus on the CETA, given that it is by far the instrument for which the negotiations are most advanced. From official documents that were circulated on ongoing negotiations, notably of the CETA, it can be concluded that the Commission’s upcoming investment agreements will largely espouse the form and content which is currently prevalent (including all core principles outlined above), but would rather attempt to remedy the defects of the current regime through efforts on two main treaty items:

- A more precise definition of the protective clauses – notably on investment and fair and equitable treatment – so as to avoid expansive interpretations which may hinder the host state’s right to regulate in the general interest;
- A reform of the dispute settlement system. If the arbitral model is maintained,⁵⁶⁹ arbitrators will have to comply with a binding code of conduct, will have more leeway to dismiss

⁵⁶⁴ European Commission (n 562), 7.

⁵⁶⁵ Frank Hoffmeister and Gabriela Alexandru, ‘A First Glimpse of Light on the Emerging Invisible EU Model BIT’, 15 [2014] *The Journal of World Investment & Trade* 379.

⁵⁶⁶ See ‘EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment’ (2011), available online <<http://www.bilaterals.org/?eu-negotiating-mandates-on>>, enjoining the Commission to negotiate with the aim of providing for ‘the highest possible level of legal protection and certainty for European investors in Canada/India/Singapore.’

⁵⁶⁷ Council of the European Union, ‘Conclusions on a comprehensive European international investment policy’, 25 October 2014, available online <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>, p. 2.

⁵⁶⁸ European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), para. 17.

⁵⁶⁹ The adoption of the arbitral model by the EU for settling investor-state disputes is confirmed by the adoption of the very recent Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

unreasonable claims and to consolidate parallel claims. Procedural rules will be aligned with recent best practice to allow for more transparency and participation by civil society, and parties might consider establishing an appeals procedure.⁵⁷⁰

To dig a bit further into the elements of these future deals as negotiation documents are largely kept secret, one is left to guess, with the help of a few documents leaked by the growing activist community concerned by these questions, what kind of innovations the Commission will decide to foster, notably in the field of human rights.⁵⁷¹ Of course caution is due with regard to the authenticity or negotiated character of the texts available on the internet, but at first sight it seems that though it represents an improvement compared to existing Member States' BITs, the CETA will not go as far as cutting edge models⁵⁷² such as the US or Canada Model BITs in specifying what general interest measures do not breach the fair and equitable treatment standard, or the links between investment and labour or investment and the environment (in this regard, only a very inchoate sustainable development chapter was found to be available among leaked documents⁵⁷³). an interesting innovation may be noticed in a leaked version of the investment chapter dated April 2014.⁵⁷⁴ The draft provision reads:

Article X.15: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:
 - a) investors of a non-Party own or control the enterprise; and
 - b) the denying Party adopts or maintains measures with respect to the non-Party that:
 - i. are related to maintenance of international peace and security; and
 - ii. prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments

There might be some uncertainty as to whether the word 'and' at the end of items a) and b) i. indicate that these are cumulative conditions (and therefore whether the clause would only apply to foreign owned companies of the other party). This clause is inspired by a similar clause in the Canada⁵⁷⁵ and US⁵⁷⁶ model BITs, but innovates in that a note inserted by the negotiators in relation to this draft article indicates that

⁵⁷⁰ See Technical summary of final negotiated outcomes -- Canada-European Union Comprehensive Economic and Trade Agreement, 2013, available online <<http://www.actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf>>; Nicolas Hachez, 'La politique de l'Union européenne en matière d'investissement étranger direct: un changement de paradigme?' [2014] *Journal de droit européen* 148, 150.

⁵⁷¹ See for example www.bilaterals.org; www.tradejustice.ca.

⁵⁷² See Marc Maes, 'Investment protection in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)', 2014, available online <<http://eu-secretdeals.info/upload/2014/02/Investment-in-CETA-MarcMaes-S2B-analysis-140306.pdf>>, p. 2.

⁵⁷³ See a 2012 draft available online <<http://www.tradejustice.ca/wp-content/uploads/2013/10/CETA-Text-February-2012.doc>>, 237-252.

⁵⁷⁴ Available online <http://www.tradejustice.ca/wp-content/uploads/2013/08/EU-Canada-FTA-Negotiations-Investment-chapter-4-April-2014_clean.pdf>. The dispute settlement chapter, is available online <http://www.tradejustice.ca/wp-content/uploads/2013/08/EU-Canada-CETA_Draft-ISDS-text-April3-2014_clean.pdf>.

⁵⁷⁵ Canada Model BIT, 2004, available online <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>, Art. 18.

⁵⁷⁶ US Model BIT, 2012, available online <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>, Art. 17.

it should be read in relation to the ‘security exception’ contained in the final provisions of the agreement, of which no version could be found, but which will most likely provide that the agreement should not be read so as limiting measures that parties can take for their own security.⁵⁷⁷ A footnote added by Canada further suggests that ‘[f]or greater certainty, measures that are “related to the maintenance of international peace and security” include the protection of human rights.’ In circumstances that are therefore still to be circumscribed, this might be the beginning of a mechanism to suspend treaty benefits in respect of human rights violating investors. Similarly the leaked draft dispute settlement chapter foresees for the moment that ‘an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.’⁵⁷⁸ While this might only very indirectly address human rights violations, the innovation should still be underlined as part of a process to more closely monitor the conditions under which rogue investors are entitled to the benefits of BITs. In that it also clearly provides for sanctions (the denial of trade benefits) against the investor, it may be said to go one step further than the ‘behaviour of investors’ clause contained in the EU-Cariforum EPA described above.

Some authors have also asked the question, in the case of FDI chapters in wider agreements, of the relation of the FDI chapter with other parts of the agreement such as sustainable development chapters or the essential elements clauses.⁵⁷⁹ The same question can be asked of the inclusion – notably for the sake of coherence – of such clauses in the ‘invisible’ model of stand-alone EU investment agreements.⁵⁸⁰ If these questions are still largely unsettled (at least in the eyes of the public), one observation must be made regarding the essential elements and non-execution clauses, namely that they seem very unsuited to achieve the purpose of fostering human rights in host states. FDI agreements indeed place the EU and the partner country in typically other positions than, for instance, trade or development provisions. In the latter, it is very often the partner country which has the most to gain from compliance with the agreement and its essential elements, as notably this allows to maintain preferential market access into the EU, and to keep benefitting from development projects. If the essential elements are breached and the agreement suspended, the other party will suffer most. On the contrary, in investment relationships, the EU stipulates stringent obligations binding on the other country *for the benefit of its own investors*. Therefore, even if a suspension of the investment agreement may stymie slightly investment flows towards the host state, it will mostly hurt EU investors, which will find themselves without protection. One does not know what the intentions of the EU will be in this regard, but it will in any event have to be creative if it wants to make human rights language similar to the essential elements clause applicable to FDI aspects of its international agreements.

⁵⁷⁷ See by comparison Art. 225 of the EU-Cariforum EPA (n 428).

⁵⁷⁸ Above (n 574), art x-17 3.

⁵⁷⁹ Bartels (n 474), p. 7.

⁵⁸⁰ See Hoffmeister and Alexandru (565) 396 with regard to sustainable development chapters. Essential elements clauses are on the contrary nowhere mentioned in relation to the ‘invisible’ model BIT.

e) *Conclusion on bilateral trade instruments and human rights*

Trade relations have been noted to be natural avenues for achieving normative objectives, such as human rights or (sustainable) development. Legal instruments governing those relations are a powerful lever to achieve those aims, notably through conditionality policies.⁵⁸¹ This has clearly been the philosophy of the EU since 1995, which it reaffirmed in its Strategic Framework for Human Rights, in which the Council lays down specific actions in respect of bilateral instruments to ‘make trade work in a way that helps human rights.’⁵⁸² In the prior section we have provided an overview of the different ways in which EU bilateral trade and investment agreements have included ‘beyond trade’ concerns in a way that leverages human rights. In this conclusion, we would like to outline a brief evaluation of whether and to what extent the EU’s ambitions in this regard have succeeded. The picture is quite mixed.

From the point of view of effectiveness, the EU has not deviated from its policy to systematically link trade and human rights by including ‘essential elements’ clauses in all its general trade agreements since 1995, and has recently upgraded this approach by also including sustainable development chapters in recent agreements, which provide for more specific action towards labour rights, but also the environment, an important enabler or obstacle to human rights enjoyment. The EU should be credited for this, as this single point has delayed and stiffened a number of negotiation processes. The essential elements clause potentially provides a hard mechanism through which the EU can sanction the many human rights violating countries with which it has an agreement in place. Yet, the EU very seldom activates conditionality in this way, and when it does, trade mechanisms are not at the heart of sanctions. This attitude has been analysed as a sign of weakness or pusillanimity from the EU, who would be talking the talk but would not dare walking the walk. Others have emphasised that sanctioning was not necessarily the point of conditionality: what is important would be to put human rights commitments on record, and thereby provide a basis for ongoing dialogue and progressive improvement. The method followed by the sustainable development chapters confirms this hypothesis, and partial evidence seems to show that, in terms of the correlation between trade instruments and human rights improvement over the long run, the dialogue-based approach is not necessarily negative.

In terms of the legitimacy, the picture is also rather conflicted. Human rights conditionality is an established line of policy and has been practiced outside of Europe. Yet it is still being questioned by a number of – developed and developing – EU partners who do not favour linking human rights and trade in conditionality terms. Arguments are that insistence on improving human rights standards should not become disguised protectionism, and should not be used to put into question the comparative advantage of developing countries. Many EU Member States being former colonial powers, the imperialistic aftertaste of this normative agenda is also increasingly resented. However warranted these objections on principles might be, the way the EU has been concretely applying conditionality based on trade agreements somehow reinforces their import. The most important challenge in this regard has to do with perceived double standards. We have put in evidence the fact that deviations in the drafting of human rights clauses – however justified by historical or geographical criteria – potentially created obligations of a different scope and intensity across the group of EU trade partners. With regard to sanctions, the only

⁵⁸¹ See generally Hafner-Burton (n 146).

⁵⁸² Council of the European Union (n 10) Action 11.

times the EU ever acted on the basis of the human rights clauses were to target ACP countries – the former group of EU colonies, whereas certain events left ignored would also have warranted some reaction by the EU.

In terms of credibility, the EU has set the bar quite high for itself, by casting into constitutional stone its commitment to linking external (trade) relations and human rights, and by identifying concrete and ambitious objectives, notably in the Strategic Framework for Human Rights. The effectiveness and legitimacy flaws identified above already largely affect the credibility of the EU's stance as a global normative power. What could further hurt the EU's credibility in this regard is its forthcoming investment policy. As indicated above, with its new competence in the field of FDI, the EU has a golden opportunity to revolutionise the whole international investment legal regime, which is widely criticised for being exclusively protective of economic interests and for largely ignoring anything beyond. Right now, from the little information available, it seems that the EU will not be taking this opportunity to re-equilibrate the interests that FDI puts at stake, and notably that there will be no strong mechanism to ensure that neither the host state nor the EU investors violate human rights. This will need to be confirmed in the light of upcoming concluded EU investment agreements, but from the leaked documents we could consult, there is not one single ground-breaking innovation regarding human rights in the texts under negotiation, which are even below the standard set by the current US or Canada Model BITs. It therefore seems that the new EU competence for FDI will largely strike out in human rights terms, which begs the credibility question: does the EU really take its commitment to 'make trade (and investment) work in a way that helps human rights' really so seriously?

All in all, it is quite difficult to evaluate whether the EU conditionality policy as implemented through bilateral trade and investment relations is successful. The EU has clearly chosen a progressive and non-adversarial approach, and therefore changes, if any, will take place incrementally and over the long run. However, the effectiveness, legitimacy and credibility issues we have outlined above confirm that the EU is fundamentally, in the words of Meunier and Nicolaidis, a 'conflicted trade power'.⁵⁸³ It wants to do the right thing and robustly link trade and human rights, but other considerations stand in the way. This is of course normal as policy-making by definition entails compromise. However, given the ways in which the bilateral trade and human rights strategy falls short, the outside observer is left wondering whether, in its position and with the tools at its disposal, the EU *could* and *should* not achieve more.

⁵⁸³ Meunier and Nicolaidis (n 156).

IV. DEVELOPMENT AND HUMAN RIGHTS

Development cooperation is a dimension of external action in which the integration of human rights has been an increasingly important priority. The notion that development cooperation is not merely a tool to foster economic growth, but should aim to support the enjoyment of human rights, has become a central tenet of contemporary thinking on development. The overlaps and potential synergies between human rights- and development-work have been increasingly explored by academics, policy-makers and practitioners. Against this backdrop, a new set of policies, instruments and tools have been developed to integrate human rights in development cooperation. The first section in this chapter (A) provides a brief overview of how human rights have become a part of the development agendas and policies. A second section (B) introduces the EU's competences, its main institutional actors, and its various financial instruments in the area of development cooperation. A third and last section (C) describes the EU's overall policy framework for integrating human rights in development cooperation, focusing on pre- and post-Lisbon policies (C.1 and C.2), the question of EU-wide coherence (C.3) and the EU's vision on new global development agenda for post-2015 (C.4). This section further describes how the EU has integrated human rights in 'bilateral' cooperation through three strategies; the role human rights as a conditioning factor in providing assistance (C.5), the provision of direct support for human rights, democracy, rule of law and governance (C.6), and the development of 'transversal' policies on human rights mainstreaming and a human rights-based approach to development planning (C.7).

A. A Brief History of Human Rights and Development Cooperation

Currently, the majority of the world's Official Development Assistance (ODA) comes from donors which have adopted human rights in their mission statements and identify it as a thematic area of work. With human rights - and the interrelated fields of 'democracy', 'rule of law', and 'good governance' – strongly embedded in the discourse on development policy, donors have adopted various policy strategies for integrating human rights into their development work. This study identifies four main components or strategies:⁵⁸⁴ (i) the introduction of an overarching policy framework on human rights, (ii) the integration of human rights in policies on aid allocation, (iii) the funding of initiatives which have human rights and democratisation as an explicit goal, and (iv) the 'transversal' integration of human rights as a cross-cutting issue through 'mainstreaming' and the adoption of a human rights-based approach to development (HRBA). Several large donor institutions and agencies, particularly in the European context, have progressively adopted such policies.

As development cooperation is not an exclusive but a shared competence within the EU (see above, section II.C) this first section provides a brief, general overview of how human rights have become a concern within the broader development community. A first dimension to address is how the introduction of a human rights agenda relates to other overarching agendas, such as the MDGs and the debate on Aid Efficiency.

⁵⁸⁴ This categorisation is loosely based and adapted from an extensive overview study carried out by the World Bank and the OECD, see OECD/WB, 'Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges', (2nd edition, World Bank; Organisation for Economic Co-operation and Development, Washington, DC, 2013).

1. Human rights and other global development agenda(s)

Parallel to the emergence of a human rights and democracy agenda within the global development community, two other highly influential agendas have dominated development policies over the last decade and a half. The Aid Effectiveness Agenda was formally launched when a broad coalition of development actors, adopted the Paris Declaration on Aid Effectiveness. The United Nations Millennium Declaration was adopted by the UN General Assembly (UNGA) in 2000 and laid the foundation for the Millennium Development Goals. The interrelation or tension between these development agendas and the integration of human rights in development cooperation is briefly described in this section, which concludes with a concise summary on the current debate on the role of human rights within the post-2015 agenda.

a) Aid Effectiveness and Human Rights

The Paris Declaration (PD) is a non-binding agreement which aims to provide a ‘common framework’ for enhancing the effectiveness of the multitude of partnerships between ODA donors and ODA recipients.⁵⁸⁵ When agreed in 2005⁵⁸⁶, it marked a relative consensus on improving the ‘mechanics’ of aid, identifying five operational principles for further action; (i) ownership, (ii) alignment, (iii) harmonisation, (iv) managing for results, and (v) mutual accountability.⁵⁸⁷ The PD did not address any thematic or geographic goal-setting, or define the broader ‘substance’ of international development efforts. Various actors have addressed the question of how human rights – and other cross-cutting issues such as gender and environmental concerns - could be part of the aid effectiveness agenda. The OECD’s Development Assistance Committee (OECD-DAC) tackled this question by publishing a series of briefings for integrating human rights into each of the Paris principles, in an effort to find a consensus on how to address human rights ‘more strategically in development policy and practice’.⁵⁸⁸ These efforts have been partially reflected in the follow-up summits and agreements of the Paris Declaration. The *Accra Agenda for Action*, adopted in 2008,⁵⁸⁹ and *Busan Partnership for Effective Development Co-operation*, adopted in 2011, clarified that development cooperation should be consistent with ‘international commitments on gender equality and human rights’⁵⁹⁰ and that ‘promoting human rights, democracy and good governance’ are an integral part of development efforts.⁵⁹¹ Although the matter of a ‘rights-based approach to development’

⁵⁸⁵ Roberto Bissio, ‘The Paris Declaration on Aid Effectiveness’, in *Realizing the Right to Development : Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, (United Nations, Office of the High Commissioner for Human Rights, New York, 2013), 234, 235.

⁵⁸⁶ In 2003, a First High Level Forum resulted in the adoption of the Rome Declaration on Aid Harmonisation by several governments, which laid the basis for the elaboration of the Paris Declaration two years later.

⁵⁸⁷ As summarised by Gulrajani, these principles can be more concretely understood as (i) aid recipients exercising leadership over development policies and strategies and leading co-ordination (ownership); (ii) donors basing their support on recipients’ systems and priorities (alignment); (iii) reducing the transaction costs of donor interventions (harmonisation); (iv) introducing performance measurement and management mechanisms (results-based management); and (v) ensuring commitment and respect between donors and recipients (mutual accountability). See Nilima Gulrajani, ‘Organising for Donor Effectiveness: An Analytical Framework for Improving Aid Effectiveness’ [2014] 32, *Development Policy Review*, 89–112.

⁵⁸⁸ OECD-DAC, ‘Action-Oriented Policy Paper on Human Rights and Development’ (2007) Organisation for Economic Co-Operation and Development, Development Assistance Committee, Human Rights Task Team.

⁵⁸⁹ *Accra Agenda for Action*, 2008, para 3;

⁵⁹⁰ *Ibid.*, para 13c

⁵⁹¹ *Busan Partnership for Effective Development Cooperation*, 2011, 1.

was put forward in Busan such demands for greater ‘democratic ownership’ of development processes was only partially reflected in the outcome statement.⁵⁹²

Despite these developments, several criticisms on how the aid-effectiveness agenda could undermine democratic governance and respect for human rights have remained pertinent. A key argument is that the principles of ‘ownership’ and ‘alignment’ concretely implies prioritising government-to-government cooperation (through the use of aid modalities such as budget support), which in turn risks undermining support for NGOs and CSOs and erode a recipient governments’ *democratic* accountability towards its citizens.⁵⁹³ Under the term ‘domestic accountability’, this question has since proliferated in debates on aid effectiveness.⁵⁹⁴ In similar vein, the emphasis on a ‘partnership’ approach which places recipient governments in the ‘driver’s seat’ might lead donors to weaken their position on human rights where a recipient government rejects such priorities.⁵⁹⁵ Additionally, the principle for ‘managing for results’ could lead donors to narrow the scope of their cooperation objectives, preferring quantifiable short-term goals over long-term, structural objectives on democratic reform and citizen empowerment.⁵⁹⁶ To summarise, while initially the Aid Effectiveness Agenda did not emphasise human rights or democratic governance, the issue has been progressively picked up at the declaratory level. None the less, it is safe to state that the development of a ‘human rights-based’ Aid Effectiveness Agenda has not been a priority at the highest level, and this demand is primarily driven by committed CSOs and supported by certain donors. With the increasing influence of non-DAC donors such as China, concerns are raised that the window for adding a stronger and more concrete human rights dimension to aid effectiveness might be closing.⁵⁹⁷

b) The Millennium Development Goals (MDGs) and Human Rights

The Millennium Declaration adopted by the UNGA in 2000 represents the point of departure for the MDGs. While the Declaration explicitly articulates the link between development and human rights, the eight goals, 18 targets, and 48 indicators which constitute the MDG framework have been criticised from various angles for not sufficiently integrating human rights concerns. A first concern is that the process of devising the MDGs was in itself a non-democratic and top-down process. Given its state-centric nature, it purveys a vision on development whereby citizens are passive recipients, not active agents. This relates to the broader critique that the design of the MDG framework does not provide the necessary ‘accountability infrastructure’, and does not provide any mechanisms for citizens to hold their government accountable for progress on the MDGs.⁵⁹⁸ This relates to the much broader criticism that the MDG framework does not adequately reflect the key importance of the fundamental political and civil liberties necessary for

⁵⁹² The Busan outcome document does highlight the importance of ‘rights-based approaches to development’, but only in relation to the role of CSOs, and not in the sense of an overarching ‘human rights-based approach’ applying to all stakeholders. See Busan Partnership Agreement, para 22.

⁵⁹³ Advisory Group on Civil Society and Aid Effectiveness, ‘Civil Society and Aid Effectiveness: A Synthesis of Advisory Group Regional Consultations and Related Processes’ (2008) 15.

⁵⁹⁴ See for example Alan Hudson, ‘Background Paper for the Launch of the Workstream on Aid and Domestic Accountability’ (2009) Organisation for Economic Co-Operation and Development, Development Assistance Committee, Governance Network.

⁵⁹⁵ Stefan Meyer, Nils-Sjard Shulz, ‘Ownership with Adjectives: Donor Harmonization, Between Effectiveness and Democratization’ (2008) FRIDE Synthesis Report, available online <http://www.fride.org/download/wp59_ownership_adjectives_eng_jun08.pdf>.

⁵⁹⁶ Advisory Group on Civil Society and Aid Effectiveness (n 593) iv.

⁵⁹⁷ Rachel Hayman, ‘The Busan Partnership: implications for civil society’, (2012) INTRAC Policy Briefing Paper 29.

⁵⁹⁸ Malcolm Langford, ‘A Poverty of Rights: Six Ways to Fix the MDGs’, [2010] 41(1) IDS Bulletin, 83-91.

sustainable development. Although the Millennium Declaration states that ‘freedom’ is a fundamental value and efforts will be made to ‘promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights’, this is not reflected in the MDGs. The eight MDGs are said to relate to some degree to certain ESCR, but the specific goals or targets do not reflect the ICCPR. Not surprisingly, some argue that achieving progress on the MDGs can serve as a ‘fig leaf’ for undemocratic and authoritarian regimes.⁵⁹⁹ Another major criticism of the MDGs is the disregard for in-country discrimination and inequality. While certain MDGs specifically target vulnerable groups⁶⁰⁰ the OHCHR has argued that the principle of non-discrimination is not sufficiently embedded in the MDG framework.⁶⁰¹ Because the MDGs set out a global ‘average’ for each country to reach, progress on these aggregated goals and targets might obscure the fact that within a country, certain regions, demographics or minorities are not seeing equal improvement.

c) Human Rights and the Post-2015 global development agenda

The above-mentioned issues of participation, accountability, equality and non-discrimination have become the subject of intense debate on a new development agenda after 2015. In September 2014 the UNGA will kick-off the formal negotiation phase on a new framework for Sustainable Development Goals.⁶⁰² With the above-mentioned criticisms on the MDG framework in mind, a range of different actors have called for a new framework which incorporates human rights. However, opinions differ to what extent the post-2015 framework can and should be ‘human rights-based’.

Several proponents argue that the human rights framework provides the normative and legal foundation on which to completely redesign the current MDG framework. A broad coalition of development and civil society organisations have called for a new architecture which ‘moves from a model of charity to one of justice’.⁶⁰³ A similar perspective has been developed by the OHCHR, wherein the ‘ultimate objective’ of a new framework should be ‘to realize the international human rights commitments’ of States.⁶⁰⁴ Human rights should be instrumental in defining ‘what Member States and other duty bearers should be accountable for under a post-2015 agreement, by when, as well as how they should be held accountable’.⁶⁰⁵ In addition, the OHCHR also stresses that new framework will need to consider the concepts of *equity* (‘fairness in distribution of benefits and opportunities’), *equality* (‘substantive equality,

⁵⁹⁹ For example undemocratic countries such as Tunisia (pre-revolution), Ethiopia and Rwanda have been hailed as success stories. See Mac Darrow, ‘The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda’ [2012] 15 Yale Human Rights and Development Law Journal, 60.

⁶⁰⁰ For example, MDG 2 addresses children and youth, MDG3 women and girls, and MDG7 addresses slum dwellers.

⁶⁰¹ OHCHR, ‘Claiming the Millennium Development Goals: A human rights approach’ Office of the United Nations High Commissioner for Human Rights, Geneva, 2008, 9.

⁶⁰² At the 2012 UN Conference on Sustainable Development (‘Rio+20’) agreement was reached to set out a number of global Sustainable Development Goals (SDGs) through a process in coherence with the post-2015 process. In order to avoid two different frameworks, it was decided to join up these processes and work towards one single agreement.

⁶⁰³ Post-2015 Human Rights Caucus, ‘Human Rights for All Post-2015’ Statement prepared by the work session of the ‘Advancing the Post-2015 Sustainable Development Agenda’ Global Civil Society Conference, Bonn, March 2013. Notably, a ‘human rights litmus test’ has been elaborated by a coalition of organisations to screen proposals, available online <<http://cesr.org/downloads/HRs.Post2015.litmus.test.pdf>>.

⁶⁰⁴ OHCHR-CESR, ‘Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda’, (2013) Office of the United Nations High Commissioner for Human Rights / Center for Economic and Social Rights, xii.

⁶⁰⁵ *Ibid.*

of both opportunity and results, with full protection under the law'), and *non-discrimination* ('prohibition of distinctions based on impermissible grounds').⁶⁰⁶ Several other key players, including the EU (see section x.x), have also emphasised the need to include equality and non-discrimination as key elements of a future framework.

In addition to coming to a new framework which design is explicitly based on - or implicitly reflects - human rights, another set of proposals advocates for a self-standing goal which covers human rights and the related fields of democracy, rule-of-law, and good governance.⁶⁰⁷ A new framework founded on human rights accountability, which includes a self-standing 'human rights goal', or 'mainstreams' certain human rights-principles throughout goals and targets, is far from being unanimously accepted. Leaving aside the objections a number of States would have regarding proposed goals on law, institutions and governance, a number of experts also express doubt whether this would lead to a more efficient post-2015 framework. The risk of overburdening or diluting the future global framework with too many 'aspirational objectives' has been flagged as a concern.⁶⁰⁸ Given that any type of 'governance goals' would require complex targets and indicators, it has been argued that the post-2015 framework risks becoming overly prescriptive, whereas it will require flexibility to be relevant.⁶⁰⁹

2. Human rights in aid allocation and budget support

The majority of 'traditional' donors emphasise that human rights, democracy, and good governance are 'essential' elements or the 'underlying principles' of their development partnerships, and have elaborated conditionality policies which include a human rights dimension.⁶¹⁰ As with granting or withdrawing trade preferences (see section III.C.2.b)), increasing, decreasing or stopping development assistance is considered tool in leveraging compliance with human rights and incentivising democratic governance in other countries. Conditionality can affect three levels of decision making: deciding on the choice of partner countries (also referred to as 'selectivity'), the amount of ODA to be provided to a country, and the way in which this assistance is provided.⁶¹¹ Not all donors formulate clear policies covering each of these three stages – country selection, amount of assistance, and type of modality – and sometimes conflate these different dimensions of conditionality. While conditionality frameworks mainly affect government-to-government cooperation, they also impact on donors' work with NGOs and private actors involved in providing assistance. Conditionality can be positive or negative. Negative conditionality implies that 'punitive' measures are taken - decreasing or suspending assistance - when certain conditions are not met.

⁶⁰⁶ *Ibid.*, 72.

⁶⁰⁷ The final report of UN Secretary-General's High-Level Panel thus put forward a goal 'Ensuring Good Governance and Effective Institutions', explicitly referring to several human rights. See UNSG, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development' Final Report, Secretary-General's High-Level Panel of eminent persons on the Post-2015 Development Agenda, 2013. A similar goal has been proposed by the European Commission (see section II.C).

⁶⁰⁸ European Centre for Development Policy Management (ECDPM), Overseas Development Institute (ODI), and German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE), 'European Report on Development 2013 Post-2015: Global Action for an Inclusive and Sustainable Future' (2013), 217.

⁶⁰⁹ Deepak Nayyar, 'The MDGs After 2015: Some Reflections on the Possibilities' (2012) Background paper, UN System Task Team on the Post-2015 UN Development Agenda.,

⁶¹⁰ OECD/WB (n 584) 45.

⁶¹¹ Paul Clist, Alessia Isopi, and Oliver Morrissey, 'Selectivity on aid modality: Determinants of budget support from multilateral donors' [2012] 7(3) Review of International Organisations, 268.

Positive conditionalities imply that extra incentives -increased total assistance or more aid through arrangements such as budget support - are provided when certain conditions are met.

In addition to conditionality frameworks which cover the entire field of bilateral cooperation with one or several countries, donors have developed specific conditionality frameworks in relation to the use of budget support and related aid modalities.⁶¹² Budget support presents the most direct way of providing financial resources directly to a recipient government. It is seen as the preferred form of aid provision in the context of the Aid Effectiveness Agenda as it embodies the highest scale of ‘alignment’ of donor funding and the fullest use of the ‘country systems’ of the recipient. Although budget support and related modalities are seen as a more structural way of aid provision than stand-alone projects, their impact on democratisation and accountability – and by extension human rights – has been questioned.⁶¹³ There is little consensus within the development community how and whether the provision of a specific aid instrument, such as budget support, should be linked to stricter conditions on human rights or democratic governance. The tension with the Aid Effectiveness Agenda is clear as strict donor-driven conditionalities compromise the ‘ownership’ of the development process and might affect the ‘predictability’ of aid resources. The notion of ‘consensual’ conditionality has been introduced to reflect a departure from the unilateral application of conditions by donors. This implies that donors avoid suspension, emphasise dialogue with recipients to identify common ground, and use consensually agreed upon conditions and indicators to increase or decrease their assistance.⁶¹⁴ Whether conditionality policies can be an effective incentive for changing political behaviour or institutional reform in recipient countries is subject to a longstanding debate which falls largely outside the scope of this study.

3. Support for Human Rights, Democracy, Rule of Law and Governance

A large share of donors engage in development cooperation which is not only geared towards poverty reduction and economic growth, but which supports actors and processes addressing human rights and democracy. Resources for so-called ‘political aid’ have increased over the past decades, and in particular the US, the EU and the EU Member State invest in this area. Accordingly, a ‘human rights’, ‘democracy’, or ‘governance’ sector has grown alongside traditional development sectors such as education and health. The scope of this sector is broad. Projects and programmes are often not explicitly framed within the international human rights framework, but given their overlapping and mutually enforcing nature many donors do not distinguish clearly between ‘human rights support’, ‘democracy support’, or ‘governance support’.⁶¹⁵ The types of actors and processes donors seek to support can relate to different levels of

⁶¹² The OECD-DAC defines ‘budget support as “[...] a method of financing a partner’s country budget through a transfer of resources from an external financing agency to the partner government’s national treasury. The funds thus transferred are managed in accordance with the recipient’s budgetary procedures.” See OECD-DAC, ‘Harmonising Donor Practices for Effective Aid Delivery, Volume 2; Budget Support, Sector Wide Approaches And Capacity Development in Public Financial Management’, (DAC Guidelines and Reference Series, Organisation for Economic Co-Operation and Development, Paris, 2006), 26.

⁶¹³ For a discussion of literature on this subject, see Paolo de Renzio, ‘Aid, Budgets and Accountability: A Survey Article’ [2006] 24(6) Development Policy Review..

⁶¹⁴ Daniel Morrow, ‘Adjusting Conditionality: Prescriptions for Policy-Based Lending’ in Stefan Koeberle, Harold Bedoya, Peter Silarsky, Gero Verheyen (eds.) *Conditionality Revisited; Concepts, Experiences, and Lessons*, (World Bank; Washington D.C., 2005).

⁶¹⁵ See Richard Youngs, ‘Trends in Democracy Assistance: What has Europe Been Doing?’ [2008] 19(2) Journal of Democracy, 162. It should be noted that conceptual and substantive differences can be distinguished between the notion of ‘democracy’ and the international human rights framework. For example, donors have tended to emphasise a liberal model of democracy, with an emphasis on certain political and civil rights, and lesser attention for economic, social and cultural rights.

interaction: state institutions and their related governmental branches, a political society constituted by (democratic) parties, civil society populated by a variety of non-governmental stakeholders, and individual citizens. While ‘civil society support’ is often considered to be at the core or ‘grassroots’ of such efforts, this term in itself covers an extensive range of actors, ranging from human rights advocates to labour unions as well religious authorities, academic institutions, etc. The different levels of intervention can be presented in a dichotomy between ‘top-down’ (as in ‘government-to-government’) and ‘bottom up’ (as in non-governmental) support. Certain authors distinguish between engaging in ‘political’ or ‘developmental’ assistance.⁶¹⁶ The ‘political’ form focuses on mobilising democratic reformers or human rights activists, whereas the latter implies a less confrontational approach with more emphasis on socioeconomic concerns, a technical rather than political tone, and a belief in the gradual consolidation of democracy through ‘small gains’.⁶¹⁷ While European donors could be considered to prefer the ‘developmental’ approach, more and less ‘politically sensitive’ support is often combined, and the country context often determines how donors engage. In this context, certain donors have increasingly refined their country level ‘diagnostics’ to come to a more comprehensive and ‘embedded’ approach to promoting human rights and democracy. The European Commission’s human rights country strategies (see section II.C.1) are an example of ‘tailor made’ support strategies.

4. Human Rights Mainstreaming and a Human-Rights Based Approach to Development

With the emergence of a ‘human rights and democracy’ sector within the development community, a variety of donors and actors are engaged in human rights work. However, this focus has led some to diagnose a form of ‘ghettoisation’ of human rights within donor institutions. As with other cross-cutting issues, in particular environmental protection and gender equality, human rights have thus been introduced as a transversal concern relevant to each sector and area of cooperation. Rejecting the idea that human rights are merely a sub-component of democracy or governance support, donors have sought to develop policies to mainstream human rights throughout their strategies, and into projects and programmes. This has often been operationalised into sub-policies focusing on specific groups: women’s rights, children’s rights, the rights of people with a disability, and other vulnerable or excluded demographics.

Building on the notion that human rights should not merely be mainstreamed as a concern but rather constitute the foundation of conceptualising, planning and implementing development programmes, the concept of a ‘human rights-based approach’ (HRBA) to development has found resonance within the development community. The most-commonly used definition is the UN Common Understanding on a HRBA, which covers the following three core elements: (i) all development initiatives should further the realisation of human rights as laid down in the UDHR and other international human rights instruments; (ii) human rights standards and principles derived from the UDHR and other international human rights instruments should guide all development programming in all sectors and in all phases of the programming process; and (iii) development cooperation should contribute to the development of the capacities of

⁶¹⁶ Thomas Carothers, ‘Democracy Assistance: Political vs. Developmental’ [2009] 20 (1) *Journal of Democracy*..

⁶¹⁷ *Ibid.*, 8.

‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.⁶¹⁸ This ‘common’ definition was endorsed by the various UN agencies of the UN Development Group (UNDG) in 2003. While many donors and actors committed to a HRBA reflect a similar understanding on the basic premises, a HRBA is none the less a multifaceted concept in which practical implications vary. It can relate to a ‘strategic’ and ‘political’ way of rethinking development partnerships, goals and processes, or it can be developed into specific guidelines, manuals or toolboxes for planning, implementing and evaluating projects and programmes. As such, it is more accurate to refer to ‘human rights based approaches’ in plural. Within the EU, various donors have developed HRBA policies and guidelines. The concept was adopted in the EU Strategic Framework/Action Plan, and the practical implications of the ‘rights-based approach’ adopted by the Commission in 2014 are further discussed in section 4 below.

B. The EU Development Apparatus

The origins of the EU’s development cooperation can be traced back to its origins in the early 1960s, when its predecessor, the European Economic Community, signed a first cooperation agreement with former European colonies in Africa.⁶¹⁹ Today, the EU’s institutions have evolved to become one of the largest providers of Official Development Assistance (ODA) in the world, engaged in development cooperation in around 150 countries.⁶²⁰ Net ODA disbursements from EU institutions to third countries and multilateral organisations accounted for EUR 12.92 billion in 2012,⁶²¹ making it the second largest donor after the US. When combining the ODA of the EU28 (EU institution and EU Member States), the EU as a whole is the largest donor by a significant margin.⁶²² This study addresses in first instances the policies set out by the European Institutions, in particular the Commission’s Directorate General for Development Cooperation – EuropeAid (DG DEVCO). Over the past two decades, the relation between development cooperation and human rights has become a prominent concern and point of action within the EU’s development policy. This mapping elaborates how the different modes of integrating human rights in development policy, illustrated in section 4.1, have been adopted by EU institutions.

Despite the progressive legal and policy framework set out at the EU level, there are no obligations for Member States to integrate human rights in their development policy, as development cooperation is a shared competence. The Treaty on the Functioning of the European Union (TFEU) clarifies the division of competences between the EU and its Member States in the area of development cooperation. Development cooperation is listed under Article 4, which identifies the areas where the Union and the Member States have a shared competence. Like humanitarian aid, the area of development cooperation is a special kind of shared competence – sometimes referred to as a ‘parallel competence’ – in that the exercise of the EU’s competence ‘shall not result in Member States being prevented from exercising

⁶¹⁸ UNDG ‘Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation’, UN Interagency Workshop on a Human Rights-Based approach in the Context of UN Reform, Stamford, 2003.

⁶¹⁹ Federiga Bindi, ‘European Union Foreign Policy: A Historical Overview’, in Federiga Bindi (Ed.), *The Foreign Policy of the European Union - Assessing Europe’s Role in the World*, (Brookings institution press, Washington, D.C., 2010), 16.

⁶²⁰ OECD-DAC, ‘Development Cooperation Report 2013- Ending Poverty’, (Paris, 2013), 192

⁶²¹ Ibid.

⁶²² European Commission, ‘Annual Report on the European Union’s development and external assistance policies and their implementation in 2012’, Directorate General Development and Cooperation – EuropeAid, 2013, 43.

theirs'. Therefore, the pre-emption effect, whereby the Union 'occupies the field' in case of the exercise of a shared competence, is not at play here.⁶²³

Although the EU and the Member States have the competence to carry out development cooperation and develop new policies independently, they are bound by the 'duty of sincere cooperation' between each other.⁶²⁴ Article 210(1) TFEU stipulates that, '[i]n order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes (...). Member States shall contribute if necessary to the implementation of Union aid programmes'. Therefore Member States are not restricted from having a development cooperation policy which can substantially differ from that of the EU, but the TFEU indicates that an adequate degree of harmonisation and coordination is deemed necessary. As such, how and to what extent MS development cooperation policies integrate human rights varies strongly, and the concept of 'human rights-based development' is far from unanimously accepted within the European development community. The question of EU-wide coherence is further discussed briefly below (see section C.3), with particular emphasis on recent efforts as part of the Strategic Framework/Action Plan.

1. Main Actors: the EEAS and DG DEVCO

The Lisbon Reforms (see section 1) reshaped the EU's institutional architecture regarding development cooperation. The entities within the Commission which were previously responsible for planning and implementing the EU's financial instruments for development cooperation were replaced by new actors. The Directorate-General for External Relations (DG RELEX) – previously in charge of programming the DCI and ENPI - was dissolved and replaced by the EEAS, an autonomous agency outside the Commission. The Directorate-General for Development (DG Dev) – previously charged with programming the EDF – and the EuropeAid Cooperation Office - which carried out the final stages of the programming and management cycle – were joined together in a newly established Directorate General 'Development and Cooperation – EuropeAid' (DG DEVCO).

Together, the newly established EEAS and DG DEVCO are the main actors elaborating EU development policy. Although the Decision on the EEAS clarifies that the overall political coordination of the EU's external action, lies with the HR/VP,⁶²⁵ the Commission continues to play a major role in the strategic programming of development cooperation. Strategic programming can be broadly understood as the process of identifying priorities for action through establishing the size of country allocations, elaborating Strategy Papers and Multiannual Indicative Programmes, which can be either country- or region-specific (for the Geographic financial instruments) or thematic (for the thematic financial instruments). Note that

⁶²³ Morten Broberg, 'From colonial power to human rights promoter: on the legal regulation of the European Union's relations with the developing countries' [2013] 26(4) Cambridge Review of International Affairs, 545.

⁶²⁴ Simon Duke, Steven Blockmans, 'The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service' (2010) EIPA Working Paper, 3.

⁶²⁵ As stipulated in Art. 9 of Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30. This provision is referred to in all the external financial instrument regulations.

this section does not provide a detailed break-down of all the steps within the development programming process.⁶²⁶

Depending on the financial instrument in question, the working relationship between the EEAS and DG DEVCO in the process of strategic programming differs. Table 5: Responsibilities and working relationship for Strategic Programming of EU Development Cooperation provides a brief overview of the responsibilities for strategic programming for the EU's financial instruments. The following section provides a more detailed overview of the individual financial instruments.

Table 5: Responsibilities and working relationship for Strategic Programming of EU Development Cooperation⁶²⁷

Responsibility EEAS (in consultation with DG DEVCO or other relevant Commission Services)	EEAS - DG DEVCO Joint Preparation	Responsibility DG DEVCO (in agreement with the HR/VP and other relevant Commissioners)
<ul style="list-style-type: none"> •EIDHR •IfSP •(INSC) •(PI/ICI) 	<ul style="list-style-type: none"> •EDF •DCI-Geographic Programmes •ENI 	<ul style="list-style-type: none"> •DCI – Thematic Programmes •(IPA) •(Instrument for Greenland)

(note: the financial instruments in brackets can be used to provide ODA, but are considered to fall outside the EU's development cooperation policy in the context of this report)

In relation to the strategic programming of the EU's largest development cooperation budgets (the DCI-Geographic, ENPI and EDF) the EEAS will prepare the programming documents 'jointly' with DG DEVCO. Accordingly, the Programming of development cooperation remains under the responsibility of the Commissioner for Development (or the Commissioner for Neighbourhood in case of ENI)⁶²⁸ but the EEAS assumes 'co-leadership throughout the whole processes.⁶²⁹ The proposals for country and regional financial allocations are established by the EEAS in agreements with the Commission, and then submitted jointly by the Commissioner and the HR/VP for approval and adoption by the college of Commissioners.⁶³⁰ The strategic programming of the thematic programmes within the DCI (see section C.6.c)), as well as the

⁶²⁶ For a more elaborate discussions see Alisa Herrero, Greta Galeazzi and Florian Krätke 'Early Experiences in Programming EU Aid 2014-2020 - Charting the Agenda for Change', in Andrew Sherriff,(ed.), *The European Union's International Cooperation – Recent Developments and Future Challenges*, (European Centre for Development Policy Management (ECDPM), Maastricht, 2014); Isabelle Tannous, 'The Programming of EU's External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO' [2013] 18(3) *European Foreign Affairs Review*.

⁶²⁷ The division of responsibilities are represented here as listed in the 'Working Arrangements' agreed upon in 2012. See European Commission Secretariat General, 'Working Arrangements Between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues', 13 January 2012, SEC(2012)48, 1, 17, 23, 26. This table is adapted from Tannous (n 626) 346-347.

⁶²⁸ European Commission (n 627) 17.

⁶²⁹ Herrero, Krätke, Galeazzi (n 626) 27.

⁶³⁰ European Commission (n 627) 17.

cooperation with candidate states for EU accession under IPA (not further addressed in this report), remains within the responsibility of the Commission. The decisions are submitted for approval by the Commissioner, in agreement with the HR/VP and other relevant Commissioners.⁶³¹

For the strategic planning of several other financial instruments, in particular the EIDHR and the IfSP, the EEAS is responsible for the strategic programming and drafting the proposals to be adopted by the college of Commissioners. Notwithstanding the different weight of ‘responsibility’ for certain financial instruments, the EEAS and DG DEVCO (as well as other relevant Commission Services) are expected to ‘perform their respective tasks throughout the programming and implementation cycle in full transparency, informing and consulting each other [...]’.⁶³² This implies that for the instruments where no ‘joint preparation’ is specified, intensive coordination is still expected to take place between the EEAS and DEVCO. Strong coordination is also expected to take place at the level of country delegations, which play a key role at various stages of the programming process. After the adoption of the strategic programming documents, DG DEVCO is responsible for further elaborating more detailed planning through annual action plans, which contain specific financing decisions.⁶³³ DG DEVCO is then charged with the further implementation of cooperation activities, and the further ‘project cycle management’ of initiatives funded by the financial instruments.

The EEAS and the Commission are also the main actors engaged in cooperation on democracy and human rights, although there are several other actors which engage directly or indirectly in this area. While not strictly falling within the EU’s development cooperation policy, the European Parliament engages in human rights promotion in several ways, including through participation in EU Electoral Observation Missions (funded by EIDHR) and through the Office for Promotion of Parliamentary Democracy.⁶³⁴ Another actor at the EU level is the European Endowment for Democracy (EED), created in 2012. Based on the model of the US-based National Endowment for Democracy, the EED is a private grant making institution with a mandate to foster and encourage ‘deep and sustainable democracy’ within the EU neighbourhood.⁶³⁵ Despite their relevance, these actors are relatively small compared to the resources at the disposal of the EEAS and the Commission. They can also be considered tools in the EU’s efforts at democracy promotion, not directly linked to the EU’s policies to integrate human rights in its development cooperation.

Before introducing the various policies for integrating human rights in EU development policy, the following section first provides an overview of the EU’s financial instruments for development cooperation, with particular reference to the human rights dimension included in its regulations.

⁶³¹ Ibid., 19.

⁶³² Ibid., 15.

⁶³³ Ibid., 20-21.

⁶³⁴ The EP’s ‘Office for Promotion of Parliamentary Democracy’ aims to strengthen the ‘parliamentary capacity’ of legislatures through partnerships with regional and national parliaments, parliamentary associations and international organizations in the field of inter-parliamentary cooperation. <<http://www.europarl.europa.eu/aboutparliament/en/008407cea1/Office-for-Promotion-of-Parliamentary-Democracy.html>>.

⁶³⁵ Council of the European Union, ‘Declaration on the Establishment of a European Endowment for Democracy’, 20 December 2011.

2. The EU's Financial Instruments for Development Cooperation

The EU institutions have several financial instruments at their disposal to fund development cooperation activities. Under its item 4 entitled 'Global Europe', the EU's Multiannual Financial Framework covers six financial instruments for external action, of which a large share can be classified as ODA.⁶³⁶ This section provides an overview of the key financial instruments for development cooperation and human rights promotion.⁶³⁷

- Three geographic instruments: the Development Cooperation Instrument (DCI), the European Neighbourhood Instrument (ENI), and the Partnership Instrument (PI)
- Two thematic instruments: the European Instrument for Democracy and Human Rights (EIDHR), and the Instrument contributing to Stability and Peace (IfSP)

The European Development Fund (EDF) provides a significant share of the EU budget for development cooperation, but does not fall under the regular EU budget. Given its specific focus on cooperation with ACP countries within the framework of the Cotonou Agreement, it can be regarded as a 'geographic instrument'.

All of these instruments (excluding the EDF) are governed by specific EU regulations, most of which have been adopted on the basis of Articles 209 (1) of the TFEU (development cooperation programmes) and 212(2) of the TFEU (economic, financial and technical cooperation with other countries), among other additional legal bases.

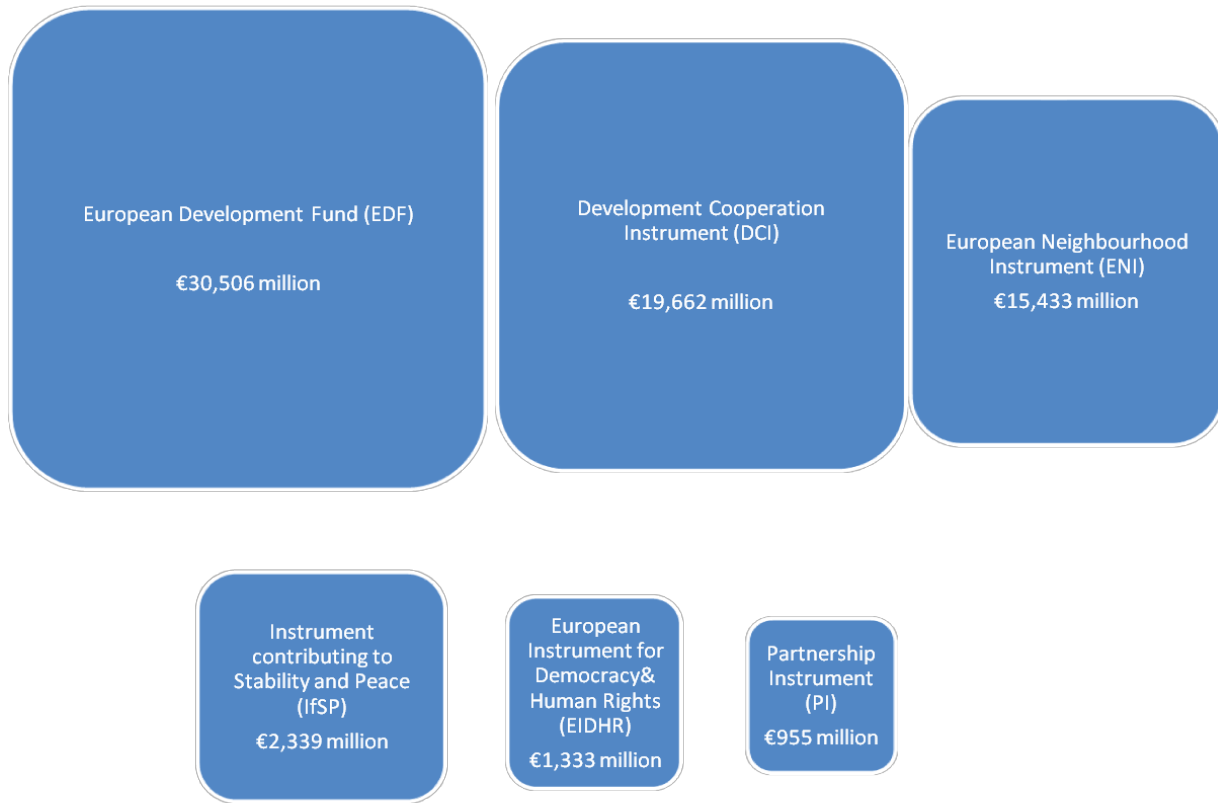
For the first time, a horizontal regulation sets common rules and procedures applicable to these external instruments for 2014-2020.⁶³⁸ This new regulation replaces the specific rules and procedures that existed under the different instruments in the former MFF 2007-2013. Besides procedural rules, it also includes provisions on substantive issues, such as the need to involve civil society and mainstream human rights across all financial instruments (Art. 1). Likewise, detailed provisions on the European Commission's annual reports (Art.13) and on the mid-term review of all instruments (Art. 17) are included in this common implementing regulation.⁶³⁹

⁶³⁶ The OECD's Development Assistance Committee (DAC) defines Official Development Assistance (ODA) as follows: "grants or loans to countries and territories on the DAC list of ODA recipients and multilateral agencies that are undertaken by the official sector at concessional terms (i.e. with a grant element of at least 25%) and that have the promotion of the economic development and welfare of developing countries as their main objective. In addition to financial flows, technical co-operation is included in aid. Grants, loans and credits for military purposes are excluded." See OECD-DAC (n 620) 287.

⁶³⁷ In focusing on development cooperation, it should be noted that the ENI, IfSP, EIDHR and PI fund a range of activities which can be broadly understood to fall under development cooperation, although not all of the funding under these instruments is classified as ODA. Furthermore, the strategic programming and planning of PI of the IfSP are not undertaken by DG DEVCO together with the EEAS (see previous section), but also involves the Commission's Service for Foreign Policy Instrument (FPI) and other relevant Commission services.

⁶³⁸ European Parliament and Council Regulation (EU) 236/2014 laying down common rules and procedures for the implementation of the Union's instruments for financial external action [2014] OJ L77/95.

⁶³⁹ European Parliament, 'The EU's 2014-2020 external financial instruments: an opportunity for the European Parliament to play a greater role' (2014) Directorate General for External Policies Policy Briefing, 6-7.

Figure 1: Visualisation of EU funding instruments for development cooperation⁶⁴⁰

Rather than a significant overhaul of the EU's structure for financing development, the main changes in the new regulations for financing EU development cooperation for 2014-2020 lie in the principles governing these instruments. These include a more differentiated approach to aid allocation and concentration of spending in a few sectors as core principles of EU assistance. Likewise, the new financial framework aims to enhance the flexibility of the instruments to respond to unpredictable changes, and simplify the procedures. Enhanced coordination between the EU and Member States through the joint programming is also a relevant feature.⁶⁴¹ Of particular importance in the context of this study is the greater focus on human rights, democracy and good governance, as key principles of the new set of instruments.

This section further provides a brief presentation and analysis of the four geographic instruments (the Development Cooperation Instrument, the European Neighbourhood Instrument, the Partnership Instrument and the European Development Fund) and two thematic instruments (the European

⁶⁴⁰ The budgets listed in this figure are based on the amounts as referred to in the regulations establishing the respective financial instruments (included under the article specifying the financial envelope). For the EDF, the budget amount as listed in the European Commission Memorandum, The Multiannual Financial Framework: The External Action Financing Instruments, 11 December 2013.

⁶⁴¹ European Commission, 'The multiannual financial framework: the external action financing instruments', MEMO/13/1134, 11 December 2013.

Instrument for Democracy and Human Rights and the Instrument contributing to Stability and Peace) which are considered to be central to the EU's development policy and its efforts to strengthen and promote human rights through cooperation activities. For each of these financial instruments, the subsequent sections identify their objectives, assess their most relevant performances and highlight the new features and funding deriving from the current legislative and financial multiannual framework.

a) *The European Development Fund (EDF)*

The EDF is the financial arm of the Cotonou Agreement between the EU and the ACP states.⁶⁴² The EDF is the EU's oldest and most singular instrument for delivering development assistance, since, among other specific features, it is the only one funded outside the EU budget by voluntary contributions from the Member States. Established by the Treaty of the European Economic Community (EEC) in 1957 and first launched in 1959, the EDF geographic coverage currently extend to 79 Africa, Caribbean and Pacific (ACP) countries. The African Union was included in the EU-ACP partnership in 2010.⁶⁴³ Its main objective is to contribute to the poverty eradication, the sustainable development and the gradual integration of these countries into the world economy. The current 11th EDF has a budget of EUR 30.50 billion (in current prices) for the period 2014-2020. This figure represents a 13% increase on the EUR 26.93 billion of the former 10th EDF (2008-2013).⁶⁴⁴ The EDF is part of the EU's collective commitments to achieve a n EU-wide ODA level of 0.7% of Gross National Income (GNI) by 2015. However, it seems this ratio is projected to reach 0.43% by 2015.⁶⁴⁵

Within the Cotonou Agreement's political framework, recipient countries commit to cooperation and dialogue with the EU on good governance, democratic principles, the rule of law and human rights, including support as regards the International Criminal Court (ICC). The Cotonou Agreement is the only international legal instrument which is contractual by nature. Mutual obligations and accountability are enshrined in the fundamental principles included in Article 2. In this sense, the Agreement lays down principles and criteria governing aid and dispute resolution mechanisms which have been agreed on with the ACP countries. It provides joint bodies for constant political dialogue, such as the EU-ACP Council of Ministers and the EU-ACP parliamentary assembly. The principles underpinning the Aid Effectiveness Agenda (see above section A.1) are also adopted, and in particular the importance of 'ownership' of development strategies is underlined.⁶⁴⁶

⁶⁴² The Cotonou Agreement succeeded the Yaoundé (1964-1975) and Lomé (1975-2000) Agreements. The consolidated version of this Agreement is available at <http://ec.europa.eu/europeaid/where/acp/overview/documents/cotonou-consolidated-fin-ap-2012_en.pdf>.

⁶⁴³ For a discussion on the role of the African Union in the revised Cotonou Agreement, see Sandra Bartelt, 'ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement' [2012] 17(1) European Foreign Affairs Review.

⁶⁴⁴ Mikaela Gavas, 'Replenishing the 11th European Development Fund' (2012) Overseas Development Institute, Background Note, 1 <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7904.pdf>>; Commission (n 4) 9.

⁶⁴⁵ European Commission, 'EU accountability report 2013 on financing for development. Beyond 2015: towards a comprehensive and integrated approach for financing poverty eradication and sustainable development' Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 16 July, 2013, SWD (2013) 273 final.

⁶⁴⁶ Cotonou Agreement (n 456) Art 2.

However, joint ownership and mutual accountability is not applied to the EU budget, or to the aid of other donors.⁶⁴⁷ As such, within the Cotonou framework, negative conditionality presides over the infringement of these commitments. The key provisions enabling the EU to condition EDF funding are found under Article 9, which contains the ‘essential elements’ clause regarding human rights, democratic principles and the rule of law, and the ‘fundamental element’ clause which relates to good governance.⁶⁴⁸ The use of conditionality within the ACP framework is covered in more detail under section C.5.a) While the ‘negative’ conditionality or ‘aid sanctions’ element of the Cotonou Agreement has garnered much attention, it should also be underlined that the Cotonou Partnership aims to ‘actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance’.⁶⁴⁹ The EDF’s funding can thus be used to support initiatives for ‘political, institutional and legal reforms’ and for ‘building the capacity of public and private actors and civil society’, although no specific provisions are included on how much of the EDF’s funding should go to what is referred to as the ‘human rights and democracy’ sector.

The 11th EDF covers a period of seven years, whose end will coincide with the expiration of the Cotonou Agreement in 2020. The EDF’s resources are channeled through two instruments: the Grant Facility, which encompasses a wide range of long-term operations including sectorial policies and macro-economic support, and the Investment Facility, which is meant mainly for the private sector and administered by the European Investment Bank.⁶⁵⁰ The current multiannual financial framework has brought along minor modifications, including the further alignment of Member States’ contributions to EDF using a new ‘contribution key’, and a new shock-absorbing scheme to help ACP countries to address the short-term effects of economic crisis or natural disasters.⁶⁵¹ Different assessments reports identify bilateral political dialogue with the host governments and alignment with national development strategies as the EDF’s strong points.⁶⁵² In addition, the assessments have rated the EDF more effective than other financial instruments in its contribution to the MDGs.⁶⁵³ Yet, the EDF currently faces a number of significant challenges and shortcomings. Civil society engagement is limited, although the Cotonou Agreement opened the EDF to a wider range of non-state actors.⁶⁵⁴ Delays and bottlenecks in disbursement of EDF funds continue to hamper development programming in various ACP regions.⁶⁵⁵ Moreover, the role of human rights in the EDF’s aid conditionality is regarded by some as a critical issue, inhibiting true ‘development’ partnerships. Perspectives on this matter are briefly touched below (see section C.5.a)).

⁶⁴⁷ Simon Maxwell, ‘EU budget surprise. Member States proposing budgetisation of the EDF’ (2012) European Development Cooperation Strengthening Programme, Opinion, 1-2 <<http://internationaldevelopmenteu.files.wordpress.com/2012/03/edcsp-opinion-16-eu-budget-surprise-member-states-proposing-budgetisation-of-the-edf.pdf>>.

⁶⁴⁸ Cotonou Agreement (n 456) Art. 9.

⁶⁴⁹ Ibid., Art 9 (4).

⁶⁵⁰ Gavás (n 644) 4.

⁶⁵¹ European Commission (n 641) 2, 9.

⁶⁵² Department for International Development, ‘Multilateral aid review: assessment of the European Development Fund’ (2011) 30-32; OECD-DAC (n 85) 18.

⁶⁵³ Ibid.

⁶⁵⁴ CONCORD, ‘Civil society involvement in the review of the 10th European Development Fund’ (2010) Cotonou Working Group Briefing Paper <http://www.developmentportal.eu/wcm/dmdocuments/acp-programming/CCWG_CS0_MTR_EDF10_20100210.pdf>.

⁶⁵⁵ Gavás (n 644) 16.

b) The Development Cooperation Instrument (DCI)

The first DCI was launched in 2007 bringing together various other budget headings. A new Regulation on this financing instrument entered into force from 1 January 2014. The DCI budget within the current MFF is the largest financial envelope among the six new financing instruments for external action: 19.6 billion EUR (in current prices).⁶⁵⁶ Its primary objective is to reduce and eradicate poverty, and consistent with the EU vision on development, this covers action to support ‘sustainable economic, social and environmental development’ as well as efforts at ‘consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law’.⁶⁵⁷ Its structure has been modified in the new regulation for 2014-2020, encompassing three kinds of programmes:

Geographic programmes: aimed to support bilateral and regional cooperation with developing countries in Latin America, Asia, Central Asia, the Middle East and South Africa. The recipient countries are those included in the OECD/DAC list of ODA recipients.⁶⁵⁸ The geographic programmes, which accounts for approximately 60% of the DCI budget (EUR 11 809 million), do not cover countries under the ACP-EU Partnership Agreement member countries (except South Africa) nor the countries covered by the EDF, the European Neighbourhood Instrument (ENI) or the Instrument for Pre-Accession. As envisaged by Article 5 of Regulation (EU) 233/2014, human rights and democracy promotion, good governance, and sustainable growth for human development are target areas within these kinds of programmes. More specifically, the regulation includes ‘earmarks’ which specify that at least 15% of the instrument’s indicative geographical allocations per geographic area/region should be dedicated to ‘Human rights, democracy and good governance’.⁶⁵⁹ Such earmarks were not included in the previous DCI regulation, and indicate a consolidation of ‘direct support’ for human rights and democracy in the use of the DCI (see also section C.6). At the same time, the new regulation also specifies that at least 45% of the total allocation per geographic area/region should be dedicated to ‘inclusive and sustainable growth for human development’.

Thematic programmes: In contrast to the geographic programme of the DCI, thematic assistance can be provided to all third countries, except for non-ODA recipients and pre-accession countries. Two thematic programmes are financed under the current regulation (in contrast with the five thematic programmes included in the previous DCI regulation):

- The ‘*Global public goods and challenges*’ programme encompasses a wide range of issues including the environment, climate change, energy, human development, food security and migration. Accounting for approximately 35% (EU 7 008 million) of the DCI’s total budget, it is the largest thematic area. Two funding conditions are set for this programme: first, no less than 27% of its budget has to be spent on climate change and environment objectives and

⁶⁵⁶ Specifically, the new regulation establishes a financial envelope of EUR 19.661.639.000. See European Parliament and Council Regulation (EU) 233/2014 of 15 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020.

⁶⁵⁷ Ibid., art 2(1)

⁶⁵⁸ Ibid. The OECD-DAC list of ODA recipients is available at <<http://www.oecd.org/dac/stats/49483614.pdf>>.

⁶⁵⁹ Council of the European Union (n 656) Annex IV.

second, at least 25% must be used to support social inclusion and human development.⁶⁶⁰ Although support in the area of human rights and democracy is not the primary objective of this programme, in its respective sectoral areas it does include reference to specific rights such as sexual and reproductive health and rights, the rights of women and girls, the rights of children and young people, the rights of migrants, etc.⁶⁶¹

- The '*Civil society organisations and local authorities*' programme aims to support an 'enabling environment for citizen participation and civil society action and cooperation, exchange of knowledge and experience and capacities of civil society organisations and local authorities in partner countries in support of internationally agreed development goals'. While not specifically framed in the language of human rights and democracy, this programme can be linked to the EU Strategic Framework/Action Plan's outcome on 'genuine partnership with civil society, including at the local level',⁶⁶² as well as the Commission's efforts to engage more systematically with civil society actors as the 'roots of democracy'.⁶⁶³ The programme thus also provides funding for the EU's 'direct' or 'targeted' support in areas broadly related to human rights, democracy, rule of law and governance (see below section C.6). The programme accounts for roughly 10% (EUR 1 907 million) of the DCI's total budget.

In addition to the geographic and thematic programmes, the DCI also provides funding for a newly-established ***Pan-African programme***. This aims to support the strategic partnership between the EU and Africa and complements other financial instruments, such as the EDF and the European Neighbourhood Instrument, in funding activities of a trans-regional, continental or global nature. The programme will provide support in a wide range of areas, such as peace and security, democratic governance and human rights, or migration, mobility and employment.⁶⁶⁴ It represents 4% (EUR 845 million) of the total budget of the DCI).

All expenditures under the geographic programmes must fulfill the OECD-DAC criteria for ODA, while at least 95% under the thematic programme and 90% under the Pan-African programme must comply with them. According to Article 17 of Regulation (EU) 233/2014, the European Commission is entitled to modify the areas of cooperation and financial allocation indicators for the geographic and the global public good and challenges programmes. These changes will eventually be introduced through delegated acts as a result of the MFF mid-term review foreseen by 31 March 2018.⁶⁶⁵

Apart from the restructuring of the programmes, the new DCI brings along three significant innovations as compared to the previous regulation: flexibility, differentiation, and coherence. Concretely, 'flexibility' is applied to respond to rapidly evolving contexts (crisis, post-crisis, fragility situations) in partner countries.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid., Annex II.A.

⁶⁶² Council of the European Union (n 10) outcome 2.

⁶⁶³ European Commission, 'The roots of democracy and sustainable development: Europe's engagement with Civil Society in external relations', Communication From The Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, 12 September 2012 COM(2012) 492 final.

⁶⁶⁴ Council of the European Union (n 656) Annex III.

⁶⁶⁵ European Parliament Research Service, 'The Development Cooperation Instrument' (February 13, 2014), <<http://epthinktank.eu/2014/02/13/the-development-cooperation-instrument>>.

In these circumstances, the Commission may adopt measures and assign unallocated funds left in each type of programme (up to 5%) through delegated acts, for which the Commission requires the consent of Member States and the EP. However, no legislative process will be applied.⁶⁶⁶ Concerning ‘differentiation’, this aspect has become a key feature of the EU’s renewed development approach, as defined by the Agenda for Change.⁶⁶⁷ Differentiation is an already well-established principle within the EDF, but the European Commission is currently extending it, not only to aid policy, but also to climate change, trade and shock facilities.⁶⁶⁸ Differentiation refers to three aspects: eligibility criteria for grant-based bilateral assistance, which leads to aid graduation; the aid volumes; and the selection of policies and instruments. In particular the first element is new as the Commission did not have an ‘aid graduation’ in place. In practice, this means that, as of 1 January 2014, 19 countries are no longer eligible for EU bilateral aid. The majority of these ‘graduated’ countries are 17 upper-middle income countries, while two are lower-middle-income countries, but the GDP of all of them is larger than 1% of global GDP.⁶⁶⁹ These countries will still be eligible for receiving assistance under regional programmes such as the investment facilities, or trade related cooperation under thematic programmes and instruments and the Partnership Instrument. Consequently, DCI funds will mainly be directed to assist the countries that are most in need and where they can have the greatest impact, that is, the low-income countries, least-developed countries (LDCs) and fragile states.

c) The European Neighbourhood Instrument (ENI)

As a result of the new legislative package accompanying the current MFF 2014-2020, the so called ‘European Neighbourhood Instrument’ (ENI) replaces the previous European Neighbourhood and Partnership Instrument (ENPI).⁶⁷⁰ The new instrument provides the bulk of funding for the 16 countries included in the European Neighbourhood Policy (ENP).⁶⁷¹ The ENI envelope amounts to EUR 15.4 billion (in current prices), which implies that per Neighbourhood country, a significant amount of funding for assistance is available. The ENI builds on the achievements and retains the structure of the ENPI based on bilateral, multi-country and cross-border cooperation programmes. The ENI regulation lists a number of specific objectives, of which the first is providing support for ‘promoting human rights and fundamental freedoms, the rule of law, principles of equality and the fight against discrimination in all its forms, establishing deep and sustainable democracy, promoting good governance, fighting corruption, strengthening institutional capacity at all levels and developing a thriving civil society including social

⁶⁶⁶ Gavás (n 644).

⁶⁶⁷ European Commission, ‘Increasing the impact of EU Development Policy: an Agenda for Change’ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 October 2011, COM(2011) 637 final.

⁶⁶⁸ Siân Herbert, ‘Reassessing aid to middle income countries: the implications of the European Commission’s policy of differentiation for developing countries’ (2012) Overseas Development Institute Working Paper 349, <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7710.pdf>>.

⁶⁶⁹ The countries excluded are: Argentina, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Kazakhstan, India, Indonesia, Iran, Malaysia, Maldives, Mexico, Panama, Peru, Thailand, Venezuela and Uruguay. Gavás (n 644), 5; European Parliament Research Service (n 665) 3.

⁶⁷⁰ European Parliament and Council Regulation (EU) 232/2014 establishing a European Neighbourhood Instrument [2014] OJ L77/27.

⁶⁷¹ The ENP countries are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, the Republic of Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine <http://epp.eurostat.ec.europa.eu/portal/page/portal/european_neighbourhood_policy/introduction>.

partners'.⁶⁷² This explicit focus on human rights and democracy was less pronounced in the regulation of the ENPI adopted in 2006.

The ENI further introduces significant changes in line with the 2011 review of the ENP⁶⁷³. The joint communication 'A new response to a changing neighbourhood', adopted by the Commission and the HR/VP on May 2011, outlined a new approach aimed at strengthening the partnership between the EU and its neighbours following the uprisings in certain North Africa countries.⁶⁷⁴ The new vision also intended to be implemented in accordance with the legal innovations introduced by the Lisbon Treaty. Concretely, Article 8 of the TEU, as introduced by this amendment treaty, provides a specific legal basis to the ENP for the first time. Before it came into force on 1 December 2009, the ENP had mainly been executed through soft-law instruments, such as action plans or association agendas. Article 8 of the TEU clearly lays down the objectives of the European policy and the binding mandate of EU commitment. Likewise, the second paragraph of this provision highlights the recourse to legally binding international instruments in establishing relationships with the neighbour partners: '[...] the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations, as well as the possibility of undertaking activities jointly. Their implementation shall be subject of periodic consultation'.⁶⁷⁵

The EU's new approach towards its neighbours stresses the need to ensure further differentiation in the bilateral relations, in line with the 'more for more' and 'mutual accountability' principles.⁶⁷⁶ The 'more for more' principle is to be based on the concrete performance of each partner.⁶⁷⁷ Financial incentives go, therefore, to the most ambitious reformers. Thus, the bilateral allocation to each partner is set as a range that may vary upwards or downwards according to the country's progress with a maximum variation of 20%. In addition, 10% of the ENI budget is reserved to partner countries demonstrating progress in advancing deep and sustainable democracy.⁶⁷⁸ While all ENP countries continue to be eligible for bilateral cooperation, the form and amount are now, more than before, contingent on the country's convergence towards the EU's political and economic model, its needs and capacities and the potential impact of EU

⁶⁷² Council of the European Union, (n 670) Art 2, 2 (a).

⁶⁷³ Stronger conditionality and the recognition of the important role that civil society can play in their own countries are some of the pillars of the new ENP. See Monika Arcipowska and Beata Wojna, 'European Neighbourhood Policy: how to reconcile EU's offer with neighbours expectations?' 2011 The Polish Institute of International Affairs Policy Paper 20/2011, <http://www.pism.pl/files/?id_plik=8998>; Jean- Pierre Cassarino and Nathalie Tocci, 'The European Union's Mediterranean policies after the Arab revolts: from crisis to a new order?' in Lorenzo Fioramonti (ed.), *Regions and crises: new challenges for contemporary regionalism* (Palgrave Macmillan 2012).

⁶⁷⁴ European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'A new response to a changing Neighbourhood' Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 25 May 2011, COM(2011) 303 final.

⁶⁷⁵ Peter Van Elsuwege and Roman Petrov, 'Article 8 TEU: towards a new generation of agreements with the neighbouring countries of the EU' (2011) 5 European Law Journal 688; Federico Casolari, 'The Janus-faced new European neighbourhood policy: normative (hard) power vs. the pragmatic (soft) approach' (2013) Istituto Affari Internazionali Documenti 13/08, <<http://www.iai.it/pdf/DocIAI/iai1308.pdf>>.

⁶⁷⁶ Commission and High Representative (n 674) 2-3.

⁶⁷⁷ It is also envisaged in the EU's 'Partnership for democracy and shared prosperity' it's Southern Mediterranean neighbours. See European Commission and High Representative of the European Union for Foreign Affairs and Security Policy 'A Partnership for democracy and shared prosperity with the Southern Mediterranean', Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 8 March 2011, COM (2011) 200 final.

⁶⁷⁸ Regulation (EU) 232/2014 (n 670) Art 7.2.

support. In a nutshell, differentiation under the new ENP and ENI is expected to be based more on political, rather than economic criteria.⁶⁷⁹

d) *The Partnership Instrument (PI)*

With respect to the Partnership Instrument (PI), this is a new financial instrument in the EU's external action, replacing in part the function of the Instrument for Cooperation with Industrialised and other high income countries and territories (ICI) 2007-2013.⁶⁸⁰ The PI financial envelope amounts to EUR 954 million for the period 2014-2020. Global reach is an essential feature of the PI, but it will focus in particular on countries with which the EU has a strategic interest to establish links. No specific countries are expressly named in the PI regulation, but it is mainly designed to become the key instrument for cooperation with both traditional partners and emerging global actors, including US, China, Brazil, South Africa, Russia⁶⁸¹ and India. It will also channel cooperation with countries which are no longer eligible under the DCI geographic programmes.⁶⁸²

Overall, the PI will intend to implement the international projection of the Europe 2020 Strategy by addressing global challenges, such as energy security, climate change and the environment. Likewise, it will also support the external dimension of EU internal policies, such as competitiveness, research and innovation. Finally, themes not covered by other geographic or thematic instruments will be covered by the PI. Thus, the promotion of trade, business and investment opportunities in third countries are specific aspects to address under the PI.⁶⁸³ It should be highlighted that, unlike the other funding instruments, the PI does not refer to strengthening human rights as a specific objective, although under its general principles it does refer to the EU's commitment to '*promote, develop and consolidate the principles of democracy, equality, respect for human rights and fundamental freedoms and the rule of law*' through '*dialogue and cooperation*'.⁶⁸⁴

e) *The European Instrument for Democracy and Human Rights (EIDHR)*

Together with the Instrument for Stability and Peace, the EIDHR is a horizontal instrument and a key tool in the EU's promotion of democracy and human rights at the global level. In 1994, the European Initiative on Democracy and Human Rights was established as a separate budget line within the EU budget. It was turned into a financial instrument in 1999 and the current EIDHR continues and builds on the EIDHR established for the period 2007-2013. With a total amount of EUR 1 332 million (in current prices) the EIDHR budget for 2014-2020 has been increased significantly. In its new regulation for the MFF 2014-

⁶⁷⁹ Partner countries have to demonstrate their commitment by agreeing an ENP action plan with the EU. At present, 12 of the 16 ENP countries are fully participating in the ENP through ENP action plans. Algeria, Belarus, Libya and Syria remain outside, not having agreed an action plan. European External Action Service (EEAS), ENP Action Plans' <http://eeas.europa.eu/enp/documents/action-plans/index_en.htm>.

⁶⁸⁰ European Parliament and Council Regulation (EU) 234/2014 establishing Partnership Instrument for cooperation with third countries [2014] OJ L77/77.

⁶⁸¹ Russia, as a neighbour country, remains eligible for multi-country programmes and cross-border-cooperation programmes under the ENI, while bilateral cooperation can be funded under the PI. Commission (n 641) 5.

⁶⁸² Camen-Cristina Cîrlig, 'EU financial instruments for external action' (2013) European Parliamentary Research Service, Briefing Paper <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130706/LDM_BRI%282013%29130706_REV1_EN.pdf>.

⁶⁸³ Council of the European Union, (n 680) Art 2.

⁶⁸⁴ Ibid., Art 3.

2020,⁶⁸⁵ EIDHR's objectives have been redefined more concretely, as stipulated in Article 2 and Annex to Regulation (EU) 235/2014. With respect to the protection of human rights, in particular, Article 2.1b of this Regulation stresses on the protection of human dignity (abolition of death penalty, eradication of torture and inhuman treatment), the protection of children's rights, including children in armed conflict, the protection of economic, social and cultural rights, actions to promote respect for international humanitarian law and the fighting against discrimination in all forms and against impunity.

The EIDHR's current priority objectives and strategy are both consistent with the core policy documents, especially the Agenda for Change⁶⁸⁶ and Europe's engagement with civil society in external relations.⁶⁸⁷ Although in terms of budgetary size EIDHR is not a large instrument, its special status should be highlighted as it focuses primarily on partnerships with non-state actors, and importantly, the various projects and programmes it funds do not require the partner government's permission. As such, it can be seen as the 'spearhead' of the Commission's support for human rights actors and democratic processes (see section 0). A key function is its funding of the EU's Election Observation Missions (EU EOMs), for which up to 25% of the 2014-2020 budget is earmarked. The majority of its funding is used for providing grants to a range of civil society actors. It should be noted that EIDHR does not provide direct funding for political parties and in principle does not fund NGOs or opposition groups that directly confront the governments of third countries.⁶⁸⁸ None the less, an emphasis on supporting human rights defenders is concretely indicated by Annex to Regulation (EU) 235/2014. In this regard, the new EIDHR will focus on the most problematic countries by providing grants for human rights defenders in urgent need of protection and direct grants in countries where calls for proposals are impossible. A new supporting tool, a comprehensive 'EU Human Rights Defenders Mechanism' has also been developed to enhance this dimension of EIDHR support.⁶⁸⁹

With a worldwide reach, the EIDHR is used to complement geographic instruments, such as Development (DCI and EDF, including the Pan-African Instrument and the African Peace Facility), Neighbourhood, Enlargement and Partnership. Its complementary character also extends to thematic programmes, mainly the Instrument for Stability, and the Civil Society Organisations and Local Authorities and Global Public Goods thematic programmes under the DCI.⁶⁹⁰ Thus, the EIDHR has funded projects such as campaigns against the use of the death penalty in US and Japan⁶⁹¹, or projects carried out by diaspora groups that stem from repressive countries.⁶⁹² Countries with a high concentration of EIDHR projects between 2007

⁶⁸⁵ European Parliament and Council Regulation (EU) 235/2014 establishing a financing instrument for democracy and human rights worldwide (2014) OJ L77/85.

⁶⁸⁶ European Commission (n 667).

⁶⁸⁷ European Commission (n 663).

⁶⁸⁸ European Commission, 'Concept Note for Multiannual Indicative Programme: EIDHR 2014-2020' (4 April 2013) <<http://www.eidhr.eu/files/dmfile/2013-12-02EIDHRdraftConceptNoteMIP.pdf>>.

⁶⁸⁹ This EIDHR Human Rights Defenders (HRDs) mechanism aims to increase the efficiency of assistance, to ensure synergies between long and short-term support, to improve operational management and to enhance the EU profile. European Commission, 'A strengthened comprehensive EU Human Rights Defenders Mechanism' (2013) <<https://www.york.ac.uk/media/cahr/documents/citiesasanctuaryworkshop/HRDs%20mechanism%20FORUM%202013.pdf>>.

⁶⁹⁰ Commission, 'Other sources of funding for democracy and human rights' <<http://www.eidhr.eu/side-panels/funding/other-sources-of-funding-for-democracy-and-human-rights>>.

⁶⁹¹ Commission, 'Delivering on the death penalty' (2013) 17-18 <<http://www.eidhr.eu/files/dmfile/EIDHRDeliveringonDeathPenalty.pdf>>.

⁶⁹² European Commission, (n 688).

and 2010 were Croatia, Bosnia-Herzegovina, Serbia, Kosovo, FYR Macedonia, Turkey, Georgia, Azerbaijan, Armenia, Russia, Israel, West Bank and Gaza Strip, Nepal, Venezuela, and DR Congo.⁶⁹³

f) *The Instrument contributing to Stability and Peace (IfSP)*

Renamed from its predecessor 'Instrument for Stability' (IfS), the IfSP is a key instrument of the EU to prevent and respond to crises and to ensure a stable environment. The primary aims of this financing instrument is to provide a quick response to a situation of crisis or emerging crisis, to prevent conflicts, to ensure capacity to build peace and to address global threats to peace and international security.⁶⁹⁴ Like the EIDHR, the IfSP operates worldwide. Its added value lies within its subsidiary character, since it enables the EU to tackle issues that cannot be otherwise addressed under development or other geographical instruments. Thus, the IfSP is not bound to eligibility criteria for ODA, which permits it to fund activities in all regions and countries, regardless of being developing, emerging, developed or candidate countries.⁶⁹⁵ In the new legal framework, the IfSP increases flexibility, for it extends the length of crisis response measures to a maximum of 30 months and enables a second Exceptional Assistance Measure in protracted conflicts of a duration of up to 18 months.⁶⁹⁶ The funding assigned to IfSP assistance for the period 2014-2020 is EUR 2 338 million.⁶⁹⁷

When the IfSP Regulation was first adopted in 2006⁶⁹⁸, the two key policy documents addressing respectively development and security were the European Consensus on Development⁶⁹⁹ and the European Security Strategy⁷⁰⁰. Both documents acknowledged the necessary link between security and development, that is, the understanding that there cannot be lasting peace without development and *vice versa*. As such, providing peace and security are considered the main objectives of the IfSP, and in this sense its activities do not fall squarely within the EU's development cooperation policy. While the IfSP can be used to fund military activities or cooperation programmes in non-ODA countries, its funding can also be used for cooperation activities which do fall within the ODA category. Specifically, it can fund 'measures to promote and defend respect for human rights and fundamental freedoms, democracy and the rule of law, and the related international instruments'.⁷⁰¹ The implementation of IfSP actions usually involve a wide range of bodies, including agencies of the UN, regional organisations, EU Member State bodies, NGOs and other civil society organisations. Involvement and coordination between Member States, Commission Services and EU Delegations remains a key element for the programming and implementation of IfSP

⁶⁹³ European Commission 'European Instrument for Democracy and Human Rights, Compendium of Projects 2007-2010', (2011), Directorate-General Development and Cooperation –EuropeAid, Brussels..

⁶⁹⁴ European Parliament and Council Regulation (EU) 230/2014 establishing an instrument contributing to stability and peace (2014) OJ L77/1.

⁶⁹⁵ European External Action Service (EEAS), 'Instrument for Stability. Thematic Strategy Annex Paper 2012-2013', 5 <http://eeas.europa.eu/ifs/docs/ifs_2012_13_strategy_en.pdf>.

⁶⁹⁶ In accordance with Article 7.2 of Regulation (EU) 230/2014, the duration of an exceptional Assistance Measure combined with the duration of the second one cannot exceed 36 months. Under the former IfSP the maximum duration of a Exceptional Assistance Measure was 18 months. The exceptional measures are geared to prevent, to mitigate or resolve crises when other external assistance instruments cannot be mobilised in timely or appropriate manner.

⁶⁹⁷ Council of the European Union (n 694) Art 13.

⁶⁹⁸ European Parliament and Council Regulation (EC) 1717/2006 establishing and Instrument for Stability (2006) OJ L327/1.

⁶⁹⁹ Council and the representatives of Member States, (n 703).

⁷⁰⁰ 'Report on the implementation of the European Security Strategy. Providing security in a changing world' (2008) S407/08 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf>.

⁷⁰¹ Regulation (EU) 230/2014 (n 694) Art. 3 (2)m.

actions. Concretely, the EU High Representative is responsible for overall political coordination of external assistance instruments, including the IfSP.⁷⁰² Likewise, in order to avoid duplication and overlapping of efforts, coordination with main donor partners and other international organisations, such as the UN, the World Bank, the Global Counter-Terrorism Forum or the G20, is considered crucial.

C. EU policies for Integrating Human Rights in Development Cooperation

The main goal of EU development policy remains ‘poverty elimination in the context of sustainable development’, as stated in the European Consensus on Development,⁷⁰³ and in Article 21.2d of the TEU and Article 208 of the TFEU.⁷⁰⁴ The 2011 ‘Agenda for Change’ further reiterated this primary objective, but also put renewed emphasis on the importance of human rights, democracy and good governance for effective development.⁷⁰⁵ This emphasis placed on human rights was not entirely new. Since the early 1990s, the EU has progressively elaborated a ‘normative and institutional architecture’ for addressing human rights in its development cooperation policy.⁷⁰⁶ This has taken form through the treaties, through partnership agreements with third countries, and through a significant number of European Commission Communications, Conclusions from the European Council (Council), and Resolutions from the European Parliament (EP).⁷⁰⁷ On the level of policy statements and formulation, the ‘development- human rights’ nexus has become firmly embedded in the EU’s framework. In this section a summarised chronological overview is presented of the major milestones in the EU’s policy framework for integrating human rights in development cooperation (see also timeline in ANNEX I).

1. Early EU Policy on Human Rights and Development Cooperation (1991-2010)

In 1991, the Commission’s *communication on ‘Human Rights. Democracy and Development Cooperation Policy’* put forward a coherent approach to addressing human rights in development. The Commission articulated that it will engage in the ‘active promotion of human rights’ or undertake ‘a negative response to serious and systematic violations’.⁷⁰⁸ The adoption of the Maastricht Treaty - of which article 177 specifically stipulated that EU development cooperation ‘shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms’ – provided a strong momentum for the further elaboration of policies. Four years later, the Commission provided an overview on policy developments and identified further challenges in a communication entitled ‘The European Union and the External Dimension of Human Rights Policy: from

⁷⁰² Council of the European Union (n 625).

⁷⁰³ Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, ‘The European Consensus on Development’ [2006] OJ C 46/01.

⁷⁰⁴ Concretely, Article 21.2d of the TEU identifies as an objective of the EU external action to ‘Foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’. On its side, Article 208.1 of the TFEU states that the primary goal of the EU development cooperation policy will be ‘the reduction and, in the long term, the eradication of poverty’.

⁷⁰⁵ European Commission (n 667).

⁷⁰⁶ Thematic evaluation of the European Commission (n 19) Vol I, 12.

⁷⁰⁷ Ibid.

⁷⁰⁸ Commission of the European Communities, ‘Human rights, democracy and development cooperation policy’, Commission communication to the Council and Parliament, 25 March 1991, SEC(91)61 final, 6.

Rome to Maastricht and Beyond'.⁷⁰⁹ In this period, the notion of 'active promotion' was primarily consolidated in the establishment of the European Initiative for Democracy and Human Rights in 1994 (see section B.2.e)). The Commission's 'Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries' adopted in 1995 foresaw the systematic inclusion of human rights clauses in partnership agreements (see section III.C.2.b) above and annex I). The human rights clauses are considered an important starting point for the elaboration of development policies, as it makes human rights 'the subject of common interest' thereby⁷¹⁰ providing 'an instrument for the implementation of positive measures' while also enabling the EU 'to take restrictive measures in proportion to the gravity of the offence'.⁷¹¹ Given the particular relevance of these measures for the EU's relationship with African countries, the Commission subsequently issued a communication on how to address 'democratisation, the rule of law, respect for human rights and good governance' with respect to ACP States.⁷¹²

The notion that human rights should be seen as a cross-cutting issue, to be mainstreamed throughout the development policy, emerged as a new policy priority around 2000 (see section II.C.2). In a joint Statement on the 'European Community's Development Policy', the Council and the Commission identified human rights, equality between women and men, children's rights, (as well as the protection of the environment) as horizontal issues to be incorporated in all aspects of development cooperation.⁷¹³ The succeeding communication on 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' signalled a renewed effort for a more coherent and consistent inclusion of human rights as a cornerstone of relationships with third countries.⁷¹⁴ The communication broke new ground by calling for a mainstreaming policy on human rights and democratisation in all assistance programmes. The notion that human rights are a cross-cutting issue was also taken up in the European Consensus on Development. The Consensus reiterates that progress in the protection of human rights, good governance and democratisation is fundamental for poverty reduction and sustainable development,⁷¹⁵ and identifies it as a priority area for the European Community.⁷¹⁶ It also calls for a strengthened approach to mainstreaming 'democracy, good governance and human rights'.⁷¹⁷

The above-mentioned policies laid the foundation for integrating human rights in development through three strategies further discussed below: accounting for human rights in aid allocation, providing support

⁷⁰⁹ European Commission, 'The European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond' Communication from the Commission to the Council and the European Parliament, 22 October 1995, COM(95)567.

⁷¹⁰ European Commission (n 24) 7.

⁷¹¹ Ibid.

⁷¹² European Commission, 'Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States' Communication from the Commission to the Council and the European Parliament, 12 March 1998, COM(1998)146 final.

⁷¹³ The European Community's development policy. Statement by the Council and the Commission. Luxembourg: Office for Official Publications of the European Communities, 10 November 2000.

⁷¹⁴ European Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries', Communication from the Commission to the Council and the European Parliament, 8 May 2001, COM(2001)252 final, 5.

⁷¹⁵ Joint statement by the Council and the representatives of the governments of the Member States (n 703).

⁷¹⁶ Ibid.

⁷¹⁷ Ibid., C46/15-16.

for actors and processes engaged in human rights and democratisation, and mainstreaming human rights as a cross-cutting issue within all cooperation programmes.

2. Recent EU policy for integrating human rights in development cooperation

Since the adoption of the Lisbon Treaty (see section II.A), several new policy measures and commitments have elevated the role of human rights in the EU's external action, in particular in the field of development cooperation. The Commission adopted its 'Agenda for Change' in 2011 after a consultation process with Member States and other stakeholders on inclusive growth and sustainable development. The communication sets out a broad vision on development which aims to reflect new realities, such as the emergence of new donors and new fragile states, as well as the changes brought forth under the Arab Spring. While the Agenda for Change addresses measures to increase the effectiveness of the EU's development cooperation, it also highlights that human rights, democracy and other key elements of good governance are essential for such progress, and should feature more prominently in all EU partnerships.⁷¹⁸ The corresponding Council Conclusions reiterate that the 'promotion of human rights, democracy, the rule of law and good governance' on the one hand, and 'inclusive and sustainable growth' on the other, are 'two basic pillars' of development policy which are 'mutually reinforcing'.⁷¹⁹ A key policy implication of the Agenda for Change is its reform of 'budget support' (see section 5.b)).

At the same time, the Commission and the High-Representative for Foreign Affairs and Security Policy, elevated the priority status of human rights throughout all dimensions of the EU's external action.⁷²⁰ With regards to development cooperation, a new impulse for consistent mainstreaming of human rights in the programming process was given by introducing the 'human rights country strategies' (see section II.C.2), and highlighting the need for adopting a 'Human Rights Based Approach' (see section 7).⁷²¹ This new drive was consolidated in the EU Strategic Framework and Action Plan in 2012.⁷²² The Framework states that *'in the area of development cooperation, a human rights based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations'*. The Action Plan, spells out concrete measures to this end and allocates responsibilities to different EU actors.⁷²³

(a) 'Develop a toolbox for working towards a rights based approach to development cooperation, with the aim of integrating human rights principles into EU operational activities for development, covering arrangements both at HQ and in the field for the synchronisation of human rights and development cooperation activities.' To be undertaken by the Commission, EEAS, and Member States.

⁷¹⁸ European Commission (n 667).

⁷¹⁹ Council of the European Union 'Council conclusions 'Increasing the Impact of EU Development Policy: an Agenda for Change', 14 May 2012, 2.

⁷²⁰ European Commission and High Representative of the European Union for Foreign Affairs and Security Policy (n 9).

⁷²¹ Ibid.,11.

⁷²² Council of the European Union (n 10).

⁷²³ In the Action Plan it is underlined that its allocation of responsibilities does not affect the division of competences between the EU and its Member States (Council of the European Union, 2012a). While the Action Plan does not present any legal obligations towards Member States and their development policies, it embodies a sustained effort towards greater coherence and harmonisation between the EU institutions and Member States.

(b) 'Include the assessment of human rights as an overarching element in the deployment of EU country aid modalities, in particular regarding budget support.' To be undertaken by the Commission, and EEAS.

(c) 'Integrate human rights issues in the EU advocacy on the global development agenda and other global issues, in particular the process post the Millennium Development Goals.' To be undertaken by the Commission, EEAS, and Member States.

The elaboration of a 'rights-based approach' can be seen as the most recent and most comprehensive effort to further integrate human rights in EU development policy, and it has been hailed as one of the key achievements of the Strategic Framework and Action Plan.⁷²⁴ The various new policies launched under the Strategic Framework and Action Plan to achieve these three action points are further discussed below. The elaboration of a 'human rights-based approach toolbox' was completed in 2014 (see section 7.b)).⁷²⁵ Forging a stronger link between human rights assessments and the choice of aid modalities is a key element in the reform of the EU's budget support policy (see section 5.b)).⁷²⁶ The integration of human rights in EU advocacy on the global development agenda is an ongoing effort as the post-2015 consultations and negotiations progress (see section A.1). Before providing a more in-depth view of these policies, the section below briefly addresses how EU Member States have adopted similar policy framework for integrating human rights.

3. EU-wide Coherence for Integrating Human Rights in Development Cooperation

While it is difficult to find a development actor which contests the notion that human rights are to be integrated in development processes, the degree to which different actors have invested in the 'development-human rights nexus' varies significantly. This is evident on a global scale but also within Europe, where discrepancies can be seen between the policies of EU institutions and Member States as well as among Member States. While several Member States put human rights at the forefront of their development policy, others have not done so, and seem less committed to integrating human rights. While no systematic comparative studies have been undertaken yet, several 'Nordic countries' such as Sweden and Denmark, are generally considered to be forerunners. Concretely, these differences appear most clearly regarding aid conditionality, whereby certain MS apply stricter selectivity or are more willing to suspend cooperation in case of human rights violations. Differences among MS in their commitments to provide direct support for human rights actors and processes, and in the elaboration of mainstreaming policies or HRBAs are also evident. Not surprisingly, the questions of coherence, coordination and harmonisation have gained prominence on the EU's development agenda. The 2006 'European Consensus on Development Cooperation' was a milestone in this regard. As referred to above, it stated that 'the

⁷²⁴ Interview with EU official, 16 April 2014.

⁷²⁵ European Commission, 'Tool-Box: A Rights-Based Approach, Encompassing All Human Rights For EU Development Cooperation', Commission Staff Working Document, 30 April 2014, SWD(2014) 152; Council of the European Union 'Council conclusions on a rights-based approach to development cooperation encompassing all human rights', 19 May 2014.

⁷²⁶ European Commission, 'The Future Approach to EU Budget Support to Third Countries', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 October 2011, COM(2011) 638/2; Council of the European Union, 'Council conclusions 'The Future Approach to EU Budget Support to Third Countries'', 14 May 2012.

protection of human rights’ as well as ‘good governance and democratisation’ are essential components of sustainable development.⁷²⁷

The EU Strategic Framework and Action Plan provided a new push for fostering greater coherence on human rights and democracy in development cooperation. While the Action Plan clearly notes that it does not change the division of competence between the EU and its Member States, the Member States are also assigned responsibilities. With regards to the actions falling under outcome ‘Working towards a rights based approach in development cooperation’, Member States are expected to cooperate with the Commission and the EEAS in developing a rights-based approach ‘toolbox’ (see section 7.b)), although it is not specified if the MS should apply this toolbox themselves or adopt a similar human rights-based approaches to planning and designing their development initiatives. Member States are also expected to be involved in the elaboration and implementation of the human rights country strategies drafted by EU delegations.⁷²⁸ In a similar vein, together with the Commission and the EEAS, the MS are to come to a ‘genuine partnership with civil society, including at the local level’ and therefore EU members state’ country missions should ‘work closely with human rights NGOs’.⁷²⁹

Interestingly, with regards to the question of aid allocation, the MS do not have a responsibility to ‘include the assessment of human rights as an overarching element in the deployment of EU country aid modalities’. None the less, in endorsing the Commission’s new budget support policy (see section x.x.) the Council has emphasised the need for an ‘EU coordinated approach to budget support’ whereby Member States and the EU share country assessments, systematically exchange information and expertise, and where possible, ‘work within joint budget support frameworks’.⁷³⁰ Accordingly, when the human rights situation would deteriorate within a partner country, the ‘EU and its Member States will aim at a coordinated response’.⁷³¹ Instrumental for such a coordinated response would be the identification of criteria for applying the human rights clause, which is included as one of the actions to be undertaken jointly by the EEAS, Commission and the MS in the EU Action Plan.⁷³² At the time of writing, it is not clear whether such criteria have been agreed upon. Lastly, the MS are also expected to ensure the integration of human rights issues in EU advocacy for a post-2015 agenda (see section B.1). In the upcoming formal negotiations at the UNGA it will become clear whether a unified EU position will be put forward, and to what degree this will cover the human rights dimension.

The above-mentioned developments reflect a strong aspiration for greater EU-wide coherence, harmonisation and coordination on integrating human rights in development policy. It remains an open question to what extent the latest efforts have crystallised into concrete coordinated action towards third countries. The remainder of this study will focus primarily on the development policy implemented by the

⁷²⁷ Ibid.

⁷²⁸ Council of the European Union (n 10) Outcome 31, actions (a), (b), and (c)

⁷²⁹ Ibid., outcome 2, actions (a), (b)

⁷³⁰ Council of the European Union (n 726) 4.

⁷³¹ Ibid., 2.

⁷³² Council of the European Union (n 10) outcome 33, action (b).

Commission, but it should be clear that the interplay between the Member States and EU institutions is crucial in understanding how policies are shaped and implemented.

4. The EU position on Human Rights in the Global Development Agenda

As highlighted above (see section A.3) the question of how a new global development framework can include or integrate human rights and interrelated concepts such as democratic governance, rule of law and access to justice, has been subject to debate. This section provides a concise overview of the EU's contributions to this debate, and how they address human rights as part of the post-2015 agenda, with particular emphasis on the Commission's latest communications.

As a first step towards an 'EU vision' on the post-2015 agenda, a public consultation 'Towards a Post-2015 Development Framework' was organised by the Commission in which 119 organisations and individuals from public authorities, civil society, the private sector and academia contributed.⁷³³ The consultation report indicated that greater attention for human rights and non-discrimination, as well as the notion of a 'human rights-based approach' were among the key issues identified by stakeholders.⁷³⁴ The 2013 European Development Report, an annual publication by several prominent research institutions which is sponsored by the Commission and Member States, added various insights on the position of human rights within a new global framework.⁷³⁵ By organising and sponsoring consultations and research, the EU has sought to foster a platform for dialogue within the European development community. In terms of concrete proposals, the EU Commissioner for Development Mr. Piebalgs was selected by the UN Secretary-General to participate in the 'High-Level Panel of eminent persons on the Post-2015 Development Agenda'. As such, the EU was able to contribute to what is considered the first influential proposal, the final report of the high-level panel. While the degree to which human rights are an integral part of this proposal can be debated, it did address issues of participation and accountability and explicitly refers to several human rights.⁷³⁶

In February 2013, the Commission issued its first communication presenting a vision on the post-2015 agenda, whereby it noted that issues relating to human rights, democracy and the rule of law should be included.⁷³⁷ The corresponding Council conclusions called for a future framework which ensures 'a rights-based approach encompassing all human rights', emphasising in particular the empowerment and rights of women and girls.⁷³⁸ Building on these first perspectives, the Commission set out a more concrete and detailed proposal in June 2014 with its communication 'A decent life for all: from vision to collective

⁷³³ The various contributions can be found on the website of the Commission, available online <http://ec.europa.eu/europeaid/how/public-consultations/towards_post-2015-development-framework_en.htm>.

⁷³⁴ IBF International Consulting, 'Final Report on the Consultation Process: Towards A Post - 2015 Development Framework', (November 2012).

⁷³⁵ European Centre for Development Policy Management (ECDPM), Overseas Development Institute (ODI), and German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE), (n 735).

⁷³⁶ See above (n 607).

⁷³⁷ European Commission, 'A Decent Life for All: Ending Poverty and Giving the World a Sustainable Future' Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 27 February 2013, COM(2013) 92 final.

⁷³⁸ Council of the European Union, 'Council conclusions on the Overarching Post 2015 Agenda', 25 June 2013.

action'.⁷³⁹ The need for a 'rights-based and people-centred' framework is underlined.⁷⁴⁰ More specifically the proposal sets out a total of 17 priority areas composed of 77 potential targets.⁷⁴¹ The priority areas include the 'traditional' development sectors (eg. food security, health and education, biodiversity, etc.), as well as a specific goal on 'human rights, the rule of law, good governance and effective institutions'. This broad 'human rights goal' is understood as making progress on 'a rights based-approach' which will 'decisively contribute to the improvement of the quality of governance, to reducing inequality and exclusion and realizing the envisaged targets and actions of this agenda through participation, transparency and accountability.' The Commission suggests six potential targets under this goal:

- Ensure free and universal civil registration and improve vital statistics systems
- Ensure freedom of expression, association, social dialogue, peaceful protest, meaningful public participation
- Ensure transparency and guarantee the public's right of access to information, government data, independent media and the open internet.
- Adoption of the appropriate legal framework to protect the human rights of the most vulnerable groups and individuals, including refugees and internally displaced persons.
- Ensure the adoption and implementation of an appropriate legal framework and national policies to reduce corruption
- Ensure justice institutions are accessible, impartial, independent and respect due process rights.⁷⁴²

In an annex to the communication, the Commission also provides examples of possible indicators for measuring compliance with these targets. Apart from a 'self-standing' goal, the Commission's proposal also 'mainstreams' human rights explicitly and implicitly in the several other goals. The goals on 'Inequality' and 'Gender equality and women's empowerment' explicitly seek to tackle discrimination and ensure equal rights and opportunities for minorities or disadvantaged groups. The proposed goals on 'Health' and 'employment and decent work' can also be considered to be at least partially rights-based.⁷⁴³ While the Commission's proposal does seek to address human rights, civil society actors argue that it falls short of adopting a fully-fledged human rights-based approach, and it provides little concrete proposals to ensure participation in decision-making and includes few proposals focusing on excluded groups.⁷⁴⁴ It is also argued that the fact that several of the proposed goals do not aim for a zero-level reduction reflects an implicit acceptance that certain people will not benefit, thus condoning a degree of discrimination and

⁷³⁹ European Commission (n 393).

⁷⁴⁰ Ibid, 3.

⁷⁴¹ Ibid., these 17 priority areas are (i) poverty; (ii) inequality; (iii) food security and nutrition and sustainable agriculture; (iv) health; (v) education; (vi) gender equality and women's empowerment; (vii) water and sanitation; (viii) sustainable energy; (ix) full and productive employment and decent work for all; (x) inclusive and sustainable growth; (xi) sustainable cities and human settlements; (xii) sustainable consumption and production; (xiii) oceans and seas; (xiv) biodiversity and forests; (xv) land degradation, including desertification and drought; (xvi) human rights, the rule of law, good governance and effective institutions; and (xvii) peaceful societies.

⁷⁴² Ibid., 10-11.

⁷⁴³ In the area of health, reference is made to the respect for universal sexual and reproductive health and rights. In the area of employment emphasis is put on the rights of migrant workers.

⁷⁴⁴ CONCORD, 'reaction to EC Communication on "A Decent life for all: from vision to collective action"' Press Release, 14 June 2014. <<http://www.concordeurope.org/publications/item/331-concord-reaction-to-ec-communication-on-a-decent-life-for-all-from-vision-to-collective-action>>.

inequality.⁷⁴⁵ The Commission's proposal can also be criticised from an effectiveness perspective. As the latest communication to be issued before the start of the formal negotiations, the Commission refers to it as a flexible document which refines the approach of the EU and its Member States but allows the space to respond to 'future developments in international discussions'.⁷⁴⁶ To what extent this EU vision on human rights and development will shape the negotiations on a new framework will become clear after September 2014, at which point formal negotiations at the UNGA commence.

5. Aid allocation, Budget Support and Human Rights

The EU applies various ways of conditioning the provision of EU development funding on human rights performance. This section emphasises particularly the conditionality mechanisms under the Cotonou Agreement which encompasses the EU's partnership with ACP countries and regulates the use of the European Development Fund. Secondly, the Commission's budget support policy, and the role of human rights in determining how the EU provides its assistance within a country, is briefly discussed.

a) Conditionality under the Cotonou Agreement

As addressed in section III.C.2.b) and presented in the annex to this report, since 1995 the EU has sought so systematically include a clause instating human rights as 'essential elements' of all of its partnership agreements with third countries. These provide the legal framework for applying human rights conditionality to both the EU's trade and its development assistance. However, it is only as part of the political agreements regulating the EU's relationships with the African, Caribbean and Pacific (ACP) countries in which procedures have been elaborated to manage violations of the 'essential elements' clause. The Cotonou Agreement currently provides the framework for cooperation between the EU and 78 ACP countries and regulates the use of the EDF (see section B.2.a)). It is only in relation to a number of ACP countries that the EU has invoked the human rights clause to suspend its development cooperation.⁷⁴⁷ As noted above, this conditionality also relates to the EU's trade relations with ACP countries agreed upon in separate 'EPA' agreements (see section III.C.2).

The origins of the EU's introduction of human rights clauses can be traced back to the drafting of the 1977 Uganda Guidelines, which formalised the EU's suspension of cooperation with Uganda after massive human rights violations.⁷⁴⁸ As indicated above, in 2003, the Cotonou Agreement introduced a 'state of the art' version of the essential elements clause which set out a 'new procedure' to address violations of the essential elements. This included in first instance, the possibility of launching a 'consultation process' with the third country concerned, in accordance with article 96 of the Agreement. The Agreement provides a means of applying negative conditionality, although suspending development cooperation is a measure of last resort. Whereas the principle of consultations is a 'relevant feature of all non-execution clauses' in the case of the Cotonou Agreement 'it is made the central element of the procedure'.⁷⁴⁹ Accordingly, the

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid., 2.

⁷⁴⁷ Lorand Bartels, 'Human Rights and Democracy Clauses in the EU's International Agreements' European Parliament, Subcommittee on Human Rights, DGExPo/B/PolDep/Study/2005/06, 2005, 36.

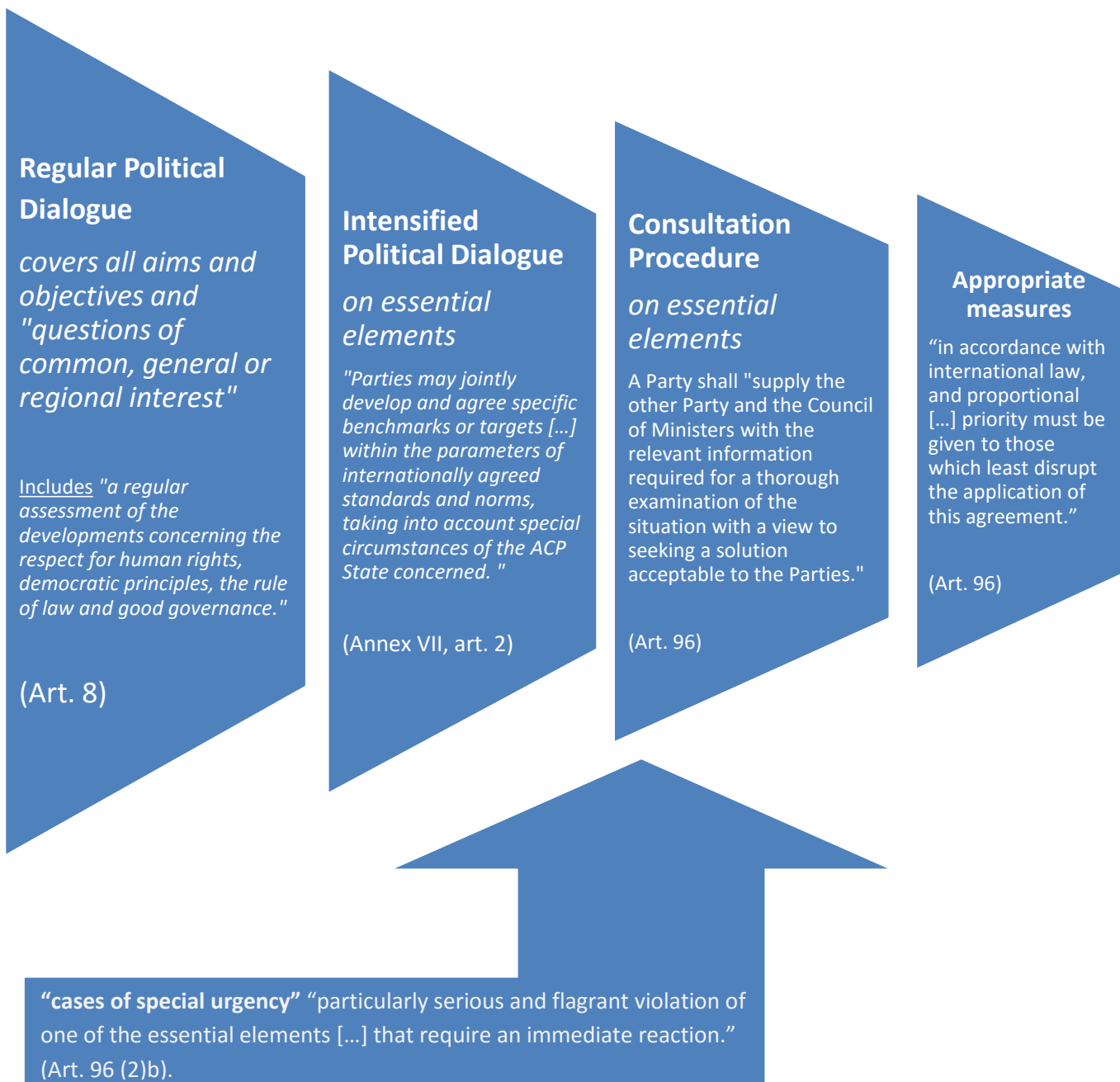
⁷⁴⁸ Ibid., 25.

⁷⁴⁹ Elena Fierro, *The EU's approach to Human Rights Conditionality in Practice* (Martinus Nijhof, 2003), 315.

Cotonou Framework is often described as primarily providing a forum for dialogue to address a broad variety of issues, including human rights, democratic principles and the rule of law.

Figure 2 presents these different levels of dialogue which the current Cotonou Framework (including the 2005 and 2010 revision) aims to address matters related to human rights, democratic principles or the rule of law.

Figure 2: Levels of dialogue for addressing Human Rights within the Cotonou Agreement



Only after a multi-staged dialogue process has not led to a satisfactory outcome to amend a violation of the essential elements, can the application of 'appropriate measures' be considered. The 2005 revision of

the Cotonou Agreement added a new ‘intermediary’ step of ‘intensified political dialogue’. This new stage of dialogue was introduced in order to provide a more constructive dialogue on the essential clauses, before the activation of the ‘punitive’ consultation procedure under Article 96.⁷⁵⁰ Unlike the consultation procedure, which is to be conducted ‘in the form most appropriate’ to find a solution, the ‘intensified political dialogue’ is expected to be ‘systematic and formal’ with the aim to ‘exhaust all possible options prior to consultations’.⁷⁵¹ In particularly urgent cases regarding the violation of the essential clauses, Article 96 may still be invoked immediately.⁷⁵² Under the ACP agreement the EU has invoked the ‘essential elements clause’ to initiate a consultation procedure on 23 occasions since 1996, with certain countries being consulted more than once. Table 6 presents a chronological overview of the activation of the consultation procedure between 1996 and 2012.

Table 6: Consultations under the ‘essential elements’ clause, by country and reason for triggering, 1996-2012⁷⁵³

Year, Country	Coup d’état	Flawed Elections	Human Rights	Rule of Law
2011 Guinea-Bissau			X	X
2010 Niger	X			
2009 Niger		X		
2009 Madagascar	X			
2009 Guinea	X			
2008 Mauritania	X			
2007 Fiji	X			
2005 Mauritania	X			
2004 Guinea		X		
2004 Togo		X	X	
2003 Guinea-Bissau	X			
2003 Central African Republic	X			
2001 Zimbabwe		X	X	X
2001 Liberia		X	X	X
2001 Côte d’Ivoire		X		
2000 Fiji	X			
2000 Haiti		X		
2000 Côte d’Ivoire	X			
1999 Guinea-Bissau	X			
1999 Comoros	X			
1999 Niger	X			
1998 Togo		X		
1996 Niger	X			

A key observation here is that the consultation procedure and the potential application of conditionality are primarily considered in the case of a coup d’état or a flawed election process. In general, Article 96

⁷⁵⁰ Jean Bossuyt, Camilla Rocca, Bregt Lein, ‘Political dialogue on human rights under article 8 of the Cotonou Agreement’ (2014) Directorate-General for External Policies of the Union, EXPO/B/DEVE/2013/31, 11.

⁷⁵¹ Cotonou Agreement (n 456) Art. 96(a); ANNEX VII, Art. 2(3)

⁷⁵² Ibid., Art. 96(2)b

⁷⁵³ Reproduced from Johanne Døhlle Saltnes, (n 496). Table is composed of cases whereby the consultation procedure was activated under Article 366a of the Lomé-agreement and Article 96 and 97 of the Cotonou-agreement.

consultations are always initiated in response to a confluence of political, security and human rights concerns, and individual, self-standing human rights violations do not lead to the activation of the procedure. In both the consultation procedure and the regular dialogue on human rights, there is a strong focus on political rights and less attention paid to social and economic rights.⁷⁵⁴ Although a thorough analysis of the application of the human rights clause under the ACP falls outside the scope of this report, several authors have criticised the manner in which human rights concerns are addressed. To some, the changes represented by the Cotonou Agreement reflect how the EU-ACP relationship has changed from one of cooperation to one of coercion, and notions of 'partnership' and 'ownership' of development strategies are undermined by the agreement's conditionality mechanism.⁷⁵⁵ Moreover, the essential elements are poorly defined, and the EU's preference to narrowly focus on electoral processes thus ignores 'genuine democratisation' within ACP countries.⁷⁵⁶ A number of studies highlight the significant inconsistencies of the evocation of the human rights clause, whereby the EU's commercial and security interests are highlighted as some of the factors which determine whether or not aid suspensions take place.⁷⁵⁷ Other authors note that the selective use of conditionality is explained by strategic considerations, as the human rights clause is only evoked when the EU can influence 'the leadership responsible for the breaches'.⁷⁵⁸ In this sense, the selective use of the consultation procedure to resolve political crises - such as coup d'états – has been considered to be 'relatively effective', whereas the ACP framework has been less effective in addressing long-term political instability.⁷⁵⁹

b) Reform of Budget support policy

The use of budget support as an aid modality has been championed by the EU from its inception as a more effective way of providing assistance. Heralded one of the most efficient modalities of aid delivery, the Commission stressed that as much as 25% of all its ODA commitments between 2003 and 2009 were provided as budget support.⁷⁶⁰ However, various factors, including questions surrounding the impact of budget support on human rights and democratic governance, have led to a 'rethinking' of its use across the EU.⁷⁶¹ The Commission initiated a round of consultations with the Member States and subsequently set out its 'Future Approach to EU Budget Support to Third Countries' in 2011.⁷⁶² With this reform, the Commission indicates a shift from its original 'technocratic' stance towards an approach wherein

⁷⁵⁴ Bossuyt, Rocca, Lein (n 750) 28.

⁷⁵⁵ Hurt (n 511) 163.

⁷⁵⁶ Ibid. 171.

⁷⁵⁷ Katarina Tomaševski, *Between sanctions and elections : aid donors and their human rights performance* (Pinter Books, 1997); Gordon Crawford, 'Foreign Aid and Political Conditionality: Issues of Effectiveness and Consistency' [1997] 4(3) *Democratization*; Karen del Biondo, 'EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice' [2011] 7(3) *Journal of Contemporary European Research*.

⁷⁵⁸ Clara Portela 'Aid suspensions as coercive tools? The European Union's experience in the African-Caribbean-Pacific (ACP) context' [2007] 3(2) *Review of European and Russian Affairs*, 42.

⁷⁵⁹ Clara Portela, and Lydie Mbang-Kiala, 'Political Dialogue and Human Rights In the Framework of The Cotonou Agreement' (2007) Briefing Paper, European Parliament's Subcommittee on Human Rights, 3.

⁷⁶⁰ See European Commission, 'Green Paper – The future of EU budget support to third countries' Green Paper from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 19 October, COM(2010) 586 final, 2.

⁷⁶¹ For an overview of the different factors which influenced this reform, see OECD-DAC (n 85) 81.

⁷⁶² European Commission, (n 726); Council of the European Union (n 726).

democratic governance and human rights feature more prominently along with the objectives of poverty reduction and growth.⁷⁶³

The policy foresees a differentiation of budget support operations designed to allow the EU to respond better to the political, economic and social context of a partner country. To this end, three types of budget support ‘contracts’ are developed. ‘Good Governance and Development Contracts’, or general budget support can be provided where the Commission has ‘trust and confidence’ that funds will be spent pursuant to human rights.⁷⁶⁴ This implies that the government in question will need to pass a political risk assessment as a pre-requisite for receiving general budget support. “Sector Reform Contracts”, or sector budget support, provide public service delivery in sectors such as education or health. Here, human rights and political governance are to be taken into account but should be balanced against ‘the need to serve and protect the population’.⁷⁶⁵ A political risk assessment is not a prerequisite but has to be carried out at the identification stage.⁷⁶⁶ Finally, the Commission can use State Building Contracts in fragile or conflict situations whereby human rights are to be considered “*inter alia*” while taking into account the overall political and security situation.⁷⁶⁷ A political risk assessment is undertaken at the identification stage and should provide a ‘forward looking’ assessment of the political situation.⁷⁶⁸

Adequate monitoring of a partner governments’ performance and track record should inform the EU’s policy and might require a shift in contracts used.⁷⁶⁹ A ‘gradual and responsible’ reaction is foreseen via ‘enhanced dialogue’, the delay of disbursements, reallocation of fund for general budget support to other aid delivery modalities, or a reduction of general budget support. As a measure of last resort, suspension of general budget support can be considered. The decision on whether a country fulfils the conditions for the above-mentioned budget support contracts lies with the Director-General of DG-DEVCO in consultation with the newly established Budget Support Steering Committee.⁷⁷⁰ This Budget Support Steering Committee is composed of representatives of DG DEVCO, the European External Action Service (EEAS) and the Directorate General for Economic and Financial Affairs. A ‘tailor-made and dynamic approach’ is used to determine eligibility for budget support,⁷⁷¹ which implies that no clear and specific benchmarks or indicators in terms of human rights compliance are identified. This differs notably from other conditionality frameworks that the EU applies, such as the GSP+ scheme which does identify a number of a human rights instruments which a country must ratify (see section 0). At the same time, development experts indicate stricter conditionality on budget support will not necessarily have an impact on a partner governments’ compliance as long as there is no coherent response among donors within a

⁷⁶³ Jörg Faust, Svea Koch, Nadia Molenaers, Heidi Tavakoli, Jan Vanheukelom ‘The future of EU budget support: political conditions, differentiation and coordination’ (2012), European Think Tanks Group.

⁷⁶⁴ European Commission (n 726) 4.

⁷⁶⁵ European Commission ‘Budget Support Guidelines: Part II: Programming, Design and Management of Budget Support’, (2012), 16.

⁷⁶⁶ *Ibid.*, 44.

⁷⁶⁷ *Ibid.*, 5.

⁷⁶⁸ Interview with EU official, Brussels, 24 April 2014.

⁷⁶⁹ European Commission (n 765) 16.

⁷⁷⁰ *Ibid.*, 18.

⁷⁷¹ Council of the European Union (n 726) 2.

given country.⁷⁷² The divergence in conditionality policies among donors is well documented,⁷⁷³ and both the Commission and the Council stress that greater EU wide coherence is required, for example by starting with carrying out joint risk assessments.⁷⁷⁴

6. Direct Support for Human Rights, Democracy, Rule of Law and Governance

The EU institutions fund a large number of projects and programmes which specifically aim to promote human rights and democratic governance in partner countries. As described in section A.3, the ‘human rights and democracy’ sector covers a broad variety of initiatives, and it is difficult to clearly demarcate ‘human rights’ programming from ‘democracy’, or the even broader ‘governance’, programming. Support activities in this area became a visible dimension of the Commission’s policy in the early nineties, and gained a consolidated place with the establishment of the EIDHR, although today various financial instruments can fund actors and processes engaged in human rights or democratic governance. The EU’s ‘human rights and democracy’ support has expanded and undergone systemic changes over the past decades, not all of which are discussed in this report. This section first describes how ‘human rights and democracy’ are now a ‘standard’ area of EU support in all countries. It further outlines several features of EU support: the size and scope of the EU’s direct support, the geographic and thematic spread of this type of support and the type of actors involved.

a) Human Rights in Country-Level Development Planning

Since 2001, the Commission has sought to ‘mainstream’ human rights in country-level development planning. Despite these commitments, an evaluation of the Commission’s Human Rights support between 2000 and 2010 reported a ‘difficult integration of human rights considerations in programming processes’.⁷⁷⁵ While EU Delegations generally undertook adequate analysis of the human rights and governance situation within a country, this was not necessarily backed up with actively providing support for human rights actors or democratic processes. Strategy papers often lacked ‘a strategic, forward-looking perspective that could guide programming processes’.⁷⁷⁶ Various observers have criticised the EU’s weak efforts on promoting or supporting human rights actors at the country level. It has been argued that the EU focuses primarily on state-centric governance reforms in its cooperation, but it is not willing to risk destabilising partner governments by supporting human rights advocates or democratic reformers.⁷⁷⁷

The rise of popular protests as part of the Arab Spring movement, which coincided with the ‘Lisbon Momentum’, have been considered a ‘wake-up’ call for the EU’s cooperation policies and its support for

⁷⁷² Faust, et al. (n 763).

⁷⁷³ Nadia Molenaers, ‘The Great Divide? Donor perceptions of budget support, eligibility and policy dialogue’ [2012] 33(5) Third World Quarterly.

⁷⁷⁴ European Commission (n 726) 7; Council of the European Union (n 726) 3.

⁷⁷⁵ Thematic evaluation of the European Commission (n 19) Vol I, 21.

⁷⁷⁶ Ibid. The Commission’s Country Strategy Papers for the ACP region were considered to address human rights more comprehensively, including by adding annexes addressing the country’s human right situation in more detail.

⁷⁷⁷ This question emerges consistently in the literature on the EU’s democracy promotion efforts, in which development cooperation is one tool. See for example, Vera Van Hüllen, ‘Europeanisation through Cooperation? EU Democracy Promotion in Morocco and Tunisia, [2012] 35(1) West European Politics; Thomas Risse, ‘Conclusions: Towards Transatlantic Democracy Promotion?’ in Amichai Magen, Thomas Risse, Michael A. McFaul (eds.), *Promoting Democracy and the Rule of Law. American and European Strategies*, (Palgrave, Basingstoke, 2009) .

human rights and democracy. In 2011, the Commission and the HRFSP flagged the need to overhaul the ‘delivery mechanisms, processes and structures’ of the EU’s policy on human rights and democracy towards third countries.⁷⁷⁸ The idea that the EU was applying a ‘one-size fits-all’ approach, and often failed to take into account complex, country specific realities, was addressed by a new policy on elaborating comprehensive and ‘tailor-made’ human rights strategies for each country.⁷⁷⁹ These Human Rights Country Strategies are to be drafted in collaboration with the EU Member States and local or international civil society organisations. They are expected to incorporate the human rights assessments, priorities, and objectives of several committed stakeholders within a partner country. In acknowledging that ‘traditionally the EU has adopted a top-down approach to its human rights strategy’,⁷⁸⁰ engaging more systematically with civil society actors has come to the foreground as a priority. A ‘genuine partnership with civil society’ including at the local level, is one of the outcomes set in the EU’s Action Plan.⁷⁸¹ To foster a ‘more strategic’ engagement at country level, the EU is in the process of setting up ‘roadmaps for engagement with CSOs’ within each partner country.⁷⁸² Accordingly, the commitment to intensify support for civil society overlaps with the EU’s support for actors and processes within the field of ‘human rights and democracy’.⁷⁸³

The elaboration of tailor-made Human Rights Country Strategies was further prioritised in the Strategic Framework and Action Plan. The process of drafting such Human Rights Country Strategy for each partner country is nearly completed as of mid-2014.⁷⁸⁴ These documents are currently classified, an issue which has been criticised by the EP which has demanded the ‘public disclosure of, at least, the key priorities of each country strategy’ and for the EP to have access to the strategies ‘so as to allow a proper degree of scrutiny’.⁷⁸⁵

b) Scope, size and actors of the EU’s direct support

The EU’s total funding for human rights, democracy and good governance projects/programmes has increased gradually over the two decades. Figure 1 and 2 illustrate this using different datasets. Figure 1 uses OECD data to aggregate the amounts of ODA committed by EU institutions in the broad area of ‘governance’ between 1995 and 2012.⁷⁸⁶ A clear upward trend in this type of cooperation initiatives becomes clear, as the total amount of funding for this broad sector has multiplied and its significance in proportion to the aggregated total of EU spending has also increased from approximately 3% percent in 1995 to 13% in 2012.⁷⁸⁷ It should be noted that not all of the initiatives under the broad ‘governance’

⁷⁷⁸ European Commission and Special Representative for Common Foreign and Security Policy, (n 9) 7.

⁷⁷⁹ Ibid. This was also a priority in the EU Strategic Framework and Action Plan, see Council of the European Union (n 10), Outcome 31, action (a).

⁷⁸⁰ Ibid., 7.

⁷⁸¹ Ibid., outcome 2.

⁷⁸² European Commission (n 663).

⁷⁸³ This section does not provide an extensive overview of how the EU’s engagement with CSOs has evolved.

⁷⁸⁴ Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2013’, 15144/13, 23 June 2014, 15.

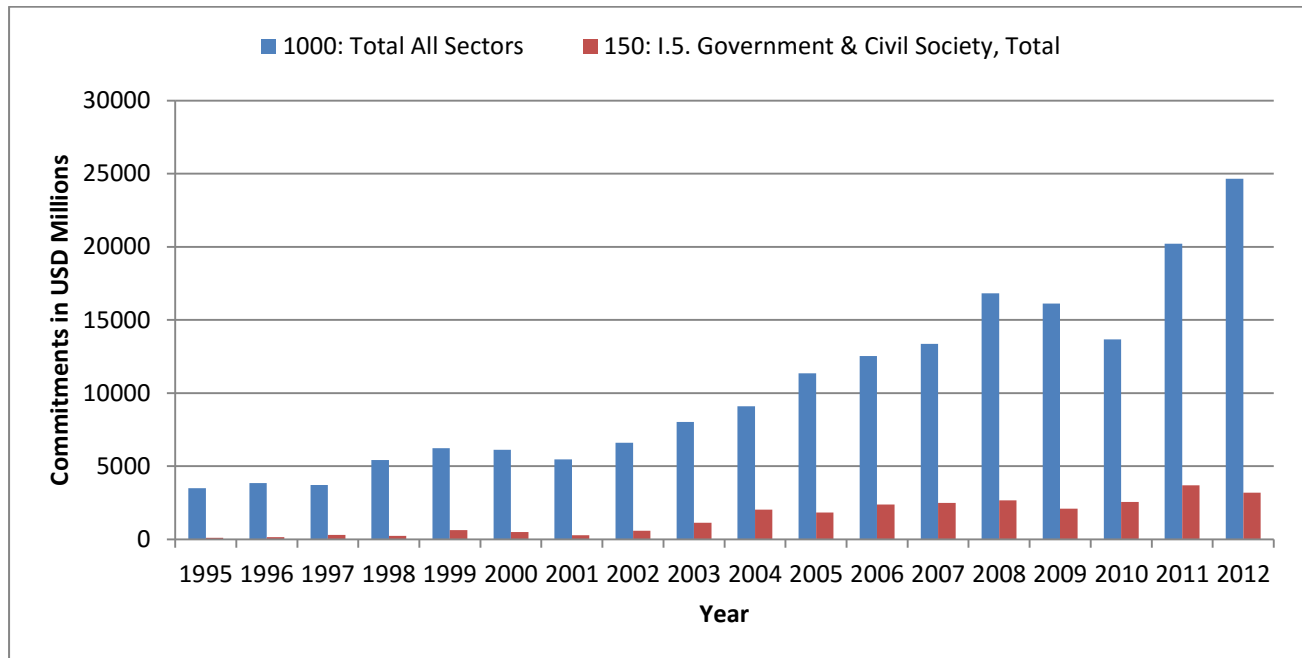
⁷⁸⁵ European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union’s policy on the matter (2013/2152(INI)), para. 25.

⁷⁸⁶ The OECD-DAC Creditor Reporting System’s reporting code ‘151: I.5.a. Government & Civil Society, Total’ was used to quantify the area of ‘governance’. Data extracted on 20.5.2014 15:33 UTC (GMT) from OECD.Stat.

⁷⁸⁷ The percentages reflect the share of the commitments under code ‘151: I.5.a. Government & Civil Society, Total’ as part of the total sector allocated ODA as reported under CRS code ‘1000: Total All Sectors’. Data extracted on 20.5.2014 15:33 UTC (GMT) from OECD.Stat.

umbrella are strongly related to support for Human Rights, Democracy, or the Rule of Law. Such programmes can also support other types of reforms (such as decentralisation, tax reform, public financial management) which do not necessarily emphasise human rights or democracy as a priority or an outcome of the intervention.

Figure 3: EU Financial commitments to ‘Government and Civil Society’ as compared to total sector spending, 1995-2012, Total Amounts in USD million⁷⁸⁸



To present a more detailed view on the Commission’s financial commitments and disbursements related to human rights, data from the 2011 Evaluation can be used. Figure x provides a more accurate selection of funding for activities ‘relating to human rights’ between 2000 and 2010, excluding ODA flows to pre-accession countries. These amounts of ODA are provided under the various geographic and thematic financial instruments presented above (see above, section A.2), whereby each allocates funding for activities supporting human rights, democracy, and the rule of law to differing degrees.

While EIDHR is considered to be a specialised instrument, the geographic financial instruments which provide the bulk of the EU’s development cooperation budget also provide most of the funding for initiatives relating to human rights and democracy. Between 2000 and 2010, the four largest financial instruments that financed 70% of all ‘human rights related interventions’ were respectively the EDF with 26%, the DCI (ALA/DCI-Asia) with 18%, EIDHR with 17%, and ENI (MEDA)⁷⁸⁹ with 9%.⁷⁹⁰

⁷⁸⁸ The OECD’s Creditor Reporting System code ‘151: I.5.a. Government & Civil Society, Total’ and ‘1000: Total All Sectors’ were included. Data extracted on 20.5.2014 15:33 UTC (GMT) from OECD.Stat.

⁷⁸⁹ The European financial instrument for the implementation of the Euro-Mediterranean Partnership (MEDA) provided the financial envelope for the EU’s cooperation with its Mediterranean and Middle-Eastern partners, until 2006 when it was dissolved and replaced by the ENPI (see section IV.B.2.c).

⁷⁹⁰ Thematic evaluation of the European Commission (n 19) Vol III, 23.

Providing support for human rights- or democracy related processes is consolidated in the regulations for establishing the geographic instruments for 2014-2020. In the regulations establishing the DCI for 2014-2020 (see section B.2.b)), earmarks have been added which specify that at least 15% of the instrument's indicative geographical allocations per region should be dedicated to 'Human rights, democracy and good governance'.⁷⁹¹ Although no specific earmarks are included in the Cotonou Agreement, it does note that the EU-ACP partnership 'shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance'. Similarly, the regulation establishing the ENI does not identify specific earmarks but clearly includes 'promoting human rights and fundamental freedoms, the rule of law, principles of equality and the fight against discrimination in all its forms' as a specific objective. The IfSP, while not considered to be part of the EU's development cooperation, can fund a range of cooperation activities in response to situations which pose 'a threat to democracy, law and order, the protection of human rights and fundamental freedoms'.⁷⁹² For example, it can support international and national tribunals and other 'mechanisms for the legal settlement of human rights claims'.⁷⁹³

In terms of managing the funding provided by the aforementioned financial instruments, it is in first instance the Commission's DG DEVCO in cooperation with the EEAS, who is charged with planning and programming the 'human rights and democracy' initiatives (see section A.3).

c) Thematic and Geographic Scope and Priorities

The EU's development cooperation activities are spread over more than 150 countries. However, in which countries the EU invests the most in direct support for 'human rights and democracy' is not clear. Relying on data provided by the 2011 Evaluation, a list of the top 15 recipients of human rights-related assistance can be composed.

⁷⁹¹ Council of the European Union (n 656) Annex IV.

⁷⁹² Ibid., Art. 3 (1)a.

⁷⁹³ Ibid., Art. 3 (2)m.

Table 7: Top 15 Recipients of EU Human Rights and Democracy Assistance, 2000-2010⁷⁹⁴

Recipient Countries
•1. Afghanistan
•2. Sudan
•3. West Bank and Gaza Strip
•4. Indonesia
•5. Somalia
•6. Iraq
•7. DR Congo
•8. Russia
•9. Colombia
•10. Georgia
•11. India
•12. Bangladesh
•13. Ukraine
•14. South Africa
•15. Sri Lanka

The same evaluation also offers insights into regional differences. The ACP bloc accounted for respectively 37% of the overall funding for human rights and democracy. In this broad area, Sub-Saharan countries received the majority, with in particular Sudan, Somalia and the Democratic Republic of Congo receiving significant assistance. With a 31% share of the total budget, Asia was the second largest region receiving human rights and democracy support between 2000-2010. More specifically, Afghanistan, Indonesia and Iraq were the largest recipient of EU assistance in this period. The European Neighbourhood countries located in Eastern Europe, the Mediterranean and the Southern Caucasus also received a significant share of human rights and democracy assistance, accounting for 20% of the overall budget. In this region, a significant share is directed at the United Nations Relief Agency for Palestine Refugees (UNRWA) and its operations in the West Bank and Gaza Strip. With only 7%, Latin America is less of a priority region.

It should be noted that the above-described geographic concentrations of human rights and democracy funding are in certain instances related to the EU's contribution to large multi-donor funds set up to address crises or post-conflict situations. Accordingly, the reason why Afghanistan is the primary recipient of assistance in the area of human rights and democracy is partly due to the EU's financial contribution to the Law and Order Trust Fund for Afghanistan managed by the UNDP.

It should be highlighted that these large multi-donor trust funds often fund an extensive range of development activities, not all of which are related to the 'human rights and democracy' support in particular. As such, the above mentioned data does not necessarily reflect more specific EU action on human rights and democracy, such as the use of EIDHR funding in certain countries. Although EIDHR has a

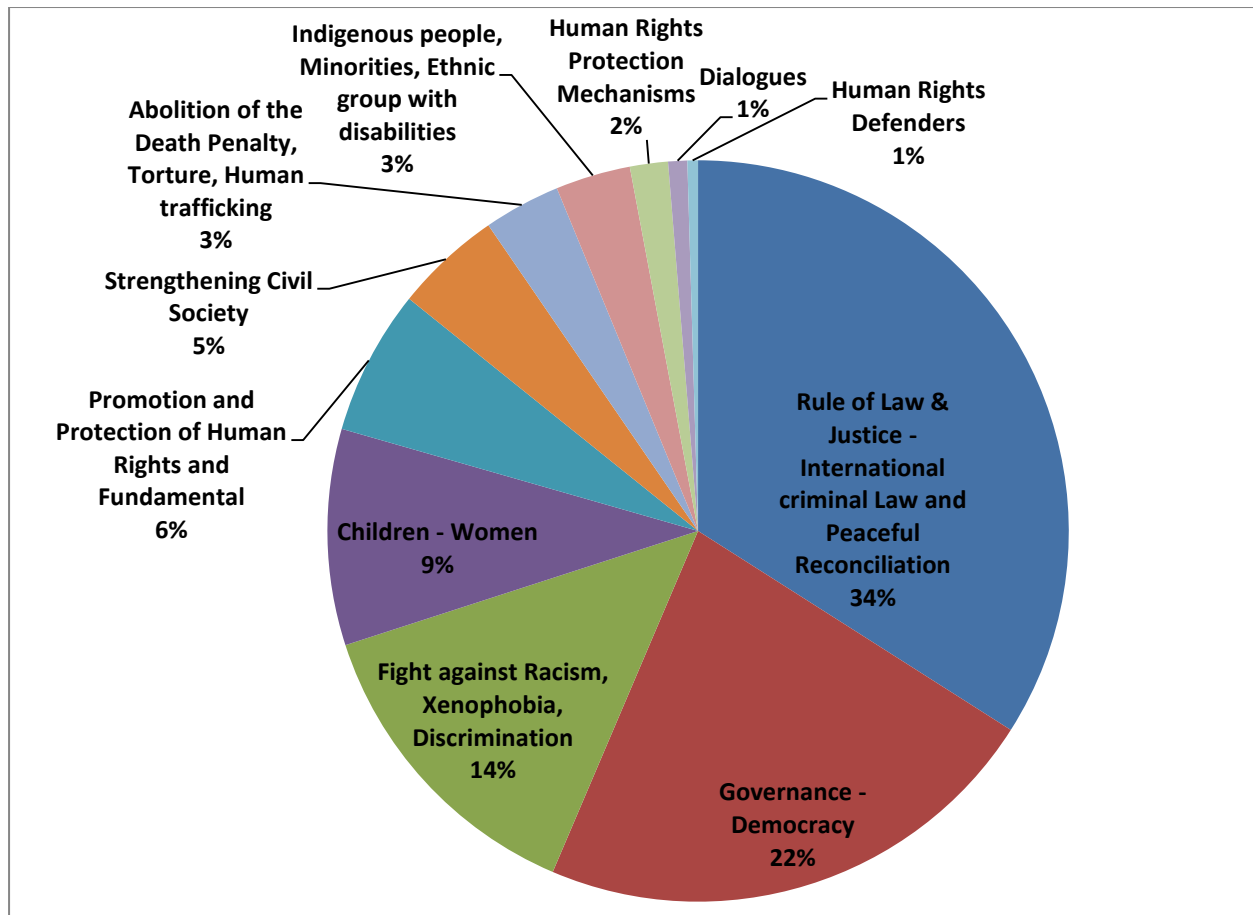
⁷⁹⁴ The measurement of financial support covers assistance managed by the Directorates-General for Development and Cooperation/EuropeAid (DEVCO), Enlargement (ELARG) and the European External Action Service (EEAS), provided to third countries (excluding OECD members and candidate countries) and "filtered" to identify human rights-related interventions. See Thematic evaluation of the European Commission (n 19) Vol III, 19-20.

worldwide-scope, countries with a high concentration of EIDHR projects are found mostly in the EU's immediate neighbourhood.⁷⁹⁵

Identifying the priority areas of the EU's 'human rights and democracy' assistance is another challenge, as there is no aggregated overview provided by the Commission on how it targets its funding towards. While for some financial instruments certain priorities are outlined in their regulations or in their strategic programming documents these do not necessarily reflect where most of the EU's ODA is channelled. In Figure 4 data from the 2011 Evaluation is used here to illustrate the broad thematic categories in which the EU invested for the period 2000-2010.

This dataset indicates that the category of 'Rule of Law & Justice - International Criminal Law and Peaceful Reconciliation' represent the main area of intervention, accounting for 34% of EC 'human rights' funding. This is not surprising as it covers a range of resource intensive activities in the area of conflict resolution and peace-building (eg. disarmament-, demobilisation-, mediation- and reconciliation-support, *ad hoc* tribunals, transitional justice, etc.), security system reform, as well as funding for programmes of judicial, constitutional and legislative reforms. The EC's funding to the ICC is also part of this category. The second largest category of 'Governance - Democracy' represents 22% of the Commission's financial assistance and covers support to electoral processes, strengthening of parliamentary bodies and other democratic institutions, as well as programmes focused on political participation and the promotion of democratic pluralism. This broad category covers again a range of different partnerships with governmental and non-governmental partners.

⁷⁹⁵ Countries with the highest concentration of EIDHR projects between 2007-2010 were Croatia, Bosnia-Herzegovina, Serbia, Kosovo, FYR Macedonia, Turkey, Georgia, Azerbaijan, Armenia, Russia, Israel, West Bank and Gaza Strip, Nepal, Venezuela, and DR Congo. These are the country's which are listed as having 25 or more EIDHR projects running between 2007-2010. See European Commission (n 693).

Figure 4: Overall financial commitments for human rights-related interventions by thematic category, 2000 -2010⁷⁹⁶

Areas with a more targeted focus on human rights accounted for a much smaller share; contributions under the ‘Promotion and Protection of Human Rights and Fundamental Freedoms’ represent 6%, and entail contributions in the areas of freedom of association and expression, independence of the media, equal participation in social and economic life, human rights and civic education and awareness, the protection of labor and social corporate responsibility. A fraction of the overall budget was invested in smaller categories which specifically address human rights actors. The ‘Human Rights Protection Mechanisms’, and ‘Human Rights Defenders’ categories cover contributions to the protection and support measures for Human Rights Defenders and the UN human rights system, including the Human Rights Council, the OHCHR, Treaty bodies and Special Procedures.⁷⁹⁷ The following section briefly elaborates further upon who the Commission works with when investing in ‘human rights’ related cooperation.

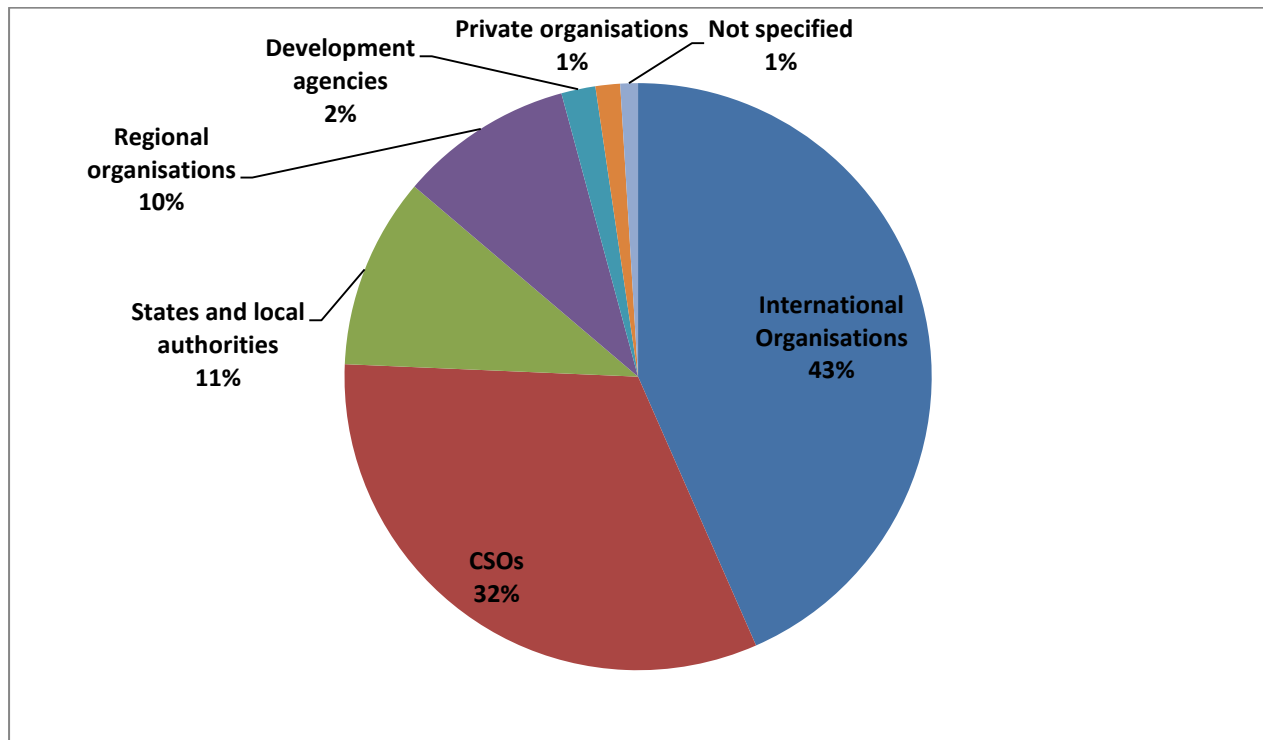
⁷⁹⁶ Adapted from the quantitative analysis of the Thematic evaluation of the European Commission (n 19) Vol III, 22.

⁷⁹⁷ Ibid., 21.

d) Partnerships and implementing actors

Initiatives within the area of ‘human rights and democracy’ can cover a range of interventions aimed at state institutions, political society, civil society, as well as individual citizens (see section 4.1.3). As such, the different EU actors, in particular DG DEVCO and the EEAS which manage and allocate most funding, rely on a multitude of implementing actors and partnerships to roll out initiatives, projects and programmes. Based on the 2011 Evaluation of the Commission’s support for human rights, international organizations are the main contractors for the EU’s human rights and democratic governance interventions between 2000-2010 (see Figure 5).

Figure 5: Overall financial commitments for human rights-related interventions by contracting parties, 2000-2010⁷⁹⁸



International organisations account for 43% of the Commission’s human rights-related funding,⁷⁹⁹ and of these organisations most resources were channelled through UN agencies. In particular the UNDP (United Nations Development Programme) stands out. Since 2004 a ‘EU-UNDP strategic partnership’ has consolidated close cooperation.⁸⁰⁰ ‘Democratic Governance’ is the UNDP’s largest focus area, and in specific areas such as ‘electoral support’ and ‘parliamentary assistance’ the EU-UNDP have elaborated joint mechanisms and strategies. Similarly, the broad fields of ‘Equal Opportunities, Justice and Human Rights’ and ‘Rule of Law, Justice and Security’ are highlighted as key intervention areas of the EU-UNDP

⁷⁹⁸ Adapted from the quantitative analysis of the Thematic evaluation of the European Commission (n 19) Vol III, 25.

⁷⁹⁹ Ibid. The large share of funding allocated to international organisations is in part due to the European Commission’s financial contributions received by such organisations via multi-donor Trust Funds. The Law and Order Trust Fund for Afghanistan (LOFTA) and the International Reconstruction Fund Facility for Iraq (IRFFI) are relevant examples.

⁸⁰⁰ UNDP, ‘UNDP-EU Partnership Report: Towards a Life of Dignity for All -10 years of UNDP-EU Strategic Partnership’ (2014).

partnership.⁸⁰¹ To a lesser extent, EU funding for human rights and democracy is also allocated to the UNRWA (United Nations Relief and Work Agency for Palestine Refugees in the Near East) and the UNHCR (United Nations High Commissioner for Refugees).⁸⁰²

The second largest category of contractors for the Commission's 'human rights and democracy' funding between 2000-2010 are Civil Society Organisations (CSOs).⁸⁰³ Accounting for approximately one third of the overall funding in this period,⁸⁰⁴ this category covers a broad range of EU-based or 'local' organisations (based in the partner country). In particular the EIDHR concentrates on developing partnerships with civil society actors, as 90% of its partners are CSOs.⁸⁰⁵ The EIDHR regulation spells out that 'civil society is to be understood as spanning all types of social actions by individuals or groups that are independent from the state and whose activities help to promote human rights and democracy'. This includes human rights defenders as defined by the UN 'Declaration on Human Rights Defenders' but also a large number of organisations which have a broader focus on political participation and promoting democratic values rather than human rights specifically. The Commission also uses the EIDHR budget to foster exchanges and organising international platforms for civil society stakeholders, in particular the annual 'EIDHR Forum' and the 'EU-NGO Human Rights Forum'. A number of larger international organisations which are closely involved as partner organisations in the EU's human rights and democracy policy are loosely organised in the Human Rights and Democracy Network which currently covers 48 NGOs. While some of these organisations – such as Amnesty International and Human Rights Watch - are strongly focused on international advocacy, other NGOs within the HRDN are themselves network- or umbrella-organisations bringing together a broader range of 'field level' organisations.

While EIDHR's specialised role in supporting non-state actors is not new, supporting civil society actors has become a central component of the DCI, which set out a specialised thematic programme on 'Civil Society Organisations and Local Authorities'. While the wording of this programme does not explicitly focus on human rights and democracy, it does aim to contribute to an 'inclusive and empowered society in partner countries', an 'increased capacity of European and Southern civil society and local authority networks [...]to promote democratic governance' and 'creating an enabling environment for citizen participation and civil society action'.⁸⁰⁶ Here, CSOs are understood as 'non-State, non-profit making actors operating on an independent and accountable basis', a very diverse set of actors which can include 'organisations representing indigenous peoples and national and/or ethnic minorities', as well as 'local traders' associations, employers associations and trade unions' and 'organisations fighting corruption and fraud and promoting good governance, civil rights organisations and organisations combating discrimination'.⁸⁰⁷ To what extent partnerships with all these actors fall squarely within the category of 'human rights and

⁸⁰¹ Ibid.

⁸⁰² Thematic evaluation of the European Commission (n 19) Vol III, 25.

⁸⁰³ Ibid.

⁸⁰⁴ This share might be larger, as within projects/programmes implemented by international organisations such as the UNDP, CSOs and NGOs might also be involved as partners.

⁸⁰⁵ European Commission, European Instrument for Democracy and Human Rights, 'Who are our partners?' <<http://www.eidhr.eu/who-are-our-partners>>.

⁸⁰⁶ Council of the European Union (n 656) Annex II (B).

⁸⁰⁷ Ibid.

democracy' support, can be questioned. None the less, it is clear that CSOs have come to occupy central stage in the EU's approach to 'partnership' in its rights and development policy.

A smaller share of the Commission's human rights funding (around 10%)⁸⁰⁸ between 2000-2010 was invested in programmes with states and local authorities.⁸⁰⁹ These types of partnerships can take on various forms, but often target the functioning of national institutions such as parliamentary bodies, electoral commissions, and the judicial branch. In some instance, financing will be provided to actors with a mandate to monitor and assess human rights, notably National Human Rights Institutions (NHRIs) or similar bodies. Another type of support aims at training national and local officials to generate awareness of international human rights standards within government institutions.⁸¹⁰ A small share of the Commission's human rights related-funding was also invested in the development of regional organisations, whereby the African Union was by far the largest recipient (80%) of support between 2000-2010, and a relatively small share (10%) was provided to the Council of Europe.⁸¹¹

7. Human Rights Mainstreaming and a Human Rights-based Approach

The elaboration of human rights mainstreaming policies and human rights based approaches indicated a new 'phase' in the integration of human rights in development cooperation whereby human rights are not only considered as a condition for aid or a 'thematic area', but as a cross-cutting issue affecting how all programmes and projects are implemented. In 2001, the Commission elaborated a first 'general' policy for mainstreaming human rights in its relations with third countries. This implied including human rights in 'the planning, design, implementation, and monitoring of policies and programmes, as well as the dialogue pursued with partners both by the Commission and the Council'.⁸¹² In 2011, the Commission stressed that a 'Human Rights Based Approach' would be necessary to 'ensure that human rights and democracy are reflected across the entire development cooperation process and ensure continuity between political and policy dialogue on human rights issues and development cooperation'.⁸¹³ As discussed above (see section A.4), the EU Action Plan sets out several actions for working towards such a 'rights-based approach'. The notion of 'human rights mainstreaming' appears to be replaced by the concept of a rights-based approach. The Commission clarifies that its rights-based approach 'builds on mainstreaming' but also 'adds an additional element through raising awareness about human rights implications' and 'fine-tuning' action.⁸¹⁴ Accordingly, the introduction of a HRBA aims to 'go beyond' mainstreaming by integrating human rights 'in each step of the project cycle management'.⁸¹⁵

⁸⁰⁸ This share might be larger, as within projects/programmes implemented by international organisations such as the UNDP, states and local authorities might also be involved as partners.

⁸⁰⁹ Thematic evaluation of the European Commission (n 19) Vol III, 25.

⁸¹⁰ *Ibid.*, 28.

⁸¹¹ *Ibid.*

⁸¹² European Commission (n 218) 8.

⁸¹³ European Commission and High Representative for Common Foreign and Security Policy (n 9) 11.

⁸¹⁴ European Commission (n 725) 6.

⁸¹⁵ *Ibid.*

This section provides an overview of the Commission's various 'targeted' mainstreaming policies and its efforts to integrate a rights-based approach into the planning and implementation of development strategies. These policies differ from the more 'general' mainstreaming of human rights in country level dialogue and strategic planning, which is discussed earlier (see section A.4), as they relate more specifically to how individual projects and programmes or broader sector strategies should integrate human rights.

a) Targeted Mainstreaming Policies

In the context of the EU's development cooperation, efforts have been made to develop mainstreaming policies addressing certain vulnerable groups. The policy concept of 'gender mainstreaming' is often seen as preceding the notion of 'mainstreaming human rights', and it is disputable to what extent donors' gender mainstreaming policies are 'rights-based'. These group-specific mainstreaming policies, which focus on equality and non-discrimination, are seen as complementary and mutually enforcing to the EU's more recent 'rights-based approach' (see section 4.2.4.1). The EU has particularly invested in mainstreaming policies on two specific, yet broad, groups: women and children.⁸¹⁶

Gender equality and women's rights have come to the fore within the EU's development policy, as well as in the wider donor community, as the most important transversal issue to be mainstreamed throughout all areas and aspects of cooperation. The European Consensus on Development reaffirmed its centrality as a cross-cutting theme for both EU institutions and MS. The EU has issued various policies and guidelines,⁸¹⁷ and set out a number of concrete steps in the 'EU Plan of Action on Gender Equality and Women's Empowerment in Development' adopted in 2010.⁸¹⁸ This policy is binding for both the Commission and the MS, and relies heavily on the goals and standards set out in international human rights agreements such as the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Platform of Action, and the Cairo Programme of Action. Concrete actions include the drafting of 'Gender Country Profiles' which assess the legislative framework within, particularly the existence of discriminatory laws and practices. For specific guidance on how to integrate gender equality and women's rights in national programming (the country strategy papers), as well as projects and sector programmes, a 'Toolkit on Mainstreaming Gender Equality in EC Development Cooperation' was issued.⁸¹⁹ Despite these efforts, the impact and nature of the EU's mainstreaming of gender equality and women's rights are still under debate. A follow-up report to the Gender Action Plan identified several challenges

⁸¹⁶ Other specific groups have been addressed as well, although with less prominence. For example, in 1998 the Council of the European Union adopted a resolution addressing the role of 'Indigenous peoples' in development cooperation. See Council of the European Union 'Indigenous peoples within the framework of the development cooperation of the Community and the Member States' Council Resolution of 30 november 1998.

⁸¹⁷ European Commission, 'Gender Equality and Women Empowerment in Development Cooperation', Communication from the Commission to the European Parliament and the Council, 8 March 2007, COM(2007) 100 final, SEC(2007)332; Council of the European Union, 'Council Conclusions on Gender Equality and Women's Empowerment in Development Cooperation', 15 May 2007; The 'EU guidelines on violence against women and girls' were adopted by the Council of the EU in 2008, see Council of the European Union, (n 104); For a more comprehensive overview, see Petra Debusscher and Anna van der Vleuten, 'Mainstreaming gender in European Union development cooperation with sub-Saharan Africa: promising numbers, narrow contents, telling silences' [2012] 34(3) International Development Planning Review.

⁸¹⁸ European Commission, 'EU Plan of Action on Gender Equality and Women's Empowerment in Development' European Commission, Commission Staff Working Document, 8 March 2010, SEC(2010) 265 final.

⁸¹⁹ The Toolkit on Mainstreaming Gender Equality in EC Development Cooperation is available online at <<http://ec.europa.eu/europeaid/sp/gender-toolkit/en/content/toolkit.htm>>.

and shortcomings to be addressed in the EU's capacity to address women's rights within its development partnerships.⁸²⁰ The OECD-DAC peer review of the EU noted progress made but also highlighted uneven implementation and a lack of resources being committed.⁸²¹ More problematically, critical academic research notes that the EU's approach to mainstreaming gender equality often remains on the surface, is based on outdated paradigms, and lacks the necessary transformative potential to challenge embedded discrimination against women.⁸²²

In addition to women, the rights of children have also come to the fore in EU external action and development policy through several communications, guidelines,⁸²³ and the adoption of the 'European Union's Action Plan on Children's Rights in External Action' in 2008.⁸²⁴ This Action Plan endorses the 'application of a holistic and coherent children's rights-based approach' based on the UN Convention on the Rights of the Child as a guiding principle. Practically, children's rights are to be accounted for in situational analysis of cooperation strategies, and should be mainstreamed throughout the programming, identification and implementation of development cooperation. To provide more concrete guidance, a toolkit on integrating children's rights in development cooperation was issued in collaboration with UNICEF.⁸²⁵ Whereas a significant amount of the EU's projects and programmes are implemented by UNICEF,⁸²⁶ which in theory mainstreams children's rights and applies a rights-based approach in its activities, there has been no follow-up report on how children's rights are mainstreamed throughout the entire EU development portfolio. Furthermore, critics point to similar challenges as those faced by efforts to mainstream women's rights. First of all, there is a lack of resources and knowledge within the Commission to consistently ensure cooperation activities and take into account children's rights.⁸²⁷ Critics also stress that the EU's approach is still focused primarily on children's needs rather than addressing their rights.⁸²⁸ The EU has been urged to recognise children as 'autonomous agents and legal subjects' whereby active participation is a key element to invest in, instead of prioritising charity and protection.⁸²⁹

⁸²⁰ European Commission, 'Report on the implementation of the EU Plan of Action on Gender Equality and Women Empowerment in Development 2010-2015', Commission Staff Working Document, 18 November 2012, SWD (2012) 410 final.

⁸²¹ OECD-DAC (n 85) 35.

⁸²² See Debusscher and van der Vleuten (n 817) 332-334.

⁸²³ Children's rights were included as a cross-cutting priority in the European Consensus on Development (n 703). In 2006, the Commission's 2006 set mainstreaming children's rights as a specific objective, European Commission, 'Towards an EU Strategy on the Rights of the Child', Communication from the Commission, 4 July 2006, COM(2006) 367 final. The Council of the EU adopted the 'EU Guidelines for the Promotion and the Protection of the Rights of the Child' in 2007 (n 103). For a more elaborate overview, see Ingi Iusmen, 'The EU and the Global Promotion of Children's Rights Norms' in Astrid Boening, Jan-Frederik Kremer, Aukje van Loon (eds.) *Global Power Europe - Vol. 2: Policies, Actions and Influence of the EU's External Relations*, (Springer Science & Business Media, 2013).

⁸²⁴ European Commission, 'The European Union's Action Plan on Children's Rights in External Action' Commission Staff Working Document, 5 February 2008, SEC(2008) 136.

⁸²⁵ UNICEF, 'EU-UNICEF Child Rights Toolkit: Integrating Child Rights in Development Cooperation', (United Nations Children's Fund, Programme Division, 2014). The toolkit is available online, <<http://www.unicef.org/eu/crtoolkit/toolkit.html>>.

⁸²⁶ For an overview and discussion of EU-UNICEF cooperation activities, see Gosia Pearson, 'Linking Policy and Practice: the Case of EU - UNICEF Cooperation in Third Countries' (2013), Institute for European Studies, Working Paper 4/2013. Available online <<http://www.ies.be/files/EU-UNICEF%20cooperation.pdf>>.

⁸²⁷ Iusmen (n 823) 332.

⁸²⁸ Ibid., 331-332.

⁸²⁹ Wouter Vandenhole, 'Children's Rights in EU External Action: Beyond Charity and Protection, Beyond Instrumentalisation and Conditionality' [2011] 19 *International Journal of Children's Rights*, 498.

b) (Human) Rights based-Approaches to Programming

The concept of a ‘human rights-based approach’⁸³⁰ to development has been adopted and elaborated by a number of European donors. As addressed above (see section A.4) the EU’s Strategic Framework and Action Plan adopted this approach setting out several actions which reflect a broad understanding of the HRBA concept. Under this section, we discuss the more narrow definition of a HRBA, as a concept informing the process of programming and planning individual programmes and projects. First, this section touches upon some of the Commission’s policies which have sought to address a HRBA to programming. Secondly, it provides an analysis of the Commission’s recently adopted ‘Toolbox on a Rights-Based Approach, Encompassing all Human Rights, for EU Development Cooperation’ (‘HRBA Toolbox’).

(1) Good Governance in EU Development Planning

Prior to its current investment in the development of a human rights-based approaches, the Commission had put forward a ‘governance’ approach.⁸³¹ Both these approaches see the operationalisation of concepts such as ‘accountability’, ‘transparency’, and ‘participation’ as being essential elements in the planning of effective development interventions. However, while a HRBA explicitly relies on the international human rights framework, the Commission noted that the ‘real value’ of its initial ‘governance’ concept is that it provides a terminology that is ‘more pragmatic’ than democracy and human rights.⁸³² The Commission’s perspective on governance in development planning was further elaborated after the European Consensus on Development identified ‘good governance’ as a cross-cutting issue along with ‘democracy and human rights’. An extensive handbook on ‘Promoting Good Governance in EC Development and Cooperation’ was issued to assist staff to integrate good governance within the management of EU projects and programmes.⁸³³ The working principles and tools identified in this handbook are highly similar to and overlap with the qualitative methodology presented in the recent HRBA toolbox. This trend in EU policies is indicative, and experts note that human rights- and governance-based development policies might overlap to the point that it is ‘impossible to distinguish one from the other’,⁸³⁴ in particular in looking at the practical implications for field-level operations.

In addition, certain thematic sections within DG DEVCO have developed sectoral strategies including dimensions of a human rights-based approach to development. Such efforts have been most visible in relation to the Commission’s development policy on food security and health.

(2) The Right-to-Food and the Right-to-Health in EU Development Policy

Both the delivery of health services and food security have been recurring priorities on the EU’s development agenda. In both areas, a rights-based approach has appeared as a new perspective or way of engaging with these thematic priorities. In 2010, the Commission put forward a comprehensive ‘EU

⁸³⁰ For an introduction to and discussion of the Human Rights Based Approach to development see Axel Marx, Siobhan McInerney-Lankford, Jan Wouters, and David D’Hollander, ‘Human Rights and Service Delivery: A Review of Current Policies, Practices and Challenges’, [forthcoming 2015] 6 World Bank Legal Review.

⁸³¹ Hans-Otto Sano, ‘The drivers of human rights change in development’, in Paul Greedy and Wouter Vandenhole (eds), *Human Rights and Development in the New Millennium* (Routledge, 2014).

⁸³² European Commission, ‘Governance and Development’, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 20 October 2010, COM(2003) 615 final, 3.

⁸³³ EuropeAid, *Handbook on Promoting Good Governance in EC Development and Co-Operation*, (2004).

⁸³⁴ Sano (n 831) 35.

Policy Framework to Assist Developing Countries in Addressing Food Security Challenges’ in which a ‘right-to-food’ approach is presented. This policy is further elaborated by the Commission’s policy plan for 2014-2020, which adopts a ‘rights-perspective’ as the first of seven guiding principles.⁸³⁵ The EU and its Member States should assist in developing such an approach in line with the institutional and legal frameworks of partner countries, deploy strategies which ‘tackle the root causes of hunger’, support the ‘empowerment of marginalised groups in the design, implementation and monitoring of national programmes’ and ‘strengthening redress mechanisms’ for beneficiaries.⁸³⁶ In doing so, the Commission aims to implement the FAO’s ‘Voluntary Guidelines to support the Progressive Realization of the Right to Adequate Food in the context of National Food Security’ as well as the more recent ‘Voluntary Guidelines and responsible governance of tenure of land, fisheries and forests in the context of national food security’.⁸³⁷ These guidelines set out the elements of a human rights-based policy on food security and land tenure. The Commission has collaborated with the FAO’s ‘Right to Food Team’ in developing more concrete tools and methodologies for development practitioners.⁸³⁸ While the Commission provides support to international, national and local civil society organisations and networks to address the right-to-food and access to land for poor and marginalised groups,⁸³⁹ it is still unclear to what extent this human rights-based approach has reshaped its cooperation policies and practices. Importantly, while Policy Coherence for Development is touched upon by the Commission in the aforementioned policies on food security, there have been strong criticisms that EU policies in the field of energy, agriculture, fisheries and trade have a negative impact on the enjoyment of the right to food in developing countries.⁸⁴⁰

Supporting health services has traditionally been a priority sector in development cooperation. The notion that health is ‘a human right for all’ has been affirmed by the Commission,⁸⁴¹ and its realisation through ‘equitable and universal coverage’ of ‘quality health services’ has been included in the Commission’s latest proposal for a post-2015 development agenda.⁸⁴² The Commission specifically refers to the General Comments of the UN Committee on Economic, Social and Cultural Rights, which defines state obligations and patients’ health entitlements, as well as the application of human rights principles in the health sector.⁸⁴³ Further practical implications are elaborated in the Commission’s working document on

⁸³⁵ European Commission, ‘Boosting food and nutrition security through EU action: implementing our commitments’ Commission Staff Working Document, 27 March 2013, SWD(2013) 104 final.

⁸³⁶ European Commission, ‘An EU policy framework to assist developing countries in addressing food security challenges’ Communication from the Commission to the Council and the European Parliament, 31 March 2010, COM(2010)127 final, 5; Council of the European Union, ‘Council conclusions on Food and Nutrition Security in external assistance’ 28 May 2013.

⁸³⁷ Ibid.

⁸³⁸ These are available online at the FAO’s ‘Right to Food Portal’, accessible at <<http://www.fao.org/righttofood/rightto-food-home/en/>>.

⁸³⁹ See David D’Hollander, Axel Marx, Jan Wouters (n 25).

⁸⁴⁰ CONCORD, ‘Spotlight on EU Policy Coherence for Development: The real life impact of the EU’s policies on the poor’, (2013) Annual Report. Specifically on the EU’s biofuel policy, see Olivier de Schutter, ‘Note on the impacts of the EU biofuels policy on the right to food’, Statement 23 April 2013. Available online <http://www.srfood.org/images/stories/pdf/otherdocuments/20130423_biofuelsstatement_en.pdf>.

⁸⁴¹ European Commission, ‘The EU Role in Global Health’, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and The Committee of the Regions, 31 March 2010, COM(2010)128, 5.

⁸⁴² European Commission (n 393) 6.

⁸⁴³ European Commission (n 841) 3.

‘Contributing to Universal Coverage of Health Services through Development Policy’.⁸⁴⁴ Here, the importance of country ownership is stressed, and concretely this implies expanding the use of budget support in partner countries where the health sector is a focal area. However, taking into account the criticism of the use of budget support (see section 5), the Commission notes that such a shift should be accompanied by improvements in the ‘democratic governance’ of the health sector, requiring the active involvement of national parliaments and civil society, to ensure ‘equity, pertinence and accountability’ in the provision of health care.⁸⁴⁵ However, to what extent a ‘right to health approach’ has shaped concrete planning and implementation of EU cooperation remains largely undocumented.

(3) The Commission’s Toolbox for applying a Human Rights-based Approach

One of the key actions for moving towards an EU rights-based approach to development has been the development of an ‘HRBA tool-box’ which should be used for ‘integrating human rights principles into EU operational activities for development, covering arrangements both at HQ and in the field for the synchronisation of human rights and development cooperation activities’.⁸⁴⁶ The HRBA Toolbox was released as a Commission Staff Working Document in May of 2014 and was subsequently endorsed by the Council.⁸⁴⁷ The term ‘rights-based approach, encompassing all human rights’ was adopted to include a number of additional rights not formalised into the international human rights framework, such as intellectual property rights. It is thus important to note that, despite the somewhat confusing term, the Commission does adopt a *human rights* based-approach, rather than a *rights*-based approach, an important conceptual distinction.⁸⁴⁸

The Commission’s HRBA concept draws heavily on the UN Common Understanding of a HRBA. It aims to ‘move development cooperation beyond voluntary cooperation and into the mandatory realm of law’.⁸⁴⁹ This means re-orienting ‘the objectives of development cooperation towards international human rights treaty standards’, and thereby redefining ‘the role of “stakeholders” into groups or individuals who have human rights or rights to claim (rights holders) and those who have duties to respond (duty bearers)’.⁸⁵⁰ Through this perspective, a HRBA provides a way of addressing more clearly ‘the root cause of governance problems’.⁸⁵¹ The Commission stresses that this re-conceptualisation and reframing of ‘traditional’ development is not about changing goals (the ‘what’) but primarily about changing the ‘how’ of development cooperation.⁸⁵² A HRBA thus provides a “qualitative methodology to advance the analysis, design and implementation of development programme and projects to better reach target - groups and

⁸⁴⁴ European Commission, ‘Contributing to universal coverage of health services through development policy’, Commission Staff Working Document, 31 March 2010, SEC(2010) 382 final, 10.

⁸⁴⁵ Ibid.

⁸⁴⁶ Council of the European Union, (n 10) Outcome 10, action (a).

⁸⁴⁷ European Commission, (n 725); Council of the European Union (n 725).

⁸⁴⁸ In theory, rights-based approaches do not draw upon the principles, standards and conventions agreed upon in international human rights law. Arguably, this gives the advantage of defining rights more fluidly and allows greater interaction with local understandings of justice. See Laure-Hélène Piron, ‘Rights-based Approaches and Bilateral Aid Agencies: More Than a Metaphor?’ (2005) 36(1) IDS Bulletin, 24-25.

⁸⁴⁹ European Commission, (n 725) 6.

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

⁸⁵² Ibid., 8.

to strengthen their access to basic services in all sectors of intervention.”⁸⁵³In defining how the HRBA concept should be applied, the Commission puts forward two objectives as the central tenets. First, respect for the ‘do no harm’ principle is highlighted as ‘development cooperation should not cause unacceptable harm and human rights violations’. Secondly, adhering to the ‘do maximum good’ principle is prioritised, implying that every intervention should maximise its ‘positive impact in terms of human rights’ by addressing questions related to governance, institutions, citizen participation, state capacity, etc. In practice, these two broad principles should be pushed forward when engaging partners through ‘sector policy dialogues’. In addition, they can be achieved by consistently taking into account five working principles in the planning of the Commission’s programmes and projects. These principles are:

- ‘Applying all Rights’: an overarching principle which reiterates the legality, universality and indivisibility of human rights.
- ‘Participation and access to the decision making process’: ensure ‘active citizenship’ and ‘free and meaningful participation’ by rights-holders, including through the involvement of civil society organisations. Carrying out assessment of the main obstacles/caveats for participation is necessary.
- ‘Non-discrimination and equal access’: ensure that basic public services and goods provided through development interventions reach those groups which are most vulnerable to poverty and human rights violations. All forms of discrimination should be identified and taken into account.
- ‘Accountability and access to the rule of law’: ensure the alignment of the relevant national legislation with legal human rights obligations, and the development of accessible, transparent, and effective mechanisms of accountability at central and local levels of government.
- ‘Transparency and access to information’: ensure citizens have access to information and enjoy freedom of expression, including for the poorest and most marginalised groups, to hold duty-bearers accountable.

Again, these working principles are based on similar human rights-based principles included in the UN Common Understanding, with slightly different emphasis and wording. The Commission’s HRBA Toolbox sets out a number of tools and actions which should ensure the further operationalisation of the HRBA by Commission Staff. Most concretely, it presents a ‘Checklist’ of questions/elements to guide the implementation of an HRBA into all programmes and projects. The Checklist covers the entire programming cycle (identification, designing, implementation, monitoring and evaluation stages), but is to be regarded as guidance and does not represent a new ‘formal’ administrative layer. It is inspired by similar ‘safeguard’ policies adopted by Member States donors such as Germany, Sweden and Denmark.⁸⁵⁴ Other internal measures, including the revision of the ‘identification fiche’ for all aid modalities and the modification of the system for ‘Results Oriented Monitoring’, should ensure the HRBA Toolbox becomes an integral part of Commission’s project management. To foster ‘uptake’ among Commission Staff, a support package will be developed which includes training courses, the establishment of a ‘help desk’, the elaboration of online resources, and a ‘dedicated support programme’ for EU delegations providing *ad hoc*

⁸⁵³ Ibid.

⁸⁵⁴ D’Hollander, Marx and Wouters (n 25).

expert assistance.⁸⁵⁵ To follow-up on the implementation of the Toolbox, the Commission will undertake a first evaluation in 2016.⁸⁵⁶

Both in terms of conceptual substance and practical measures, the HRBA Toolbox adopted by the Commission reflects similar policy initiatives undertaken by the UN and several EU Member State donors.⁸⁵⁷ While hailed as an important signal that the Commission does seem committed to the implications of ‘human rights-based’ development, the Toolbox has also been criticised by civil society actors for lacking practical insights and more concrete guidance.⁸⁵⁸ As such, the further downstream implementation of the Toolbox will depend on how staff at EU delegations will be capacitated and incentivised to take on the complex implications of a HRBA in the management of their portfolios.

Few robust empirical studies have been carried out to scrutinise the impact and effectiveness of HRBA implementation at country-, sector-, or community-level projects and programmes,⁸⁵⁹ although some donors have presented their positive experiences.⁸⁶⁰ It can be noted that the HRBA concept is strongly related to what certain authors refer to as a ‘democratic governance’ approach, whereby the EU does not aim to change state institutions but concentrates on ‘changes in governance rules and practices within individual policy sectors’.⁸⁶¹ From this perspective, case studies note that the EU has been successful in supporting processes of ‘governance-driven democratisation’ and creating ‘democratic enclaves within the state administration’, for example in its cooperation on water management in Morocco.⁸⁶² Whether focusing on human rights and democratic governance at the sectoral level is a step towards the further democratisation of the broader state apparatus, or if such changes just provide more legitimacy to governments which remain repressive and undemocratic, emerges as a pertinent question in this regard.⁸⁶³

In addition to the outstanding question of how a HRBA will shape the Commission’s development policy, the Commission’s Toolbox has also been criticised for failing to adequately address to what extent EU Member States are duty bearers with an obligation to implement a HRBA in their development policies.⁸⁶⁴

⁸⁵⁵ Ibid., 26.

⁸⁵⁶ European Commission (n 725) 26.

⁸⁵⁷ D’Hollander, Marx and Wouters (n 839).

⁸⁵⁸ CONCORD, ‘From Vision to Action: Operationalizing the EU Rights Based Approach Toolbox Encompassing All Human Rights in EU Development’ (2014) Position Paper, 1.

⁸⁵⁹ A number of qualitative case-studies have been published, see, among others, Samuel Hickey, Diana Mitlin (eds.) *Rights-based Approaches to Development; Exploring the Potential and Pitfalls*, (Kumarian Press, 2009); Sheena Crawford, ‘The Impact of Rights-based Approaches to Development’ (2008) Report for the UK Interagency Group on Human Rights Based Approaches.

⁸⁶⁰ For example, the German Development Agency (GIZ) has published a series of ‘promising practices’ in collaboration with the German Human Rights Institute, see GIZ/DIM ‘Compilation - Promising Practices on the human rights based approach in German development cooperation’ (2013) Deutsche Gesellschaft für Internationale Zusammenarbeit. Available online <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/promising_practices_compilation.pdf>.

⁸⁶¹ Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripkac, Anne Wetzel, ‘Democracy promotion through functional cooperation? The case of the European Neighbourhood Policy’ [2011] 18 (4) *Democratization*, 1028.

⁸⁶² Tina Freyburg, ‘The two sides of functional cooperation with authoritarian regimes: a multi-level perspective on the conflict of objectives between political stability and democratic change’ [2012] 19(3) *Democratization*.

⁸⁶³ Ibid., 591.

⁸⁶⁴ CONCORD, (n 858) 3.

How the HRBA Toolbox can be used to foster greater EU-wide coherence in the management and design of development projects and programmes thus remains to be seen.

V. CONCLUSION

Trade, development and human rights are intimately intertwined. Often acting as communicating vessels between one and other, there has been a growing consensus amongst scholars – albeit to varying degrees – that trade can create economic growth and help countries develop, and that development cooperation can enhance and stimulate economic growth through various interventions, including by strengthening a country’s capacity to trade. All the while, improvements in a country’s human rights situation are considered to have a multiplier effect on the benefits of trade and development policies. Trade and development flows, in turn, are also poised to have a significant impact on a country’s human rights record, and therefore increasingly require a human rights-sensitive approach. In addition to a normative and legal imperative, the integration of human rights in development and trade policies are thus also founded on an instrumental reasoning; namely that trade and development cooperation, when designed in such a way that they foster rather than undermine the protection of human rights, will lead to enhanced levels of economic growth and an overall reduction of poverty.

As the world’s largest aid donor and a powerful trading bloc, the EU has, over the past two decades, increasingly scaled up its efforts to forge a ‘nexus’ with mutually reinforcing synergies between these three hitherto distinct policy areas (for a historical overview, see the designated Timeline in Annex I). Starting with the groundbreaking communication which turned human rights into an ‘essential element’ for all international agreements (1995), the EU subsequently adopted the present-day Cotonou Agreement in which human rights function as a cornerstone of EU-ACP relations (2000). Shortly after, that cornerstone was expanded to also be applied to the realms of trade and external assistance at large, in which a ‘higher priority on human rights’ was pronounced to come into being (2001).

With the entry into force of the Lisbon Treaty, and the accompanying obligation to put the promotion and protection of human rights at the heart of *all* EU policies, the EU is now more than ever equipped to effectively foster human rights in all the aspects of its trade and development policies. Indeed, both the EU’s Common Commercial Policy (Art. 206 and 207 TFEU) and its Development Cooperation (Art. 208 TFEU) are poised to be guided by the EU’s human rights ‘principles and objectives’ – an innovation which had never before been enshrined in the Treaties since the establishment of the Union. Conversely, after the Commission and the EEAS had pronounced that ‘the protection and promotion of human rights is a silver thread running through all EU action both at home and abroad’ (2011),⁸⁶⁵ the Council swiftly pledged to ‘[m]ake trade work in a way that helps human rights’, whilst also ‘[w]orking towards a rights based approach in development cooperation’ (2012).⁸⁶⁶ In doing so, the EU thus delivered on the overall recommendation to ‘upgrade the political status of human rights in the EC/EU external action’, which had

⁸⁶⁵ European Commission and High Representative for Common Foreign and Security Policy (n 9) 4.

⁸⁶⁶ Council of the European Union (n 10).

been put forward by an extensive External Evaluation of the EU's human rights policies published in 2011.⁸⁶⁷

In spite of the legal and political opportunities created by the Lisbon Treaty to strengthen a nexus between trade, development and human rights, however, the EU has faced challenges in coherently and consistently upholding these ambitious commitments. The purpose of this report, therefore, has been to extensively map the intricate toolbox the EU has at its disposal to foster human rights throughout its trade and development policies, thereby compiling an overview of how the EU's nexus between trade, development and human rights is coming to fruition in the post-Lisbon era. This mapping exercise has addressed human rights in a holistic and transversal manner, whilst treating trade and development as two separate policy areas that are each characterised by a distinct *esprit de corps*.

The Human Rights-Trade Nexus in EU policy

In the realm of international trade and investment policies, the integration of human rights obligations and principles has come quite unexpectedly. Although there has been a growing consensus that trade and human rights can mutually reinforce each other, there still remains considerable opposition to the notion that human rights should therefore also be incorporated into trade agreements (see *supra*, section III.A). As the long battle over introducing 'beyond-trade' elements within the scope of the WTO has shown, many developing countries indeed feared that this move would bring forth protectionist measures in disguise. Conversely, and as announced in its landmark communication on the 'Global Europe Strategy' (2006), the EU increasingly opted for the pursuit of its own 'deep trade agenda', thereby gradual abandoning multilateral trade agreements in favor of a unilateral or even bilateral Plan B. Although this development may have generated some dismay amongst advocates of the 'effective multilateralist' approach, it is important to note that it has also enabled the EU to strengthen the human rights provisions in its trade instruments, without running into the procedural constraints of a human rights-reluctant WTO (see *supra*, section III.A).

In practice, the EU has two broad strands of human rights-infused trade instruments at its disposal. First, there are two types of unilateral trade measures, by which the EU (i) grants preferential market access to developing countries in exchange for the implementation of human rights standards under its GSP scheme; and (ii) places restrictions on the trade in certain goods that have been detrimental to human rights. In both cases, the EU has considerable human rights leverage over third countries, as both the GSP scheme and the specific measures take the form of a non-reciprocal decision which cannot be (formally) negotiated. In practice, this study has shown that the GSP, although deemed to be 'a dying breed' in an era of expanding FTAs, has concretely resorted to its human rights conditionalities the most. Whereas the GSP indeed places human rights at the heart of its conditions for market access and has indeed withdrawn trade preferences on three occasions in response to human rights violations (Myanmar, 1997-2013; Belarus, 2007-present and Sri Lanka, 2010-present), the EU's issue-specific measures tend to paint a bleaker picture. While earlier measures on instruments of torture (2005), export of military equipment (2008) and renewable energy (2009) pay considerable attention to their respective linkages to human

⁸⁶⁷ Thematic evaluation of the European Commission (n 19) xi.

rights, the more recent measures relating to extractive industries and international forest management have been increasingly silent on the issue of human rights.

A second broad strand of human rights-infused trade instruments are the bilateral or regional FTAs (and related Framework or Association Agreements), in which human rights clauses operate as a necessary condition for the validity of the agreement. Since the entry into force of the Lisbon Treaty, this category now also encompasses the rapidly expanding realm of foreign direct investment and its corresponding BITs. As emerges from the intricate overview in the first section of this chapter, however, it is not easy to make sense of the broad network of trade agreements concluded by the EU, as these may range from 'pure' trade agreements to much broader partnerships in which trade is only one aspect. From the point of view of effectiveness, the EU has systematically included 'essential elements' clauses in all its agreements since 1995, and has upgraded this approach by also including sustainable development chapters in more recent agreements, which provide for more specific action towards labour rights in particular. As noted throughout this study, however, the enforceability of human rights in the EU's FTAs and BITs has been found to be rather weak at best, and virtually absent at worst. In other words, the EU thus seems to still have a tendency to revert to the route of 'quiet diplomacy', thereby shying away from the more tangible trade instruments it has at its disposal. In terms of legitimacy, the picture is also rather mixed, as the linkages between human rights and trade in FTAs and BITs are still contested in many parts outside of Europe. The finding that the EU has thus far only enforced its human rights clauses through trade in relation to ACP countries has, by some accounts, only added insult to injury. The combination of the EU's track record in both effectiveness and legitimacy, in turn, is bound to also affect the EU's credibility as a global human rights actor – especially, as shown in this study, in light of the first BITs under negotiation, in which the echo of the EU's human rights commitment already seems to be further removed.

The Human Rights-Development Nexus in EU policy

Under the impetus of the Commission's Agenda for Change (2011) and the joint actions undertaken in the context of the Strategic Framework, human rights and the closely related areas of democracy, the rule of law and good governance, have been prioritised and addressed more systematically throughout different aspects of the EU's development cooperation. This is evident in the new Multiannual Financial Framework and the various financial instruments which will fund the EU's development cooperation activities between 2014 and 2020. In all of the major funding instruments for EU development cooperation (i.e. the EDF, DCI and ENI) the promotion of human rights is considered as an objective (see section IV.B.2). Furthermore, the inclusion of human rights as a cross-cutting issue in the new regulation laying down common rules and procedures for the implementation of the various financial instruments, illustrates this increased commitment.

The EU has developed policies and measures which may be summarised into three broad categories. First, it has progressively refined its legal and policy frameworks for conditioning the provision of development assistance based on a country's performance on human rights and democratic governance (see section IV.C.5.a)). This is embodied by the consultation procedure and appropriate measures in Article 96 of the Cotonou Partnership agreement (negative conditionality), the 'more for more' principle in the ENP policy

(positive conditionality), as well as in the new budget support policy which reflects a renewed emphasis on the respect for human rights (positive conditionality).

Secondly, the EU has scaled up its ‘direct’ or ‘targeted’ support for actors and processes related to human rights or the interrelated field of democracy, rule of law and good governance (see section IV.C.6). The increased funding for the EIDHR, and the earmarking of a share of the DCI’s geographic funding for activities on ‘human rights, democracy and good governance’, indicate a sustained investment for 2014-2020. The renewed efforts to establish ‘genuine partnerships’ with civil society actors in development partnerships can also be seen as a complementary policy. In addition, the establishment of the EED has created a new actor with the potential to bolster more cooperation in the nexus between development and human rights.

Third, the EU has progressively developed more coherent ‘transversal’ policies, aimed at integrating human rights as a cross-cutting dimension of development cooperation (see section IV.C.3). Regarding planning at the national level, the EU has established the practice of drawing up and internally coordinating ‘Human Rights Country Strategies’ for nearly all of its partner countries (see supra, IV.C.2). Regarding the planning and implementation of individual projects and programmes, the recent adoption of a toolbox to apply a ‘rights-based approach encompassing all human rights’ signals a new development. In addition, the EU has invested in policies for ‘targeted’ mainstreaming on gender equality and women’s rights and children’s rights in development cooperation. In the thematic areas of food security and health, human rights-based approaches have also shaped the Commission’s initiatives.

To conclude, the EU and in particular DG DEVCO have moved to strengthen the development-human rights nexus in several ways. In particular, the Strategic framework’s actions for moving toward a ‘rights-based approach’ for EU development cooperation have led to renewed efforts. The Commission has worked to substantially integrate human rights in the debate and preliminary proposals on a post-2015 global development agenda. It has elaborated and is implementing a new budget support policy in which human rights and democratic governance play a larger role. And, it has elaborated a toolbox to apply a ‘rights-based approach encompassing all human rights’ in EU development programmes and projects. While progress has been made at the level of policy formulation, the further implementation and follow-up of such policies, and their capacity to actually shape the EU’s development cooperation efforts towards partner countries, will require close follow-up and scrutiny.

Concluding Remarks and Future Perspectives for Research

The policies and instruments presented throughout this mapping report confirm that the inter-linkages between trade, investment, development cooperation and human rights are actively being operationalised by the EU’s institutions and actors. With the proliferation of policies aimed at integrating human rights in these areas of external action, a new set of questions and challenges emerges relating to the effectiveness and impact of such efforts. The 2011 External Evaluation of the Commission’s promotion of human rights in its external action identified a ‘mixed’ tracked record in its conclusions, identifying a number of systemic constraints.⁸⁶⁸ Since then, the EU’s external action has evolved structurally, with the

⁸⁶⁸ Thematic evaluation of the European Commission (n 19) viii, ix.

creation of the EEAS and the reform of certain Commission departments. All the while, the central, overarching place of human rights and democracy in EU external action has been reiterated and consolidated. In addition to these new structures, the Strategic Framework also put in place several new policies over the last couple of years, in response to the purported lack of political prioritisation, 'downstream' implementation, institutional memory, internal capacity-building and in-house expertise across operating structures.⁸⁶⁹

The reforms and new policies presented in this mapping study indicate a sense of a 'fresh start for the EU to take the lead in implementing a more consistent, coherent and effective external action which prioritises human rights. However, as explained in the introduction, it has been beyond the scope of this study to also assess the impact of the various instruments and policies on the actual protection of the human rights of citizens in EU partner countries. In the subsequent phase of the ongoing research, and most notably under the upcoming deliverable 9.2, this mapping exercise will further be valorised as an analytical tool to come to a more in-depth assessment of the EU's pledge to truly place human rights at the heart of all its trade and development policies.

⁸⁶⁹ As identified by the EC External Evaluation, *Ibid.* viii.

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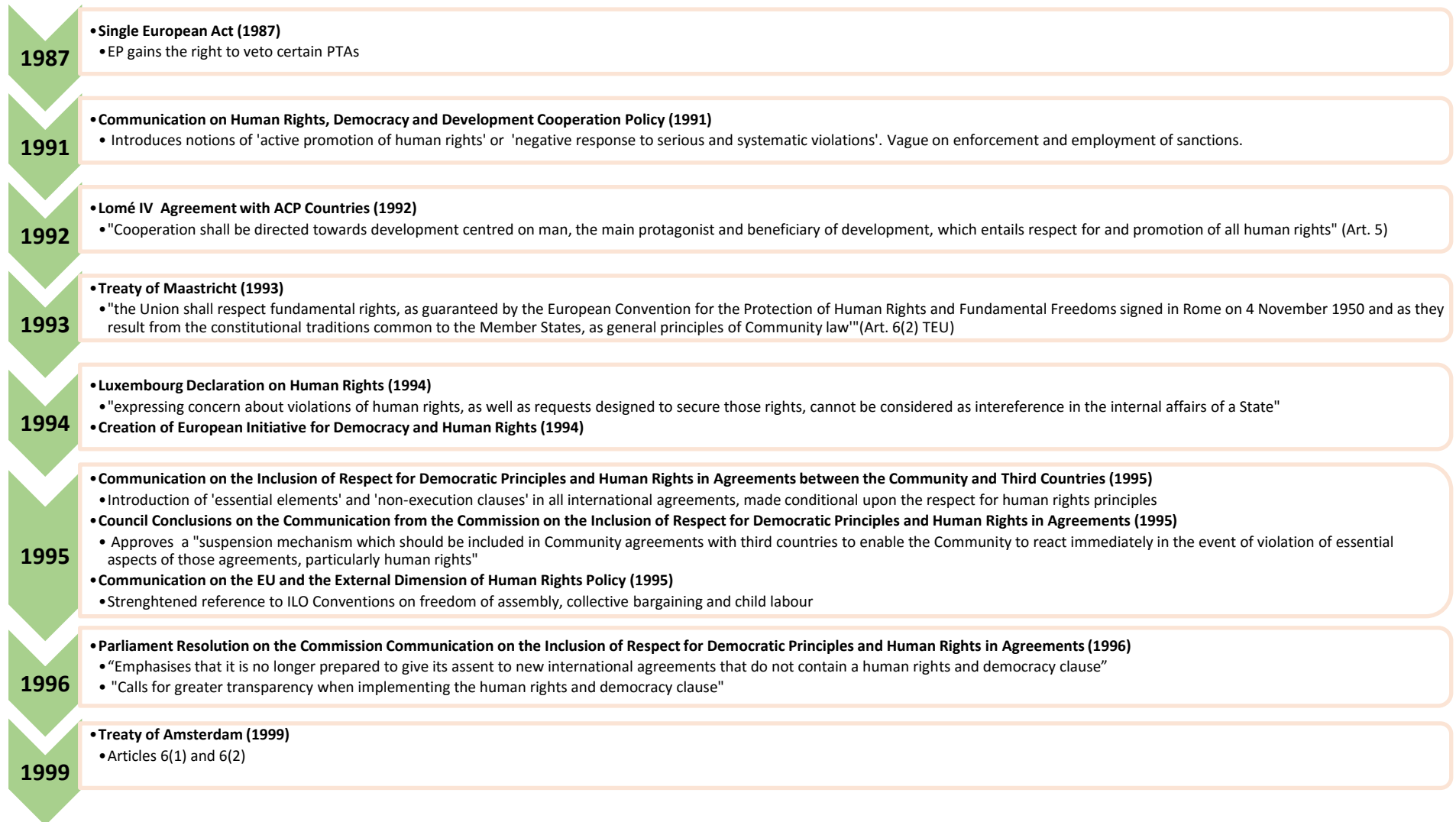
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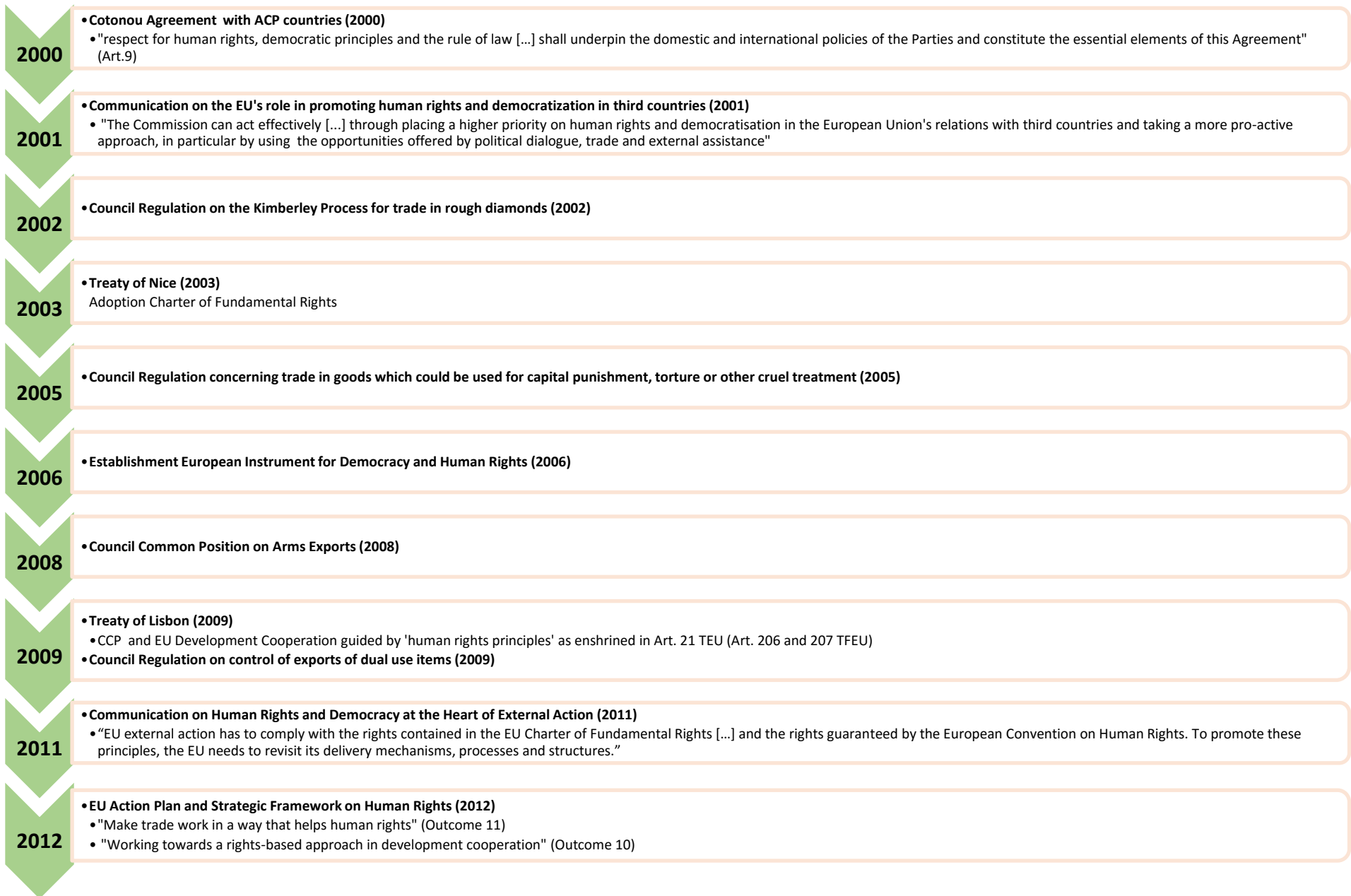
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ANNEX I

Figure 6: Timeline on the Progressive Integration of Human Rights in Trade and Development





ANNEX II

Table 8: Overview of essential elements clauses in EU trade agreements in force, by region, country and/or country bloc (excluding sectoral agreements)