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Article (Published Version)

Velluti, Samantha (2016) The promotion and integration of human rights in EU external trade relations. *Utrecht Journal of International and European Law*, 32 (83). pp. 41-68. ISSN 2053-5341

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RESEARCH ARTICLE

# The Promotion and Integration of Human Rights in EU External Trade Relations

Samantha Velluti\*

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The European Union (EU) has made the upholding of human rights an integral part of its external trade relations and requires that all trade, cooperation, partnership and association agreements with third countries, including unilateral trade instruments, contain with varying modalities and intensity a commitment to the respect for human rights. The paper discusses selected aspects of the EU's promotion and integration of human rights in its external trade relations and assesses the impact of the changes introduced by the 2009 Treaty of Lisbon (ToL) on EU practice.

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**Keywords:** EU law; Human rights; EU external trade relations; Unilateral trade arrangements; Bilateral and regional agreements; Human rights conditionality

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## I. Introduction

This paper discusses certain aspects of direct relevance to the European Unions's (EU) promotion and integration of human rights in its external trade law and policy before and after the entry into force of the Treaty of Lisbon (ToL) and in so doing it unravels and assesses extant limitations to EU practice and ways of addressing them.

Since the mid-1990s, the EU has developed a sophisticated array of instruments to promote human rights in its external trade policy such as human rights clauses in bilateral trade agreements and a set of human rights criteria in the Generalised System of Preferences (GSP).<sup>1</sup> In 2010, a Communication on *Trade, Growth and World Affairs* emphasised the trade-human rights nexus by stating that the aim of the EU is to encourage the EU's partners to promote the respect of human rights, labour standards, the environment and good governance through trade.<sup>2</sup>

However, the impact and credibility of the EU's approach to human rights in its external trade policy has been called into question because of the selective and uneven application of these human rights instruments. In this context the EU appears to be more concerned with the goals of an economic and political integration community rather than with the objectives of a human rights organisation.<sup>3</sup> This and other trade-related human rights concerns have been recognised and addressed in the Council's 2012 Strategic Framework and corresponding Action Plan for Human Rights and Democracy, which provides a roadmap to mainstream human rights into 'all areas of its external action without exception'<sup>4</sup> and commits the EU to 'develop methodology to aid consideration of the human rights situation in third countries in connection with the launch

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<sup>1</sup> These are in addition to the other instruments that the EU uses to engage in the promotion of human rights externally such as human rights guidelines, bilateral and multilateral diplomacy, and technical and financial assistance instruments, see Annabel Egan and Laurent Pech, 'Respect for Human Rights as a General Objective of the EU's External Action' (2015) KU Leuven Working Paper No 2015/161 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp161-170/wp161-egan-pech.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp161-170/wp161-egan-pech.pdf)> accessed 26 March 2016.

<sup>2</sup> COM(2010) 612 final, 12.

<sup>3</sup> Allan Rosas, 'Is the EU a Human Rights Organisation?' (2011) CLEER Working Paper No 2011/1, 11, 13 <<http://www.asser.nl/media/1624/cleer-wp-2011-1-rosas.pdf>> accessed 26 March 2016.

<sup>4</sup> Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12, 2 (Strategic Framework).

or conclusion of trade and/or investment agreements'.<sup>5</sup> In a similar vein, in a Communication on *Trade, Growth and Development*<sup>6</sup> the European Commission mentioned the need for change in order to foster growth, develop synergies between trade and development policies and the importance of projecting the EU's values and interests in the world, highlighting how the respect for human rights represents one of its core values in its external action. In the new EU trade strategy,<sup>7</sup> this shift in focus has been further expanded in order to include a parallel concern for the environment and human rights, including social rights. In addition, there is explicit reference to using trade agreements and trade preference programmes as levers to promote around the world values such as sustainable development, human rights, fair and ethical trade and the fight against corruption as well as improving the responsibility of supply chains. Indeed, it is now widely recognised that business operations affect the public interest and can impact on a range of human rights.<sup>8</sup>

At international level there has been a turn to 'responsible contracting'<sup>9</sup> and, in particular, a growing concern for infusing ethical and normative objectives and processes into State-investor contracts<sup>10</sup> as well as ways for incorporating human rights. The drafting of the *Principles for Responsible Contracts – Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations*<sup>11</sup> and the *Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework*<sup>12</sup> are aimed at fulfilling the aforementioned objectives and at reducing the negative externalities on third parties such as affected communities and service recipients.

The ToL reinforced the EU's external commercial competence<sup>13</sup> and, at the same time, it injected a normative approach into its external action through Articles 3(5) and 21 of the Treaty on European Union (TEU)<sup>14</sup> to advance European values, principles and objectives and whose universal application is sought via explicit reference to compliance with international law. Arguably, human rights have become the 'silver thread' of EU external action.<sup>15</sup>

However, the promotion and protection of human rights externally presents many challenges. In the first place, there are problems concerning vertical and horizontal consistency requiring all the Member States within the EU to speak with one voice in their external relations and, linked to this, the persistence of inter-institutional conflict at EU level. While internal cohesiveness is not a sufficient condition for the effectiveness of EU external action to occur and other factors need to be taken into account, such as bargaining configuration between the parties,<sup>16</sup> achieving and maintaining a common position at the EU inter-institutional level is a necessary condition for ensuring consistency in policy implementation. In addition, from the perspective of coherence integrating human rights in the EU external policies is problematic because of the mismatch between the internal and external dimensions of human rights promotion and protection, the inevitable clash between the objectives of the different EU external policies and human rights as well as

<sup>5</sup> *ibid* 11.

<sup>6</sup> Commission, 'Trade, growth and development: Tailoring trade and investment policy for those countries most in need' (Communication) COM(2012) 22 final.

<sup>7</sup> Commission, 'Trade for all – towards a more responsible trade and investment policy' (Communication) COM(2015) 497 final.

<sup>8</sup> Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' (2009) 3 *Human Rights & International Legal Discourse* 301, 316.

<sup>9</sup> OHCHR, *A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment* (ICTSD and World Economic Forum 2015).

<sup>10</sup> A State-investor contract can be broadly defined 'as a contract made between the State, or an entity of the State, which, for present purposes, may be defined as any organisation created by statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality'. See United Nations Conference on Trade and Development (UNCTAD), 'State Contracts' (2004) IIA Paper Series <[http://unctad.org/en/Docs/iteit200411\\_en.pdf](http://unctad.org/en/Docs/iteit200411_en.pdf)> accessed 20 August 2016. Examples are: loan agreements, purchase contracts for supplies or services, contracts of employment, large infrastructure projects and concession agreements.

<sup>11</sup> UNGA 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators' (25 May 2011) UN Doc A/HRC/17/31/Add.3.

<sup>12</sup> John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework* (UN 2011) (Ruggie Principles). It is noteworthy that the human rights obligations contained in the Ruggie Principles have been anchored to the eight core ILO Conventions.

<sup>13</sup> Roberto Bendini, 'The European Union's Trade Policy, Five Years after the Lisbon Treaty' (2014) PE 522.329.

<sup>14</sup> As for the obligations provided for by Consolidated version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 21. See also Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU) arts 205, 207, and 208.

<sup>15</sup> Clair Gammage, 'Social Norms and Labour Standards in EU FTAs: A Legal Perspective' (GIFTA Workshop, London, United Kingdom, 30 June – 1 July 2015).

<sup>16</sup> Eugénia da Conceição-Heldt and Sophie Meunier, 'Speaking with a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance' (2014) 21 *Journal of European Public Policy* 961.

the disparity in treatment between the EU's trading partners. The risk is thus of a 'disjunction between the proclamation of rights (. . .) and the contingent conditions for their fulfilment.'<sup>17</sup>

Against this background, the paper explores and critiques selected aspects of the development of EU human rights promotion and integration in its external trade relations. The analysis starts with an examination of the fragmented human rights protection legal regime of the EU with a particular focus on the impact of the ToL. This analysis is important because it shows that despite the foundational and pervasive character of human rights in EU law—which has been made even more visible by the introduction of certain constitutional changes of the ToL—the legal framework for the respect of human rights remains fragmented and does not provide for a coherent legal system of human rights protection in both the internal and external sphere of EU action.

The paper then looks at the way the EU integrates human rights in its unilateral trade arrangements and regional and bilateral trade agreements. After having identified the main shortcomings concerning the practice of EU human rights conditionality it considers whether *ex ante* human rights-informed impact assessments combined with *ex post* evaluations can help improve the methodology for measuring the trade sustainability and human rights impact of trade agreements. The paper thus considers whether these improved impact assessments may be one of the ways to effectively tackle the extant limitations of EU human rights conditionality together with trade agreements, which are tailored to the specificities of the third country concerned. The added value of these changes is that they would not require any further Treaty reform to ensure better promotion and respect for human rights. The paper concludes with some considerations on the EU's promotion of human rights in its external trade relations.

## II. Human Rights Protection in the European Union

### A. The Lisbon Treaty and the Foundational Character of Human Rights in the EU: Between Myth and Reality

Article 2 TEU<sup>18</sup> states that the EU is founded *inter alia* on the value of respect for human rights and Article 3(1) TEU provides that the Union's aims include the promotion of its values. Article 6 TEU is a key human rights provision, which grants legally binding status to the EU Charter of Fundamental Rights (EUCFR), envisages EU accession to the European Convention of Human Rights (ECHR) as an obligation and makes explicit reference to fundamental rights as general principles of EU law. Together Articles 2 and 6 TEU:

(. . .) illustrate the foundational and pervasive character of human rights in EU law. They permeate the EU legal order in multiple forms: as primary law (codified in the Charter), as general principles (extracted from International Human Rights Law and common constitutional traditions of the Member States), and as minimum standards for action on the international scene (in accordance with international law).<sup>19</sup>

The 'foundational' character of human rights is a legal construction to legitimise the European polity and EU action. The original European Economic Community (EEC) Treaty did not include any reference to fundamental rights. This omission was not accidental but the result of a deliberate choice.<sup>20</sup> The initial case law of the Court of Justice of the EU (CJEU) confirms that fundamental rights were not the domain of the EEC. It shows how the Court resisted attempts by litigants to invoke fundamental rights and was unwilling to treat them as part of the Community legal order. At the time it was considered that it was not the Community's competence to deal with infringements of national constitutional principles.<sup>21</sup> Hence, the narrative of a 'Europe of fundamental rights' constitutes a carefully constructed political myth of the EU. Yet, this has not

<sup>17</sup> Matthew Craven, 'The Violence of Dispossession: Extraterritoriality and Economic, Social and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 83.

<sup>18</sup> TEU art 2 provides that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail.

<sup>19</sup> 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 and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1660.

<sup>20</sup> Stijn Smismans, 'Fundamental Rights as a Political Myth of the EU: Can the Myth Survive?' in Sionaidh Douglas-Scott (ed), *Research Handbook on Fundamental Rights in the European Union* (Edgar Elgar, forthcoming).

<sup>21</sup> See eg Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, EU:C:1959:4; Case 40/64 *Marcello Sgarlata and Others v Commission of the EEC*, EU:C:1965:36.

impeded the EU to develop narratives on fundamental rights at a later stage, which claim *retrospectively* that fundamental rights are and have always been inherent in the EU.<sup>22</sup>

In addition, the above human rights Treaty provisions do not make any reference to territory or jurisdiction. Similarly, the EUCFR does not contain a jurisdictional clause that resembles the one contained in Article 1 ECHR delimiting its scope of application.<sup>23</sup> Certainly, the scope of the EUCFR also applies to EU external policies.<sup>24</sup> However, it is unclear what these rights concretely entail for the EU when pursuing its external trade and development policies. According to Bonavita the value of the Charter consists in acting as a parameter of legality for the EU's Common Commercial Policy (CCP), including international agreements concluded by the Union.<sup>25</sup> In particular, in relation to social rights should a trade agreement be found to be in breach of workers' rights contained in the Charter, its validity could be subject to judicial review before the Court. However, this may prove to be difficult in practice. It brings to the fore the issue of legal standing of non-privileged applicants (NPAs) before the CJEU under Article 263(4) Treaty on the Functioning of the European Union (TFEU) and, in particular, the limited ability of NPAs to meet the *Plaumann* test<sup>26</sup> for individual concern, given the opposition of the CJEU to the relaxation of the standing requirements.<sup>27</sup> The revised text of Article 263(4) TFEU, as amended by the ToL,<sup>28</sup> does not provide the basis for an expansion of the standing rules. The Charter rights and the standing rules for judicial review seem to be at variance with each another. As posited by Craig and De Búrca, '[t]he Charter accords individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by EU law will normally not be able to meet the requirements of individual concern.'<sup>29</sup> However, the *Frente Polisario* decision by the General Court of the EU (GCEU)<sup>30</sup> to annul the EU-Morocco agricultural agreement insofar as it applies to Western Sahara<sup>31</sup> seems to suggest that the Union's internal human rights standards are binding in EU external trade. The ruling also seems to ease the above tension between rights and NPAs legal standing in a number of respects. First, *Frente Polisario*, a national liberation movement for the independence and autonomy of the Sahrawi people in Western Sahara territory that is under the control of Morocco, has been found to have legal standing. Second, the EU is under an obligation to ensure respect for the fundamental rights of non-EU nationals in non-EU territory.<sup>32</sup> Third, 'entirely neutral' agreements, which do not require the violation of fundamental rights, may still fail to conform to this obligation if they favour the occurrence

<sup>22</sup> Smismans (n 20).

<sup>23</sup> Article 51 only states that it is addressed to EU Institutions, bodies, offices and agencies, and to the Member States only when implementing EU law. On the meaning of 'implementing' EU law, see Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:280, where the Court confirmed the continuity between the scope of the Charter and the general principles of EU law. The case, however, focused on the national context and whether it may concern cross-border issues within the EU. Even in this context, it remains unclear what should be considered to fall within the scope of the Charter (and the jurisdictional dimension is not considered), see eg Bas van Bockel and Peter Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åklagaren v Hans Åkerberg Fransson*' (2013) 6 *European Law Review* 866; Filippo Fontanelli, 'Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and 'Non-preclusion' Troubles Loom Large' (2014) 39 *European Law Review* 682; Michael Dougan 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the 'Scope of Union Law' (2015) 52 *Common Market Law Review* 1246.

<sup>24</sup> Interestingly, in referring to Article 21 TEU, the Commission maintains that 'the Charter also applies to the EU's external action', see Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final, 4.

<sup>25</sup> Valeria Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 261.

<sup>26</sup> Case 25/62 *Plaumann & Co. v Commission of the European Economic Community*, EU:C:1963:17.

<sup>27</sup> The judicial position on individual concern has been maintained in the post-ToL case law, see Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625.

<sup>28</sup> Amended Article 263(4) TFEU provides that:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

<sup>29</sup> Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (OUP 2011) 510.

<sup>30</sup> Case T-512/12 *Front Polisario v Council of the European Union*, EU:T:2015:953; the Council of the EU has brought an appeal against the decision of the GCEU, see Case C-104/16 P *Council of the European Union v Front Polisario and Commission* (pending).

<sup>31</sup> Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/2.

<sup>32</sup> *Council v Front Polisario* (n 30) paras 227–228. For a case analysis, see Geraldo Vidigal, 'Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council and the Protection of Fundamental Rights Abroad*' (*EJIL: Talk!*, 11 December 2015) <<http://www.ejiltalk.org/13901-2/>> accessed 22 July 2016.

of such a violation.<sup>33</sup> Fourth, the fact that an agreement may ‘indirectly encourage’ the violations of fundamental rights, or that the EU ‘benefits from them’, is sufficient to trigger the duty to take into account the specific elements of the agreement.<sup>34</sup> Hence, with the changes introduced by the ToL human rights are mechanisms that the EU should use to comply with its obligations under the EU Treaties, particularly in the light of Articles 3(5) and 21(1) TEU which recognise economic and social rights as a matter of justice that must be extended to external trade relations.

Another limitation of the Charter is that not all of its provisions can have direct effect as illustrated by those provisions concerning social rights. A careful reading of the Charter shows that the legally binding status it has acquired has not had the desired impact in relation to the qualification and place given to social rights. Only individual social rights are fully justiciable. Chapter IV on Solidarity includes individual rights, guiding principles and objectives. For example, Article 34 EUCFR on social security and social assistance is considered a mere objective,<sup>35</sup> while Article 28 EUCFR on the right of collective bargaining is a guiding principle since its practical specification is left to national legislation.<sup>36</sup> On the other hand, the provisions contained in Article 29 EUCFR on the right of access to placement services and Article 31 EUCFR on fair and just working conditions and, in particular, para 2, which specifies three distinct rights (a right to a limitation of maximum working hours; a right to daily and weekly rests periods; and a right to an annual period of paid leave), are considered justiciable. The first reason for such interpretation is that they are formulated in fairly concrete terms and seem capable of conferring a subjective right on individuals given their specific wording. The right protected by Article 29 EUCFR is considered a key prerequisite to fully realise the freedom of movement of workers guaranteed by Article 45 TFEU. The place of this provision within the EU *acquis* is further reinforced through secondary legislation based on Article 46 TFEU and its precursors.<sup>37</sup> In a similar vein, Article 31(2) EUCFR is also placed within the EU *acquis* and in particular the Working Time Directive<sup>38</sup> and some of the rights protected by Article 31(2) EUCFR, such as the right to a limitation of maximum working hours, are well established in international law.<sup>39</sup>

The different conceptualisations of social rights highlight ‘the complexities of the normative structure of EU labour law, which combines the “principles” of EU law contributing to a logic of protection, with the “principles” according to the Charter, which have a much weaker legal status.’<sup>40</sup> The CJEU case law has not been particularly helpful in reducing the confusion surrounding the distinction between rights and principles contained in the Charter. This is well illustrated by the *AMS* case<sup>41</sup> where the CJEU did not discuss whether Article 27 EUCFR on workers’ right to information and consultation within the undertaking should be seen as a principle or a right thereby missing the opportunity to shed light on Article 52(5) EUCFR concerning the meaning and nature of the Charter’s principles.

Since the emergence of the internal fundamental rights regime, human rights have also become an important component of EU external relations.<sup>42</sup> The ToL has injected a normative approach into its external relations through Articles 3(5) and 21(1) and (3)(1) TEU. Article 3(5) TEU<sup>43</sup> establishes the objectives to ‘promote’

<sup>33</sup> *Council v Front Polisario* (n 30) paras 239–241 and 246.

<sup>34</sup> *ibid* paras 231, 238.

<sup>35</sup> Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, 27.

<sup>36</sup> *ibid* 26.

<sup>37</sup> Diamond Ashiagbor, ‘Article 15, Freedom to Choose an Occupation and Right to Engage in Work, and Article 29, Right of Access to Placement Services’ in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) 796.

<sup>38</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

<sup>39</sup> Alan Bogg, ‘Article 31 – Fair and Just Working Conditions’ in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing 2014) 876.

<sup>40</sup> Sophie Robin-Olivier, ‘The Contribution of the Charter of Fundamental Rights to the Protection of Social Rights in the European Union: A First Assessment after Lisbon’ (2013) 1 *European Journal of Human Rights* 109; Pierre Rodière, *Les Droits Sociaux Fondamentaux à l’Épreuve de la Constitution Européenne* (LGDJ 2005) I-136.

<sup>41</sup> Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail*, EU:C:2014:2.

<sup>42</sup> Rosas (n 3); Giuseppe Balducci, ‘The EU’s Promotion of Human Rights’ in Knud E Jorgensen and Katie V Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge 2013).

<sup>43</sup> TEU art 3(5) provides that:

In its relations with the wider world, the Union shall uphold and promote its values [as defined in Article 2 TEU] and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

the EU's values and interests outside the Union and to 'contribute to' the other norms mentioned as well as an obligation to achieve these objectives.<sup>44</sup> Article 21(1) TEU is similar to Article 3(5) TEU, although as opposed to the latter there is reference to the Union as being required to 'be guided by' rather than 'uphold' and 'promote' principles in its 'action on the international scene'.<sup>45</sup> According to Bartels, Article 21(3)(1) TEU<sup>46</sup> extends the scope of application of the EU's external human rights obligations and is thus normatively stronger than the other two provisions in that it refers not only to 'the development and implementation of the different areas of the Union's external action' but also—and significantly—to 'the development and implementation (. . .) of the external aspects of [the EU's] other policies'.<sup>47</sup> What this means is that it also covers the external aspects of the EU's internal policies. Taken together these provisions seem to require that the EU respects human rights in its external action and also in its internal policies with an external dimension.

### ***B. The Extant Ambivalence in the EU's Constitutional Framework for Human Rights Promotion and Protection***

The various human rights provisions introduced by the 2009 ToL are considered to buttress the role of the EU as a global human rights actor.<sup>48</sup> However, as posited by de Búrca,<sup>49</sup> the traditional narrative that sees the ToL as the culmination of a linear, unidirectional and developmental progress towards a clear EU human rights policy is to be contrasted with two longstanding deficiencies in the Union's constitutional framework, which remain notwithstanding the changes introduced by the ToL. Firstly, the EU lacks a serious and coherent human rights policy and mechanism, which applies also to its Member States. Secondly, and linked to the former, the EU maintains double standards between its internal and its external policies.<sup>50</sup> These two deficiencies are largely explained by the fact that the EU lacks a general competence in the field of human rights. In spite of the broad set of objectives laid down by Articles 3(5) and 21 TEU these two provisions do not confer new competences on the EU.<sup>51</sup> For Cannizzaro the normative effect of Articles 3(5) and 21 TEU is limited precisely because the restraints deriving from the EU Treaties hinder the possibility for these provisions to be capable of providing a sufficiently strong legal basis for EU action aimed at promoting and protecting human rights. In his view, to entrust the EU with 'full' global human rights powers would require further Treaty amendments.

<sup>44</sup> Declaration 41 on Article 352 TFEU (the so-called 'flexibility clause') includes among the objectives of this provision the objectives laid out in Article 3(5) TEU. See also Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864, para 101, in which the CJEU refers to TEU art 3(5) and states that:

[u]nder Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.

<sup>45</sup> TEU art 21(1) provides that:

[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

<sup>46</sup> TEU art 21(3)(1) provides that:

[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

<sup>47</sup> Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071, 1074–1075.

<sup>48</sup> In this sense Weiß argues that the ToL challenges the substance and methodology of human rights protection in the EU, Wolfgang Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 *European Constitutional Law Review* 64.

<sup>49</sup> Grainne De Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649. De Búrca explains the significant difference between the 1950s constitutional model which envisaged that the Union would monitor and review human rights matters within the Member States and potentially even intervene to protect those rights and the current constitutional framework which restricts this role of the EU in Member States' 'internal affairs'. In addition, this model also saw a closely entwined constitutional relationship between the then EC and the ECHR, their respective Courts, and between the EC and the regional human rights system more generally.

<sup>50</sup> Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004).

<sup>51</sup> Enzo Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 *European Journal of International Law* 1093.

To some extent, this situation is explained by the fact that the EU is also a 'conflicted' trade power<sup>52</sup> as it is made up of Member States, which hold very different views on how to wield the EU's power through trade. Hence, some observations are warranted. First, the existence of these opposing goals can be seen in relation to the underlying reasons for the EU's increasing interest in becoming a global human and social actor on the international plane. In part, the EU seeks to exert some degree of political and economic domination over third countries because the failure to export its standards developed within its Internal Market to others outside the EU would put European firms at a competitive disadvantage. Moreover, by acting as a global regulator, the EU can defend its social preferences without compromising the competitiveness of its industries. At the same time, however, the EU's externalisation of its regulatory preferences is driven by altruistic purposes reflecting the legal traditions of those Member States with a strong focus on guaranteeing constitutional safeguards for the protection of human rights. This state of affairs explains why there is an increasing dialectical tension within the EU<sup>53</sup> involving civil society organisations, transnational networks and supranational actors such as the EU Commission, the Court and increasingly the European Parliament<sup>54</sup> 'against' the more 'resistant' governmental actors as represented by the Council of Ministers, which to a certain degree oppose full Europeanisation of human rights.

The ToL has given the EU Parliament a stronger role in relation to the conclusion of international agreements, which is of great significance given that it constitutes a formally independent voice for EU citizens<sup>55</sup> and that it is a strong human rights advocate. This flows from its ongoing commitment to the protection of human rights generally as well as its democratic legitimisation function that may be said to be independent and separate from that of the Member States. The EU Parliament has been given a right to be informed at all stages of the procedure for adopting international agreements.<sup>56</sup> It has also acquired a general power of veto by either giving consent or rejecting an international agreement (although it is noticeable that the EU Parliament cannot introduce amendments to the text of the proposed agreement but only entirely approve it or entirely reject it).<sup>57</sup> Indeed, since the entry into force of the ToL, the EU Parliament has refused to give its consent to various international agreements such as the Terrorist Finance Tracking Program with the United States<sup>58</sup> to protect data protection rights of EU citizens<sup>59</sup> and the multilateral Anti-Counterfeiting Trade Agreement for potential threat to civil liberties.<sup>60</sup> Similarly, the EU Parliament has refused to give its consent to the EU-Morocco Fisheries Partnership Agreement,<sup>61</sup> *inter alia*, because further to the 2002 Opinion of the UN Legal Counsel Hans Corell there was no evidence in the agreement that the fishery activities were to the benefit of, and according to, the wishes of the people of Western Sahara.<sup>62</sup>

<sup>52</sup> Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2007) 13 *Journal of European Public Policy* 906.

<sup>53</sup> De Búrca (n 49).

<sup>54</sup> Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (2014) PE 433.751.

<sup>55</sup> On the powers of the EU Parliament in the external relations of the EU post-Lisbon, see Christina Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' (2014) Jean Monnet Working Paper No 12/14 <<http://jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP12Eckes.pdf>> accessed 25 July 2016.

<sup>56</sup> TFEU art 218(10) and, specifically for international trade agreements, TFEU art 207(3). See also the Framework Agreement on Relations between the European Parliament and the Commission [2010] OJ L304/47, Annex 11, which goes beyond the strict wording of the Treaty on the Functioning of the EU thereby strengthening the EU Parliament's role in the negotiations and conclusion of international agreements. It could be argued that this agreement is an expression of the duty of sincere cooperation under Article 4(3) TEU and the principle of inter-institutional balance as per Article 13(2) TEU, see also Case C-658/12 *European Parliament v Council of the European Union (Somali Pirates)*, EU:C:2014:2025.

<sup>57</sup> TFEU art 218(6)(a) (i)-(v); cf TEC art 300(3) para 2.

<sup>58</sup> Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11.

<sup>59</sup> European Parliament Legislative Resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ C341/E100.

<sup>60</sup> European Parliament Legislative Resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, P7\_TA-PROV(2012)0287.

<sup>61</sup> European Parliament Legislative Resolution of 14 December 2011 on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2013] OJ C168/E42.

<sup>62</sup> UNSC 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council' (12 February 2002) UN Doc S/2002/161.



That said, the role of the EU Parliament remains limited in the context of the Common Foreign and Security Policy (CFSP), including human rights matters, and can only exercise influence on the general policy choices. Moreover, its role in the EU's ordinary external action remains smaller in comparison with the Union's internal policies.

### **C. The Autonomy of the EU Legal Order and Human Rights Regime**

The current constitutional framework places significant emphasis on the autonomy and distinctiveness of the EU's own human rights regime as exemplified by the CJEU Opinion 2/13 on the Draft Agreement on EU Accession to the ECHR<sup>63</sup> and other rulings where the CJEU has rather boldly stressed the autonomy of the EU legal order,<sup>64</sup> also in relation to the interpretation of the EUCFR vis-à-vis the ECHR. *Kadi* is illustrative.<sup>65</sup> It is considered one of the CJEU's most 'anti-International Law' judgments. Here the Court considered the EU's implementation of the UN Security Council anti-terrorist asset-freezing resolutions via Council Regulation 881/2002 to be in breach of EU fundamental human rights. In a similar vein, in *NS and ME* the CJEU held that the judgments of the European Court of Human Rights (ECtHR):

(. . .) essentially always constitute case-specific judicial decisions and not rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter.<sup>66</sup>

In *Elgafaji*<sup>67</sup> the CJEU applied the approach proposed in Opinion 1/91 concerning the Agreement creating a European Economic Area, negotiated between the former European Community, its Member States, and the countries forming the European Free Trade Association to the ECHR.<sup>68</sup> In the latter judgment the CJEU held that: 'the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically'.<sup>69</sup> Hence, the fact that Article 15(c) of the EU Asylum Qualification Directive<sup>70</sup> contained a provision, the content of which was different from that of Article 3 ECHR, justified its autonomous interpretation.<sup>71</sup>

In the context of the EU's external trade relations<sup>72</sup> it is well-known that 'WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted

<sup>63</sup> Opinion 2/13 of the Court on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

<sup>64</sup> For critical analysis, see Christina Eckes, 'International Law as Law of the EU: The Role of the ECJ' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 353.

<sup>65</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

<sup>66</sup> Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865. This preference for an autonomous interpretative approach has been confirmed in many other asylum cases, see eg Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2011:102; Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, EU:C:2013:740; Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:518; Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, EU:C:2013:342.

<sup>67</sup> Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94.

<sup>68</sup> On this point, see Samantha Velluti and Francesca Ippolito 'The Relationship between the European Court of Justice and the European Court of Human Rights: The Case of Asylum' in Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (Routledge 2014) 158.

<sup>69</sup> Opinion 1/91 of the Court on the Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, EU:C:1991:490, para 14 (Opinion 1/91).

<sup>70</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12, replaced by the Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 (EU Asylum Qualification Directive).

<sup>71</sup> *Meki Elgafaji and Noor Elgafaji* (n 67) para 28.

<sup>72</sup> With regard to non-trade related cases, see Case C-308/06 *Intertanko and Others v Secretary of State for Transport*, EU:C:2008:312, para 10, where the CJEU has refused to test the legality of an EU Directive against the standards in the UN Convention on the Law of the Sea (UNCLOS) on the basis that the 'nature and broad logic' of the Convention (to which the Union was a party) prevented the Court from assessing EU law by reference to it and on jurisdictional matters. See Case C-459/03 *Commission of the European Communities v Ireland (Mox Plant)*, EU:C:2006:345 in which the Court held that a Member State could not bring proceedings under

by the Community Institutions',<sup>73</sup> on the ground of the flexible and imprecise nature of the GATT and WTO rules.<sup>74</sup> Two exceptions have been identified by the CJEU. Firstly, direct effect is recognised where the Union intended to implement a particular obligation assumed in the context of the GATT/WTO (*Nakajima* exception).<sup>75</sup> The second exception occurs where a Union measure refers expressly to precise provisions of the GATT/WTO (*Fediol* exception),<sup>76</sup> which have rarely been applied.

To fully understand the CJEU's rationale it is necessary to situate it in the broader context of the European legal integration process. As posited by Martines:

(. . .) while the autonomy of the EU legal order vis-à-vis its Member States is functional to validate its authority, once this authority has been established (with its identity built around values, but also economic power) it has to be asserted and defended against the international legal system.<sup>77</sup>

In other words:

[t]he EU provides a way of protecting its legal order when it establishes that the *permeability* to its international law obligations (technique of automatic incorporation combined with supremacy over secondary legislation) finds a limit in the EU treaties and in the Charter of Human Rights.<sup>78</sup>

Linked to the autonomy of the EU legal order, the current constitutional framework –anti-discrimination law being an exception– does not envisage a major role for human rights in the EU internal policies<sup>79</sup> and, more generally, any legal or constitutional discussion of human rights issues concerning the EU is still constrained by the lack of or limited EU competence and powers.<sup>80</sup> In particular, in the context of the EU's internal policies the scope of human rights policy is limited to those areas of EU power or competence, which directly promote human rights.<sup>81</sup> Further, the combined reading of Articles 23 and 40 TEU indicate that the pursuit of the political objectives laid down by Article 21(1) and (2) TEU, which include human rights, is the primary competence of the CFSP and that the other EU substantive policies are prevented from autonomously pursuing the objectives of the CFSP.<sup>82</sup>

This fragmented legal framework for the promotion of human rights is somewhat in contradiction with the fact that the EU is bound by human rights obligations, both of its Member States and of its own.<sup>83</sup> The

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UNCLOS against another Member State before an arbitral tribunal, in so far as those proceedings related to matters coming within Union competence.

<sup>73</sup> Case C-149/96, *Portugese Republic v Council of the European Union*, EU:C:1999:574, para 47.

<sup>74</sup> Joined Cases 21/72, 22/72, 23/72, and 24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, EU:C:1972:115, para 21. WTO obligations do not have direct effect even if specifically confirmed by the WTO Dispute Settlement Body (DSB), see eg Case C-377/02 *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau (BIRB)*, EU:C:2005:121; and Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council of the European Union and Commission of the European Communities*, EU:C:2008:476.

<sup>75</sup> Case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities*, EU:C:1991:186, para 31. See also Case C-76/00P *Petrotub SA and Republica SA v Council of the European Union*, EU:C:2003:4, paras 53–58; Case T-45/06 *Reliance Industries Ltd v Council of the European Union and Commission of the European Communities*, EU:T:2008:398, paras 87–91.

<sup>76</sup> Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities*, EU:C:1989:254, paras 19–22. This exception is limited in scope and currently probably applies only to Council Regulation (EC) No 125/2008 of 12 February 2008 amending Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation [2008] OJ L40/1 (Trade Barriers Regulation).

<sup>77</sup> Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 *European Journal of International Law* 129, 145.

<sup>78</sup> *ibid* 146. As the author posits, this is confirmed by TFEU art 218(11) and again by the CJEU in several judgments (in addition to the one cited in this paper). See eg *International Agreement on Natural Rubber*, Opinion 1/78 of the Court on the *International Agreement on Natural Rubber*, EU:C:1979:224; Opinion 1/91 (n 70) para 46; Opinion 2/94 of the Court on the *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, para 35; Case C-211/01 *Commission of the European Communities v Council of the European Union*, EU:C:2003:452.

<sup>79</sup> De Búrca (n 49).

<sup>80</sup> See eg the horizontal clauses of the EUCFR, namely, arts 51(2) and 52(2).

<sup>81</sup> cf TEU art 3(3) concerning human rights within internal EU policies, which is quite specific (it provides that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child') and art 3(5) concerning human rights in external relations, which is broader and more general in scope and conceives the protection of human rights as an overarching goal.

<sup>82</sup> Cannizzaro (n 51).

<sup>83</sup> Member States are parties to several international human rights treaties. All Member States have ratified the *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

human rights protected in these treaties are part of the constitutional traditions of each Member State. In turn, the fundamental rights enshrined in Member States' constitutions are general principles of EU law.<sup>84</sup> By contrast, as the analysis in the previous section showed, in its external sphere of action the EU is given a much stronger and interventionist role with regard to the promotion of human rights internationally and it uses its commercial leverage to exert influence on third countries' conduct by imposing human rights conditionality. More generally, human rights concerns feature prominently in EU external trade.

### III. Unilateral Application of Social Conditionality in the EU Generalised System of Preferences

The EU GSP is an autonomous trade arrangement, which is part of the CCP. It was first set up in 1971<sup>85</sup> and since then subject to periodical revision. Through this scheme the EU provides preferential access to the EU market to a certain number of developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. To this end, it accords tariff preferences to countries, which fulfil certain economic criteria in terms of poverty and non-diversification of exports. Hence, the first objective pursued by the GSP is to contribute to the development of developing countries' economies. Secondly, it also aims at improving their political and social situation. In 2005 the GSP+ incentive regime (GSP+) was set up,<sup>86</sup> which offers additional benefits under certain conditions to support vulnerable countries in their ratification and implementation of international conventions, including ILO Conventions. To qualify for GSP+, countries must ratify and effectively implement international standards in the field of human rights, core labour standards (CLS), sustainable development and good governance.<sup>87</sup> The preferences granted by the GSP+ may be withdrawn from the beneficiary if the latter fails to implement the necessary conventions. There is also the special Everything But Arms (EBA) arrangement, pursuant to which the countries listed by UN Development Programme as 'Least Developed Countries' (LDCs) on the Human Development Index receive full duty and quota-free access to the EU market with the exception of arms and armaments.

The EU, via these unilateral trade preference schemes, pursues a two-fold objective: on the one hand, it rewards countries that are vulnerable but willing to ratify and implement key international conventions on sustainable development, including human rights and CLS, with additional tariff reductions under GSP+; on the other hand, it will temporarily withdraw GSP preferences in case of serious and continued violations of these conventions. The EU has used its power to withdraw access from beneficiary countries very rarely, and only in response to grave violations of ILO labour standards rather than human rights more generally.

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(ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); and various conventions of the International Labour Organisation (ILO). Member States also have extraterritorial obligations, which can be found, *inter alia*, in Articles 2 and 11 of the ICESCR. See in this sense Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 12: The Right to Adequate Food (Art. 11)' adopted at Twentieth Session of the CESCR (12 May 1999) UN Doc E/C.12/1999/5; CESCR, 'General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)' adopted at the Twenty-Ninth Session of the CESCR (20 January 2003) UN Doc E/C.12/2002/11. See also the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (ETO) (ETO Consortium 2012); ILC, 'Report on the Work of Its Fifty-Third Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10; ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/49 (Vol. I)/Corr.4 (ARSIWA); ILC, 'Report of the International Law Commission on the Work of its Sixty-Third Session' (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10; ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/473 (DARIO), all of which attempt to clarify the scope of extraterritorial obligations. However, the analysis of extraterritorial obligations goes beyond the scope of this paper.

<sup>84</sup> First developed by the CJEU, it has been constitutionalized with explicit reference to be found in TEU art 6(3). See eg Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

<sup>85</sup> Social considerations in the scheme were inserted only in January 1995 when the new EC GSP scheme for industrial products entered into force. Subsequent GSP Regulations have been increasingly including the requirement of complying with ILO labour standards and specifically with ILO Conventions No 87, 9, 138, 29, 105, 100, 111 and 182.

<sup>86</sup> Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences [2005] OJ L169/1. One of the reasons to reform the EU's GSP scheme was the decision handed down by the WTO Appellate body in January 2004, which upheld – albeit for different reasons – the previously established findings of the WTO adjudicating panel concluding the WTO-inconsistency of the EC's GSP scheme. See WTO, *India: European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (20 April 2004) WT/DS246/AB/R.

<sup>87</sup> For a list of the 27 core conventions, see Council Regulation (EU) No 978/2012 of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1, Annex VIII, which has changed the list so as to remove the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 from the list and adding the 1992 UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

In 1997 the Council withdrew GSP status from Myanmar for forced labour practices,<sup>88</sup> which were then reinstated in June 2012.<sup>89</sup> In addition the Council suspended Belarus access to the EU GSP as of June 2007, further to ILO and European Commission investigations, which revealed serious and persistent violations of the rights of freedom of association and collective bargaining in Belarus.<sup>90</sup> Overall the EU is reluctant to suspend beneficiary countries from its GSP scheme,<sup>91</sup> which explains why the EU's approach is generally referred to as 'soft unilateralism'.

### A. Evaluation

The EU has not always been applying the GSP scheme consistently. Other countries such as Uzbekistan<sup>92</sup> and Turkmenistan, which similarly breach labour rights, continue to have access to the EU's GSP scheme. This 'selective human rights conditionality' has led many to question the legitimacy of the EU's role in promoting human rights and ILO labour standards.<sup>93</sup> Many observers argue that the EU not only applies the GSP scheme at its own discretion but also that it uses it instrumentally in order to pursue foreign policy objectives rather than for ensuring the protection of labour rights.<sup>94</sup>

The implementation of the EU's GSP+ scheme has been subject to criticism because of various GSP+ beneficiary countries having a particularly poor record as regards one or more CLS. For example, in 2014 Guatemala—a notorious labour rights violator—was granted GSP+ status. Guatemala has ceased to be a GSP+ beneficiary country from January 1, 2016. However, the reason for this is that it benefits from preferential market access under the 2012 EU-Central America trade agreement and not because of a decision of the Commission to withdraw GSP+ preferential treatment for labour rights abuses. Infringements of CLS have often been reported and the EU Parliament has continuously called upon the Commission to monitor more strictly the compliance with ILO labour standards and asking for the suspension of preferences in respect of countries that breach fundamental social rights.<sup>95</sup>

The effects of withdrawal of GSP+ benefits have varied. For example, in 2009 the Commission opened an investigation into El Salvador, following a judgment of the El Salvador Supreme Court that El Salvador's ratification of ILO Convention No 87 on freedom of association and the right to organise was unconstitutional. The prospect of loss of access to GSP+ benefits appears to have been instrumental in persuading the El Salvadorian government to amend the Constitution so as to render ratification of the Convention constitutional.<sup>96</sup> Similarly, the Commission initiated an investigation into Bolivia concerning the effective implementation of the UN Single Convention on Narcotic Drugs<sup>97</sup> following Bolivia's decision to withdraw from the said Convention as of 1 January 2012. However, Bolivia continued to give effect to the Convention

<sup>88</sup> Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to the generalized tariff preferences from Myanmar/Burma [1997] OJ L85/8.

<sup>89</sup> Council Regulation (EU) No 607/2013 of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to the generalized tariff preferences from Myanmar/Burma [2013] OJ L181/13.

<sup>90</sup> Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus [2006] OJ L4056/35.

<sup>91</sup> Other EU official investigations to evaluate allegations of human rights violations, which did not result into withdrawals from the scheme, were the following: 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. For El Salvador, see Commission Decision 2008/316/EC of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador [2008] OJ L108/29. For Bolivia, see Commission Implementing Decision 2012/161/EU of 19 March 2012 providing for the initiation of an investigation pursuant to Article 17(2) of Council Regulation (EC) No 732/2008 with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia [2012] OJ L80/30.

<sup>92</sup> Under the Uzbekistan Partnership and Cooperation Agreement technical meetings were suspended in response to the Andjan massacre. However, in the Council Common Position there was no reference to the human rights clause, see Council Common Position 2005/792/CFSP concerning restrictive measures against Uzbekistan [2005] OJ L299/72; see further Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 *Legal Issues of Economic Integration* 297, 304.

<sup>93</sup> 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.

<sup>94</sup> For a discussion of these issues, see Jan Orbie and Ferdi De Ville, 'Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 487.

<sup>95</sup> European Parliament Resolution of 15 November 2006 on the European Union's GSP, P6\_TA(2006)0489, para 4; European Parliament Resolution of 13 May 2007 on promoting decent work for all, P6\_TA(2007)0206, para 8.

<sup>96</sup> Commission, 'Investigation pursuant to Article 18(2) of the Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador' (Report) C(2009) 7934.

<sup>97</sup> Commission Implementing Decision 2012/161/EU (n 91).

and on 10 January 2013 Bolivia's request to re-accede was accepted. Consequently, the Commission stopped its investigation in March 2013.

However, a Commission proposal to withdraw access to the GSP+ from Sri Lanka, further to an investigation which found widespread violations of the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture (CAT) and the 1989 Convention on the Rights of the Child (CRC), was not sufficiently persuasive with the Sri Lankan government to take adequate measures to address the violations identified by the investigation. Sri Lanka was then temporarily suspended from the GSP+ scheme in August 2010.<sup>98</sup> Prior to this the Commission had offered to delay the entry into force of the withdrawal by six months (decision was made in January 2010) in exchange of 'tangible and sustainable progress on a number of outstanding issues'.<sup>99</sup>

With regard to the EBA, Cambodia's sugar industry illustrates some of the problems associated with this scheme. In the absence of effective human rights safeguards, Cambodia's policy of granting large-scale land concessions to private investors for agro-industrial development and the EU's policy of granting preferential tariffs to facilitate such investments in LDCs have had an adverse human rights impact on the population with forced evictions and land seizures.<sup>100</sup> A 2014 EU Parliament resolution called for the Commission 'to act, as a matter of urgency, on the findings of the recent human rights impact assessment of the functioning of the EU's EBA initiative in Cambodia' and to require exporters seeking to take advantage of EBA privileges 'to testify that they have not evicted people from their land and homes without adequate compensation'.<sup>101</sup> The key question is whether this unexpected and highly undesirable 'side-effect' of the implementation of the EBA in Cambodia would constitute a violation of a EU obligation. Even though Articles 3(5) and 21(3)(1) TEU require the EU to respect human rights in relation to its external policies and internal policies with external effects, it is unclear whether these provisions require the EU also to protect human rights extraterritorially or to fulfil human rights other than in general terms.<sup>102</sup> In such scenarios the EU would have to withdraw its preferential treatment to adhere to its ethical normative role, which would be unlikely in practice nor could it take coercive steps with a view to enforcing the other country's own obligations in this regard.

The foregoing provides a mixed picture of the GSP scheme. Questions have arisen in relation to the lack of transparency in the decision-making process pursuant to which third countries are granted the standard GSP and GSP+ preferences, as well as issues of selective conditionality and double standards. There have also been questions concerning the review of implementation of the relevant Convention requirements for the granting of GSP+ benefits.

Further to these limitations in the operation of the GSP and GSP+, the EU adopted a reformed GSP law in 2012 with the aim of strengthening the impact and the monitoring of the GSP scheme.<sup>103</sup> The reform reduced the number of beneficiaries to those developing countries most in need<sup>104</sup> and reinforced the incentives for the respect of core human and labour rights, environmental and good governance standards.<sup>105</sup> The changes made to the monitoring of GSP+ compliance are particularly worthy of note. Together with the European External Action Service, the Commission has set up a structured monitoring process: an ongoing 'GSP+ dialogue' with the beneficiary authorities, formalised through annual lists of issues known as 'scorecards'. Every two years the Commission reports to the EU Parliament and the Council on the fulfilment

<sup>98</sup> Council Regulation (EU) No 143/2010 of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided under the Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka [2010] OJ L45/1.

<sup>99</sup> Commission, 'EU regrets silence of Sri Lanka regarding preferential import regime' (Press Release, 5 July 2010) IP/10/888.

<sup>100</sup> Inclusive Development International, 'Bittersweet Harvest: A Human Rights Impact Assessment of the EU's Everything But Arms Initiative in Cambodia' <[http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet\\_Harvest\\_web-version.pdf](http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf)> accessed 24 July 2016; International Federation for Human Rights, 'Cambodia: Deteriorating Human Rights Situation Calls for Urgent EU Action (Briefing Paper EU's HRD with Cambodia, Brussels, 12 March 2014) 5–6 <[http://www.fidh.org/IMG/pdf/cambodia\\_deteriorating\\_human\\_rights\\_situation\\_calls\\_for\\_urgent\\_eu\\_action.pdf](http://www.fidh.org/IMG/pdf/cambodia_deteriorating_human_rights_situation_calls_for_urgent_eu_action.pdf)> accessed 24 July 2016.

<sup>101</sup> European Parliament Resolution of 16 January 2014 on the situation of rights defenders and opposition activists in Cambodia and Laos, P7\_TA(2014)0044.

<sup>102</sup> Bartels, 'EU Human Rights Obligations' (n 47); Cannizzaro (n 51).

<sup>103</sup> Council Regulation (EU) No 978/2012 (n 88). The revised scheme is in place as of 1 January 2014. For academic commentary, see Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)' (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 285.

<sup>104</sup> The list of beneficiaries has been modified several times to reflect the exit from and the entry of countries newly meeting the eligibility conditions for each of the three types of arrangements since the first modifications effected with the 2012 reform, which at the time of writing is as follows: 30 GSP, 13 GSP+ and 49 EBA beneficiaries; Commission, 'Report on the Generalised Scheme of Preferences Covering the Period 2014–2015' COM(2016) 29 final.

<sup>105</sup> id; for an assessment of the reformed GSP scheme.

status of those conditions using scorecards for each GSP+ recipients.<sup>106</sup> These scorecards are an important source of information for the Commission as it enables it not only to establish a form of cooperation with beneficiary countries through the so-called 'GSP+ dialogue' but also to constructively discuss beneficiaries' commitments to the ILO Conventions within the relevant international organisations. Hence, it can be argued that the monitoring of GSP+ compliance has been enhanced in two ways: first, by involving a multiplicity of actors; second, and linked to the former, by developing forms of dialogue and cooperation with the beneficiaries' local authorities which strengthen the capacity-building of the developing country concerned and therefore go beyond the mere monitoring process.

#### IV. Human Rights Conditionality in the EU's Bilateral and Regional Trade Agreements

To date the EU has concluded and is in the process of negotiating an array of international trade agreements, which vary in nature and belong to very different contexts, namely, purely trade relationships to much broader partnerships of which trade is only one element.<sup>107</sup>

Since the 1990s it has been a policy of the EU that all framework agreements concluded with third countries such as Association Agreements, Partnership Agreements and Cooperation Agreements, should include a 'human rights' clause<sup>108</sup> which provides that the respect for human rights, democracy and the rule of law constitutes the basis for the agreement and represents the 'essential element' of the agreement<sup>109</sup> on which the reciprocal obligations of the parties are premised, so that human rights violations of a certain scale by one of them can amount to a material breach of the agreement and justify suspension or other counter-measures.<sup>110</sup>

An overview of all essential elements clauses in EU trade agreements currently in force shows that there are clear patterns in the drafting of the essential elements clause and, in particular, that these clauses have evolved over the years and can be grouped by country and/or regional bloc.<sup>111</sup> In addition, there is also a 'non-execution' clause stating that in the event that one party fails to comply with its obligations, the other party is able to adopt 'appropriate measures'. According to the Commission sanctions under the clause should be reserved only for the most extreme and flagrant violations of human rights.<sup>112</sup> This form of unilateral enforcement is well-illustrated by Article 8(3) of the 2012 EU–Colombia and Peru Trade Agreement, which provides that 'any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement.' Specifically in relation to labour issues the agreement requires the effective implementation in law and practice of CLS. The sustainable development chapter of the agreement contains obligations on the effective implementation of, and non-derogation from, domestic labour laws, recognition of the ILO decent

<sup>106</sup> Council Regulation (EU) No 978/2012 (n 88) art 14(1).

<sup>107</sup> We can identify four types of international agreements: (i) exclusive trade agreements (based on Article 207 TFEU); (ii) trade and economic cooperation agreements (based on Articles 207, 211, 212 and 218 TFEU); (iii) association agreements (based on Article 217 TFEU); and (iv) partnerships with southern or eastern neighbouring countries (based on Article 8 TEU), or ACP group countries or candidate countries (the legal bases varying).

<sup>108</sup> Commission, 'On the inclusion of respect for democratic principles and human rights in agreements' (Communication) COM(95) 216 final. The first operative human rights clause was inserted in the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic [1990] OJ L295/66, art 1(1). The human rights standards referred to in the clause were based on three declaratory human rights instruments: the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), and later on, the Final Act of the Conference on Security and Cooperation in Europe (1 August 1975) 14 ILM 1292 (Helsinki Declaration) and the Charter of Paris for a New Europe (21 November 1990) 30 ILM 193 (Paris Charter).

<sup>109</sup> See eg Agreement establishing an association between Central America, on the one hand, and the European Union and its member States, on the other [2012] OJ L346/3, art 1 (EU-CAAA). A database with a list of all the agreements can be found at, EEAS, 'Treaties Office Database' <<http://ec.europa.eu/world/agreements/default.home.do>> accessed 25 July 2016. Interestingly, under Framework Agreement on comprehensive partnership and cooperation between the European Union and its member States, of the one part, and the Socialist Republic of Vietnam, of the other part [2012] OJ L134/3, arts 1(1) and 1(3) (PCA) both parties commit themselves not only to the respect for human rights but also to promoting sustainable development.

<sup>110</sup> In line with Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art. 60. For detailed analysis, see Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003); Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005).

<sup>111</sup> Laura Beke and others, 'Report on the Integration of Human Rights in EU Development and Trade Policies' (2014) FRAME Deliverable No 9.1, Annex II <<http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>> accessed 25 March 2016.

<sup>112</sup> Toby King, 'The European Union as a Human Rights Actor' in Michael O'Flaherty and others (eds), *Human Rights Diplomacy* (Martinus Nijhoff 2011) 77, 91.

work principles and their relevance for trade and labour.<sup>113</sup> It also includes a provision on equality of treatment as regards working conditions with a focus on migrant workers legally employed in the Parties' respective territories.<sup>114</sup> There is also an 'implementation' clause such as the one contained in the 2012 EU-Central America Agreement providing that 'the Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement, and shall ensure that they comply with the objectives laid down in this Agreement.'<sup>115</sup> The exact meaning of this clause is unclear. According to Bartels 'it could have the effect of imposing on the parties not only a negative duty to ensure that human rights and democratic principles are respected but also a positive duty to ensure that these norms are ensured and fulfilled.'<sup>116</sup>

Human rights clauses have been included also in the new generation of Association Agreements (AA) with Ukraine, Georgia and Moldova signed in 2014 on the basis of Article 217 TFEU, which constitute a new typology of bilateral instruments of the EU Eastern Partnership within the broader context of the European Neighbourhood Policy.<sup>117</sup> Together with their Deep and Comprehensive Free Trade Areas (DCFTAs) they represent the most extensive form of co-operation offered by the EU to its non-candidate neighbours to date.<sup>118</sup> These agreements foresee far reaching political and economic integration with the EU by significantly deepening political and economic ties. They are also the first post-Lisbon agreements in the region. This is important insofar as the inclusion of human rights conditionality in the three AAs is now mandated by EU primary law.<sup>119</sup> These agreements signify how human rights clauses have become a key component of EU foreign policy as well as illustrating, more generally, the EU's firm commitment to human rights promotion. All three agreements include two different forms of conditionality. First, the Preambles and initial articles of the AAs include several provisions related to the Eastern Partners' commitments to the 'common values' of the EU, such as the respect for human rights, democracy and the rule of law.<sup>120</sup> Some of these are contained in the 'essential elements' clauses.<sup>121</sup> Second, the parts dealing with the DCFTA include 'market access' conditionality on the basis of which additional access of the Eastern Partners' to the EU Internal Market depends on whether they have successfully implemented their legislative approximation commitments.<sup>122</sup>

The AAs are premised on the idea that these countries have special privileged links whereby the party must take part in the Union system thus illustrating the process of gradual integration in the EU *acquis*.<sup>123</sup> The stated objectives of the Eastern AA include 'gradual rapprochement' and 'close and privileged links' with Ukraine<sup>124</sup> and 'political association and economic integration' based on 'close links' with Moldova and Georgia.<sup>125</sup>

The human rights clauses included in these agreements are conceived differently in comparison with the human rights clauses discussed above due to the legal and political specificities of these countries. Out of the three agreements the EU-Ukraine AA stands out not only for its comprehensiveness and complexity but particularly for its 'strict conditionality'<sup>126</sup> as the Preamble to the agreement puts emphasis on the essential elements clause and progress in cooperation is linked to respect for common values as well as progress in achieving convergence with the EU in political, economic and legal areas. In all three agreements an

<sup>113</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3, Title IX (EU-Colombia and Peru TA).

<sup>114</sup> *ibid* art 276.

<sup>115</sup> EU-CAAA art 355.

<sup>116</sup> Bartels, 'Human Rights and Sustainable Development' (n 93) 301. Cf EU-Colombia and Peru TA art 8(1), which makes explicit reference to all authorities and government levels of the Parties.

<sup>117</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part [2014] OJ L161/3 (EU-Ukraine AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Moldova of the other part [2014] OJ L260/4 (EU-Moldova AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia of the other part [2014] OJ L261/4 (EU-Georgia AA).

<sup>118</sup> Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 *European Law Review* 391.

<sup>119</sup> Szilárd Gáspár-Szilágyi, 'Human Rights Conditionality in the EU's Newly Concluded Association Agreements with the Eastern Partners' in Christina M Akrivopoulou (ed), *Defending Human Rights and Democracy in the Era of Globalisation* (IGI Publishing 2016).

<sup>120</sup> EU-Ukraine AA prmb, art 1(2)(e); EU-Moldova AA prmb, art 1(2)(e); and EU-Georgia AA prmb, art 1(2)(f).

<sup>121</sup> EU-Ukraine AA art 2; EU-Moldova AA art 2; and EU-Georgia AA, art 2.

<sup>122</sup> EU-Ukraine AA arts 475(2), (5), (6), and 476; EU-Moldova AA arts 451–452; EU-Georgia AA arts 419–420.

<sup>123</sup> Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2015).

<sup>124</sup> EU-Ukraine AA art 1(2)(a).

<sup>125</sup> EU-Moldova AA art 1(2)(a); EU-Georgia AA art 1(2)(a).

<sup>126</sup> Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument' (2014) EUI Working Paper Law No 2014/09, 3. For further analysis, see Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Brill 2016).

extensive list of international instruments constitutes the basis for the essential elements that the parties must respect in their domestic and foreign policies. In addition to the UDHR, the essential elements clauses make references to the ECHR, the Helsinki Declaration, and the Paris Charter.<sup>127</sup> The AAs essential elements clauses include democratic principles and human rights as well as fundamental freedoms.<sup>128</sup> They also contain security elements and are broad in scope. The EU-Ukraine AA essential elements clause includes the 'promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence'<sup>129</sup> in support of Ukraine particularly following the illegal annexation of Crimea by Russia. Further, the clause also includes reference to 'other relevant human rights instruments' thus leaving an open-ended possibility for future inclusion of international human rights instruments. All Eastern clauses include 'countering the proliferation of weapons of mass destruction, related materials and their means of delivery.'<sup>130</sup> The 'principles of free market economy' as well as a list of other objectives and/or values such as 'rule of law, the fight against corruption, the fight against the different forms of transnational organised crime and terrorism, the promotion of sustainable development and effective multilateralism' are not part of the essential elements clauses.<sup>131</sup> Instead they are considered to 'underpin' the relationship between the parties and are 'central to enhancing' this relationship.<sup>132</sup> As Petrov maintains 'a distinction is made between hard-core common values related to fundamental rights and security, and a range of other general principles that are deemed crucial for developing closer relations but which cannot trigger the suspension of the entire agreement.'<sup>133</sup> The essential elements clauses are coupled with 'Bulgarian' type 'non-execution' clauses, which means that they provide for 'appropriate measures' in case of breaches against the essential elements of the agreement.<sup>134</sup> They are preceded by the agreements' general dispute settlement clauses. All three AAs include separate dispute settlement clauses for trade and trade-related matters.<sup>135</sup> Moreover, the essential elements clauses in all three AAs require the respect of human rights by the contracting parties both in their domestic and external policies.<sup>136</sup> All three Eastern Partners have territories over which they de facto do not exercise control.<sup>137</sup>

The EU's general reluctance to adopt a punitive approach and to apply 'appropriate measures' can also be seen in relation to these Eastern AAs as the possibility of suspension is to be considered as a means of last resort and only in 'exceptional circumstances' can trade relations, and thus the operation of the DCFTA, be suspended.

With regard to labour provisions, the 2000 Cotonou Partnership Agreement (CPA)<sup>138</sup> is particularly worthy of mention as both the EU and the African, Caribbean and Pacific (ACP) countries have equally committed themselves to respect CLS and to enhance cooperation in this area, for example, through the adoption and enforcement of legislation and, at the same time, rejecting the use of labour standards for protectionist purposes, as provided in Article 50, the key labour clause of the agreement. While mainly promotional in nature, the clause 'entrenches the CLS within the partnership as recommended by the World Commission on the Social Dimension of Globalization (WCSDG)' and specifically that the objectives of the ILO can be best achieved with the cooperation of certain regional actors and through transposition into the CPA of those obligations stemming from the 1998 ILO's Declaration, which in turn are 'subject to the oversight of the parties and coordinated action under the EU-ILO strategic partnership.'<sup>139</sup> In addition, the CPA provides for the use of dispute settlement in relation to the interpretation and application of their human rights

<sup>127</sup> EU-Ukraine AA art 2; EU-Moldova AA art 2; and EU-Georgia AA art 2.

<sup>128</sup> EU-Ukraine AA arts 6–7; EU-Moldova AA arts 4–5; EU-Georgia AA arts 4–5.

<sup>129</sup> EU-Ukraine AA art 2.

<sup>130</sup> *id.*; EU-Moldova AA art 2; and EU-Georgia AA art 2.

<sup>131</sup> EU-Ukraine AA art 3; EU-Moldova AA art 2; EU-Georgia AA art 2.

<sup>132</sup> *id.*

<sup>133</sup> Roman Petrov, 'EU Values in Integration-oriented Agreements with Ukraine, Moldova and Georgia' in Sara Poli (ed), *The European Neighbourhood Policy: Values and Principles* (Routledge 2016) 99, 103.

<sup>134</sup> EU-Georgia AA art 422; EU-Moldova AA art 455; EU-Ukraine AA, art 478. In contrast with the so-called 'Baltic' type 'non-execution' clause, which gave parties the right to suspend an agreement in whole or in part with immediate effect if a serious breach of its essential provisions should occur.

<sup>135</sup> EU-Ukraine AA, DCFTA Title IV, ch 14; EU-Moldova AA, DCFTA Title V ch 14; EU-Georgia AA, DCFTA Title IV ch 14.

<sup>136</sup> EU-Ukraine AA art 2; EU-Moldova AA art 2; and EU-Georgia AA art 2.

<sup>137</sup> Gáspár-Szilágyi (n 120) examines this specific aspect and how it has been addressed in detail.

<sup>138</sup> Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3 (CPA). This agreement has since been revised twice: in Luxembourg on 25 June 2005 (OJ L209/27) and in Ouagadougou on 22 June 2010 (OJ L287/3).

<sup>139</sup> Jeff Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in Bart Van Vooren and others (eds), *The EU'S Role in Global Governance: The Legal Dimension* (OUP 2013) 316.



clauses,<sup>140</sup> including appropriate measures adopted under these clauses.<sup>141</sup> However, with the exception of Article 50 CPA, social norms in EU agreements seem to be included as objectives to be achieved rather than enforceable legal commitments, as they do not provide for genuine enforcement mechanisms.

Since the mid-1990s, sustainable development has become increasingly important in the EU's trade policy<sup>142</sup> and the ToL has elevated it to one of the key principles underlying EU external action.<sup>143</sup> As Bartels points out 'it is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements admit the possibility of violating the principle of sustainable development.'<sup>144</sup> This overarching legal commitment has been given further effect with the adoption of so-called 'new generation' of FTAs containing a 'trade and sustainable development' chapter, which includes provisions for the respect of labour and environmental standards. The agreements contain provisions on cooperation and obligations to respect and 'strive' to improve multilateral and domestic labour and environmental standards.<sup>145</sup> In particular, a first set of obligations contain minimum obligations to implement certain multilateral obligations and other obligations which require the parties to the agreement not to reduce their levels of protection and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.<sup>146</sup>

Examples of such agreements are the 2010 EU-Korea FTA,<sup>147</sup> the 2012 EU-Central America Agreement<sup>148</sup> and the 2012 EU-Colombia/Peru Agreement.<sup>149</sup> The 2013 EU-Singapore FTA<sup>150</sup> and the 2016 EU-Vietnam FTA<sup>151</sup> (both awaiting ratification) also contain such chapter. The 2008 EU-CARIFORUM agreement is also important in this context as it is the first Economic Partnership Agreement (EPA) concluded with a regional group.<sup>152</sup> It refers to the DWA and CLS and the clauses are worded in such a manner suggesting that there is also reference to labour rights rather than merely standards or principles. It also contains a commitment by the signatory parties that they will not lower their domestic labour standards to attract foreign direct investment<sup>153</sup> and has a separate chapter on social aspects of trade.<sup>154</sup> Another innovative feature of this EPA is, firstly, the setting up of the Joint Council, which has 'the power to take decisions in respect of all matters covered by the Agreement.'<sup>155</sup> Secondly, the EPA provides for a consultation and monitoring process, under which each party may request consultations on the interpretation and application of the social clauses in the agreement, with an advisory role for the ILO.<sup>156</sup> The agreement also envisages that in the event of continued disagreement a Committee of Experts may be convened.<sup>157</sup> In general terms, while there is some variation between the provisions contained in the different agreements, there seems to be some level of commonality as to the substantive standards and the institutional set-up envisaged.

<sup>140</sup> CPA art 98.

<sup>141</sup> *ibid* art 96.

<sup>142</sup> The first of the EU's agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement, see Bartels, 'Human Rights and Sustainable Development' (n 93) 306.

<sup>143</sup> TEU arts 21(2)(d) and 21(3).

<sup>144</sup> Bartels, 'Human Rights and Sustainable Development' (n 93) 306.

<sup>145</sup> For further analysis, see Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements* (CUP 2009) 342.

<sup>146</sup> Bartels, 'Human Rights and Sustainable Development' (n 93) 307–309.

<sup>147</sup> Free Trade Agreement between the European Union and its Member States of the one part, and the Republic of Korea of the other part [2011] OJ L127/6, 6 (EU-Korea FTA). It entered into force in July 2011 and it is the EU's first trade agreement with an Asian country. It is also the first completed agreement in a new generation of FTAs launched by the EU in 2007 as part of its strategy to create 'deep and comprehensive' free trade agreements (DCFTA) with selective partners following the Doha round stand-still at the WTO.

<sup>148</sup> See text at EU-CAAA (n 110).

<sup>149</sup> See text at EU-Colombia and Peru TA (n 114).

<sup>150</sup> It is the first bilateral agreement concluded by the EU with an Association of Southeast Asian Nations (ASEAN) country and will, most likely, provide the blueprint for future bilateral agreements with other ASEAN countries. See Free Trade Agreement between the European Union and Singapore, (Authentic text as of May 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 24 July 2016.

<sup>151</sup> Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (Agreed text as of January 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 24 July 2016.

<sup>152</sup> The regional group comprises 15 Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/3 (EU-CARIFORUM EPA).

<sup>153</sup> *ibid* art 72.

<sup>154</sup> *ibid* arts 191–196.

<sup>155</sup> *ibid* art 229(1).

<sup>156</sup> *ibid* art 195.

<sup>157</sup> *ibid*.

While these promotional features of the 'new generation' of trade agreements contribute to injecting a social dimension into the EU's trade policy, it remains to be seen whether they entail an effective improvement of the implementation-capacity of developing countries to respect and protect labour standards.

The practice of linking economic benefits to human rights conditionality is clearly the standard modus operandi of the EU. However, the analysis carried out in this section showed that its effectiveness is far from being uniform. Human rights conditionality seems to have some clear results with third countries over which the EU holds substantial economic leverage, which might also suggest that the latter is more important than legalisation for promoting compliance.<sup>158</sup> In other words, the fact that the EU's essential elements clause is expressed in legally binding language only matters insofar as the cost of a breach is high. The focus therefore should be on the actual impact that the enforcement of human rights clauses has on third countries and ultimately on implementation, namely tailoring the enforcement of human rights clauses to each third country's political and socio-economic situation. There are other significant limitations of EU human rights conditionality. To date there is no agreement that foresees the establishment of a specific body charged with the monitoring of human rights and no proper 'operational mechanism' is set up overseeing the implementation of human rights and the evaluation of the effectiveness of sanctions.<sup>159</sup> Bartels also points out that there is no mechanism yet to deal with the situation when the partner country might want to suspend the agreement in order not to infringe its own human rights obligations. Moreover, the failure of the European Commission and Council to publish a clear catalogue of human rights, rule of law and democracy benchmarks in order to help understand the type of situations and actions that may trigger the application of a human rights clause has also been criticised.<sup>160</sup> In order to address such shortcomings Bartels has put forward various recommendations.<sup>161</sup> Among these he suggests that essential elements clauses should contain references to 'all other relevant international agreements', which some of the new generation of trade agreements are beginning to include, such as for instance the EU-Ukraine AA.

The foregoing shows how EU human rights conditionality presents some significant limitations, which need to be tackled. It remains to be seen whether future agreements will incorporate some of the suggested changes discussed above. Another way to address these limitations is by way of improving the methodology for measuring the social and human rights impact of trade agreements, which is the focus of analysis of the next section.

## V. Harnessing Human Rights to Improve Trade Sustainability Impact Assessments

Extraterritorial obligations stemming from human rights treaties require that both Member States and the EU, in addition to their domestic obligation to protect human rights, must also ensure that external policies such as international agreements have no adverse impact on human rights outside the Union's borders.<sup>162</sup> Sarah Joseph defines such extraterritorial duties as 'diagonal', *i.e.* obligations which States have towards the population of another State.<sup>163</sup> This obligation is two-fold: on the one hand, it includes not undertaking trade obligations, which undermine their ability to fulfil their human rights obligations. For example, the Committee on Economic Social and Cultural Rights (CESCR) has said that States must take their International Covenant on Economic Social and Cultural Rights (ICESCR) obligations into account when entering into treaties or joining international organisations.<sup>164</sup> On the other hand, it also requires that the EU does not seek to conclude trade agreements, which if implemented, would undermine a third country's capacity to fulfil its human rights duties.

<sup>158</sup> Daniela Donno, 'Legalization and Leverage: Human Rights Conditionality in the European Union's Economic Agreements' (Annual Meeting of the American Political Science Association New Orleans, Los Angeles, 1 September 2012).

<sup>159</sup> Nicolas Hachez, 'Essential Elements' Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?' (2015) Leuven Centre for Global Governance Studies Working Paper No 158, 19–20.

<sup>160</sup> European Parliament Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter, P7\_TA(2010)0489, para 108.

<sup>161</sup> Bartels, 'Human Rights in Trade' (n 54).

<sup>162</sup> For a list of key human rights instruments, see text at n 84. For academic commentary, see Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (OUP 2011) ch 8.

<sup>163</sup> Joseph (n 163) 244 distinguishes these type of obligations from so-called 'vertical' obligations, namely, 'obligations owed by a State to its population with regard to its own conduct', 'horizontal' obligations refer to 'a State's duty to apply human rights in the private sphere so as to protect people from harm to their rights from other people or other non-State actors'.

<sup>164</sup> See eg CESCR, 'General Comment 12' (n 84) para 19; CESCR, 'General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4, para 39.

One way of ensuring this could be through improved impact assessments of EU trade agreements.<sup>165</sup> Three types of evaluation can be conducted during the life of a trade initiative:<sup>166</sup> an Impact Assessment (IA) at the initial design stage, a Sustainability Impact Assessment (SIA) during the trade negotiations,<sup>167</sup> and an *ex post* evaluation after implementation.

The EU has been systematically conducting *ex ante* 'trade sustainability impact assessments' (trade SIAs) prior to the conclusion of each trade agreement, as part of the EU's sustainable development policy (focusing in particular on economic development, social development and environmental protection) to establish what the impact of a given international agreement could be, particularly the likely changes and trade-offs caused by trade liberalisation, and to identify certain measures, which may reduce its negative effects.<sup>168</sup> Once the Council gives a mandate to conduct trade negotiations, the Commission initiates the process of a trade SIA. The EU trade SIAs are outsourced to competitive agencies and experts selected by the Commission. Consultants are tasked to choose a specific methodology, deliver economic analysis, carry out a preliminary assessment and provide detailed sector studies and a final synthesis report.

These trade SIAs have been increasingly subject to criticism as they have failed to provide a proper assessment of how a given trade agreement will impact on human rights. In particular, it is argued that they do not adequately consider the real problems that developing countries (particularly LDCs) have. This is mainly because not all sectors are assessed as illustrated by the SIAs carried out in relation to the EU–ACP EPAs, which have not fully taken into account the impact that market integration has on small-scale farmers. Many NGOs have paid particular attention to the vulnerability of small-scale farmers due to their inability to deal with external shocks combined with a lack of infrastructure as well as abuses of human rights by both State and non-State actors. It has to be added that trade SIAs involve highly complex studies concerning a wide spectrum of sectors, stakeholders and economic, social and political variables that, as some IAs recognise, are very difficult to disaggregate and measure. To some extent, therefore, trade SIAs have inherent limitations which explains why they can only provide a limited perspective on a given trade agreement and its potential impact.

Hence, 'Human Rights Impact Assessments' (HRIAs) have increasingly been developed and conducted outside of the EU covering specific aspects of public policy, including the impact of government programmes for developing countries, trade negotiations, intellectual property and domestic legislation on human rights protection.<sup>169</sup> HRIAs can examine a number of activities of different actors such as government measures, multinationals and NGOs, the overall aim being to determine the degree of impact on human rights.<sup>170</sup> This is achieved by measuring specific human rights impacts through an evidence-based analysis, of particularly vulnerable and potentially disadvantaged groups.

<sup>165</sup> Commission, 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach' (Joint Communication) COM(2011) 886 final, explicitly refers to the importance of impact assessments. See also the Strategic Framework (n 4), which expressly calls for the insertion of human rights in Impact Assessment, as and when it is carried out for trade agreements that have significant economic, social and environmental impacts. The new generation of trade SIAs reflect this goal.

<sup>166</sup> For further information, see Commission, 'Analysis' <[http://ec.europa.eu/trade/policy/policy-making/analysis/index\\_en.htm#\\_bilateral-regional](http://ec.europa.eu/trade/policy/policy-making/analysis/index_en.htm#_bilateral-regional)> accessed 22 July 2016.

<sup>167</sup> There are also economic assessments of the negotiated outcome (EANOs). Once the negotiations are concluded, and before the trade agreement is signed, an economic analysis of the proposed agreement for the EU is prepared by the services of the Directorate-General (DG) Trade of the Commission for the European Parliament and the Council. The analysis assesses the impact of the actual outcome of the negotiations with regard to the reduction of trade barriers. This economic assessment is distinct from SIAs in which estimation of the likely impact of a proposed trade agreement is based on assumptions about the level of such reductions that will be achieved. It should also be noted that the economic assessment of the negotiated outcome is a trade-specific instrument and relates only to negotiations conducted by DG Trade. See Lars Nilsson, 'EU Trade Policy: Recent Progress and Analytical Advances' (GIFTA Workshop, Brussels, Belgium, 7–8 July 2016).

<sup>168</sup> Commission, *Handbook for Trade Sustainability Impact Assessment* (2nd edn, EU 2016), For a list of completed and ongoing assessments, see Commission, 'Assessments' <<http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/>> accessed 22 July 2016. For further analysis, see Kyle Cote, 'European Union Trade Sustainability Impact Assessments: Developing Coherence between Trade Agreements and Labour Standards' in Roger Blanpain and others (eds), *Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy* (Wolters Kluwer 2015) ch 6.

<sup>169</sup> UNGA 'Report of the Special Rapporteur on the right to food, Olivier de Schutter – Guiding principles on human rights impact assessments of trade and investment agreements' (19 December 2011) UN Doc A/HRC/19/59/Add.5 (Guiding Principles on HRIA); Ruggie Principles (n 12).

<sup>170</sup> For a detailed list and analysis of HRIAs, see James Harrison, 'Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments' (Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, Geneva, Switzerland, 23–24 June 2010) <[http://www.humanrights.ch/upload/pdf/100719\\_Background\\_paper.pdf](http://www.humanrights.ch/upload/pdf/100719_Background_paper.pdf)> accessed 24 July 2016. For academic commentary, see James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) 3 *Journal of Human Rights Practice* 162.

As posited by Harrison, HRIAs must be based on a clear evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to a given country avoiding that the inclusion of human rights in the assessment becomes a mere window dressing exercises.<sup>171</sup> However, the problem with HRIAs is that it is often difficult to translate human rights obligations contained in international treaties and national laws into analytical tools that can be used to measure the impact of trade agreements.<sup>172</sup> Despite much talk about using indicators there is not much evidence of their use in practice. Again, this is explained by the difficulty of developing appropriate human rights indicators that have the required contextual specificity, which is tailored to the problems of the country concerned.

Despite these shortcomings, HRIAs constitute an invaluable process to systematically identify, predict and respond to the potential human rights impact of trade agreements. This is particularly in consideration of the fact that the EU is increasingly establishing trade relationships with countries that are either notorious human rights violators or that are unable to prevent or stop human rights abuses from taking place in their own territory because they do not have the adequate governance and capacity-building to do so. Given that increasingly non-State actors perpetrate human rights breaches within States' territories, *ex ante* HRIAs could also assist States to fulfil due diligence obligations.<sup>173</sup>

In the Joint Communication on *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*<sup>174</sup> there is an emphasis on the need to develop tailor-made approaches to human rights-relevant policies, including trade policy and the use of IAs to ensure human rights consistency.<sup>175</sup> Similarly, the EU Strategic Framework and Action Plan on *Human Rights and Democracy* emphasises the importance of inserting human rights in IAs.<sup>176</sup>

Since 2012, and in line with Article 21 TEU, a new generation of EU trade SIAs has thus started to integrate, albeit partially, human rights considerations into their research methodologies.<sup>177</sup> While trade HRIAs focus on State obligations, trade SIAs generally look at policy goals and the outcome of economic processes. For these EU trade SIAs of new generation (which in part derive their legitimacy from human rights obligations) to be credible they must be employed to draft international agreements with third countries or regions. However, studies show that this is not always the case.<sup>178</sup> Moreover, if potential negative impacts are expected the Trade SIA Handbook provides that consultants conducting the trade SIA should make recommendations to prevent or minimise them and make proposals for the adoption of flanking measures to maximise the benefits of the proposed agreement. Generally, EU trade SIAs tend to focus on so-called 'mitigation' measures, which deal with negative impacts after the relevant agreement has come into force rather than amendments to the agreement to prevent negative impacts, or recommendations that the agreement should not come into force as currently constituted. From a human rights perspective the predilection for 'mitigation' measures may not be an optimal way, however, of dealing with negative impact particularly in light of the fact that impact assessments are not fully accurate or do not consider all sectors of the economy where human rights abuses may potentially occur. As pointed out by Bonanomi:

(. . .) this limited set of responses available for trade SIAs reflects the assumptions underlying trade SIA processes: that FTAs are, in general, favourable to sustainable development, and that negative impacts can be adjusted. In contrast to trade HRIAs, which focus on risks, trade SIAs concentrate on opportunities and seek ways to optimally capture the opportunities provided by a new trade agreement.<sup>179</sup>

<sup>171</sup> Harrison, 'Impact Assessments of Trade Agreements' (n 171) 12.

<sup>172</sup> *ibid* 13.

<sup>173</sup> Joseph (n 163) 272.

<sup>174</sup> COM(2011) 886 final (n 166).

<sup>175</sup> *ibid* 11–12, 19.

<sup>176</sup> Strategic Framework (n 4) Action 1, 6.

<sup>177</sup> See eg SIA of the EU–Georgia AA and EU–Moldova AA DCFTAs; Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives' (2015) <[http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf)> accessed 24 July 2016. For detailed analysis of this new generation of trade SIAs, how they measure human rights impact of the trade agreements, and the extent to which they are informed by human rights considerations, see Elisabeth B Bonanomi, 'Improving the Methodology for Measuring Social and Human Rights Impacts of Trade Agreements' (Austrian Foundation for Development Research Conference, Vienna, Austria, 4–6 February 2016).

<sup>178</sup> Clive George and Colin Kirkpatrick, 'Sustainability Impact Assessment of Trade Agreements: From Public Dialogue to International Governance' (2008) 10 *Journal of Environmental Assessment Policy and Management* 67.

<sup>179</sup> Bonanomi (n 178) 11.

According to the Guiding Principles on HRIA States have human rights obligations to both individuals on their territory and to individuals on the territory of the States with which they conclude a trade or an investment agreement.<sup>180</sup> The EU Trade SIA Handbook is in line with this approach but SIA practice reveals a different picture. Firstly, there is a problem of lack of consistency. The EU trade SIAs, such as the EU–ACP EPAs, have focused exclusively on the EU trade partners whereas on the other side of the spectrum the SIA of the EU–India FTA resulted in a comprehensive report on the overall economic, social, and environmental impacts on both partners.<sup>181</sup> An additional problem is that *ex ante* impact assessments may lack accuracy for a variety of reasons. Hence, more consistency is required in the EU SIA practice ensuring the assessment of human rights impacts is made in the EU and in the partner country concerned. The former, therefore, should always be combined with *ex post* assessments after implementation, which should also include human rights considerations. With the new generation of trade SIAs *ex post* evaluations are conducted to analyse the observed economic, social, environmental and human rights impacts. These evaluations are prepared by Commission services.<sup>182</sup> It is pivotal that the EU responds adequately to the findings of the *ex post* evaluation. The Special Rapporteur on the Right to Food has recommended that trade agreements be adopted provisionally with so-called ‘sunset clauses’, namely a provision that it shall automatically cease to have effect after a specific date unless further action is taken to extend it. This would allow for modifications to be made in case their implementation is found by independent assessments to be causing human rights violations.<sup>183</sup>

However, EU practice reveals that the EU does not always respond adequately to SIAs, which show the adverse impact of trade measures on human rights. The EU-ACP EPAs are a case in point. A 2007 study on EPAs for the UN Human Rights Council concluded that the treaties would ‘result, at least in the short run, in huge losses in revenue and restricted access to the EU market making it highly likely that the social and economic human rights of millions will be adversely affected.’<sup>184</sup> The European Commission’s own SIA’s of EPAs warned of the consequences for ACP countries from lost tariff revenue and increased competition from EU exports.<sup>185</sup> Without adequate safeguards the resultant damage to local production could disproportionately threaten the livelihoods and food security of rural populations, with the most affected being the Economic Community of West African States region, even though imports from other regions of the world would continue to provide tariff revenues. By the same token, Oxfam has also reported that the real winners of these EPAs would be EU Member States and not ACP countries.<sup>186</sup> And yet the EU has insisted on the inclusion of a Most-Favoured Nation provision in EPAs (encapsulating the WTO principles of reciprocity and non-discrimination), which reinforces the historical dependence of former colonies on the EU based on the ACP exporting primary low-cost goods and importing high-value goods.<sup>187</sup> This explains why to date there has been only one EPA finalised with ACP countries, namely the 2008 EU-CARIFORUM EPA, discussed above.<sup>188</sup>

<sup>180</sup> Guiding Principles on HRIA (n 170) Annex II, para 2.6.

<sup>181</sup> Elisabeth B Bonanomi, ‘EU Trade Agreements and Their Impacts on Human Rights’ (2014) CDE Working Paper No 1, 14 <[http://www.nccr-trade.org/fileadmin/user\\_upload/nccr-trade.ch/other\\_publications\\_events/01\\_CDE\\_Working\\_Paper\\_Buergi\\_2014.pdf](http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/other_publications_events/01_CDE_Working_Paper_Buergi_2014.pdf)> accessed 25 July 2016.

<sup>182</sup> For detailed information, see Commission, ‘Evaluating Existing Laws’ <[http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws\\_en](http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws_en)> accessed 20 August 2016; Commission, ‘Evaluating Laws’ <[http://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws\\_en](http://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en)> accessed 20 August 2016.

<sup>183</sup> UNHRC, ‘Report of the Special Rapporteur on the right to food, Olivier De Schutter – Mission to the World Trade Organisation’ (4 February 2009) UN Doc A/HRC/10/5/Add.2, para 37.

<sup>184</sup> UNHRC, ‘Application of the criteria for periodic evaluation of global development partnerships – as defined in Millennium Development Goal 8 – from the right to development perspective: the Cotonou Partnership Agreement between the European Union and ACP Countries (21 December 2007) UN Doc A/HRC/8/WG.2/TF/CRP.6, 2.

<sup>185</sup> PricewaterhouseCoopers, ‘Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements’, (9th Regional Seminar of ACP-EU Economic & Social Interest Groups, Bridgetown, Barbados, 14–16 May 2007) <<http://www.eesc.europa.eu/resources/docs/jochen-krimphoff-sia4-en.pdf>> accessed 4 September 2015. See also Sanoussi Bilal and others, ‘Global Financial and Economic Crisis: Analysis of and Implications for ACP-EU Economic Partnership Agreements (EPAs)’ (2009) ECDPM Discussion Paper No 92 <<http://ecdpm.org/publications/analysis-of-and-implications-for-ACP-EU-economic-partnership-agreements-epas/>> accessed 4 September 2015; Lionel Fontagne, Cristina Mitaritonna and David Laborde, ‘An Impact Study of the EU-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions’ (2008) <[http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc\\_138081.pdf](http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138081.pdf)> accessed 20 August 2016.

<sup>186</sup> Emily Jones, ‘Partnership or Power Play? How Europe Should Bring Development into Its Trade Deals with African, Caribbean, and Pacific Countries’ (2008) Oxfam Briefing Paper <[https://www.oxfam.org/sites/www.oxfam.org/files/bp110\\_europe\\_EPAs\\_trade\\_deals\\_with\\_acp\\_countries\\_0804.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/bp110_europe_EPAs_trade_deals_with_acp_countries_0804.pdf)> accessed 20 August 2016.

<sup>187</sup> *id.* A study conducted for the EU Parliament clearly recommends that EPAs with ACP countries should not contain an MFN provision, see Aileen Kwa, Peter Lunenborg and Wase Musonge, ‘African, Caribbean and Pacific (ACP) Countries’ Position on Economic Partnership Agreements (EPAs)’ (2014) PE 433.843, 7.

<sup>188</sup> See Part IV.

The foregoing shows that the combined use of *ex ante* trade SIAs and *ex post* evaluations could significantly contribute to strengthening the EU's practice of human rights conditionality in trade agreements, provided the methodologies employed in the *ex ante* trade SIAs and *ex post* evaluations increasingly take into consideration the human rights impact of EU trade agreements and, most importantly, that the EU acts upon their findings in a way which is not limited to maximising the benefits of trade agreements and minimising their potential negative impact but also as 'enabling mechanisms' which help the EU to better comply with its own human rights obligations.

## VI. Conclusion

Is the EU human rights conditionality in external trade instruments effective? Is the EU a credible global human rights actor? Answering these questions is particularly important in consideration of the fact that human rights feature prominently in EU law and policy. Moreover, the Union's external trade policies have a significant human rights impact outside of its borders. The analysis carried out in the preceding sections explained how the foundational character of human rights is a legal construction to legitimise the European polity and EU action. It also showed how the contradictory and ambivalent approach towards human rights in both the internal and external sphere of EU action remains essentially 'unresolved' in spite of the changes introduced by the ToL. In addition, the examination of the various types of instruments used by the EU to promote human rights in its external trade policy found that there is a lack of transparency, the use of selective conditionality and the application of double standards. What is equally problematic is the absence of a uniform understanding and approach to the integration of human rights in the EU's external trade policy, which is further compounded by the complexity surrounding the conceptualisation of human rights in EU external relations generally.

The fragmented legal framework of the EU human rights regime, despite the strengthening of its constitutional dimension by the ToL, together with the EU's lack of 'full' competence in the field of human rights as well as the mismatch between the internal and external dimension of EU human rights promotion and protection explains the EU's limited progress to date in effectively upholding human rights in its external trade relations. The importance of trade agreements as key and strategic foreign policy instruments should also not be underestimated. Arguably, this explains why the changes introduced by the ToL have been particularly significant in terms of injecting a normative approach into policy discourse rather than having a direct impact on EU practice. This notwithstanding, it is here posited that rather than focusing on furthering Treaty reform the EU should ensure that its various trade instruments employed to promote and uphold human rights be tailored to the specificities of the countries that are parties to a given agreement at implementation, monitoring and enforcement levels. To some extent, this is what has been done with the new generation of AAs with Ukraine, Georgia and Moldova together with their DCFTAs.<sup>189</sup>

Hence, in turning back to the initial questions raised earlier the answer is that *sometimes* EU human rights conditionality can be effective and *sometimes* the EU can be a credible global human rights actor depending on the existence (or absence) of concurring factors such as the legal or policy instrument used, the degree to which the latter is binding, the third country concerned, the EU institutions and, more generally, the actors involved.

## Competing Interests

The author declares that they have no competing interests.

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<sup>189</sup> See Part IV.

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**How to cite this article:** Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) *Utrecht Journal of International and European Law* 41, DOI: <http://dx.doi.org/10.5334/ujiel.342>

**Submitted:** 27 April 2016    **Accepted:** 15 September 2016    **Published:** 29 September 2016

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