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'An analysis of the legal obligations of the EU stemming from its international trade agreements'

Dr Samantha Velluti\*

DRAFT PAPER

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Work in progress based on forthcoming publications:

-Velluti, S. (2015) 'Human rights conditionality in the EU GSP scheme: "a focus on those in need or a need to refocus?"' in Ferreira, N. and Kostakopoulou, D. (eds) *The human face of the European Union: is EU law and policy humane enough?* (Cambridge: CUP)

-Velluti, S. (2015) 'The EU's social dimension in its external trade relations' in Beke, L., Marx, A., Wouters, J. and Rayp, G. (eds) *Global Governance of Labor Rights* (Cheltenham: Elgar)

## 1. Introduction

Since the mid-1990s, the European Union (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 Generalized System of Preferences (GSP). In 2010, a Communication was adopted on Trade, Growth and World Affairs, which emphasized 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>1</sup> However, the effectiveness and credibility of the EU's approach to human rights in its trade policy has been called into question because of the selective and uneven application of these human rights instruments. This and other trade-related human rights concerns have been recognized and addressed in the Council's 2012 Strategic Framework and corresponding Action Plan for Human Rights and Democracy ("Strategic Framework"), which provides a roadmap to mainstream human rights into 'all areas of its external action without exception'.<sup>2</sup> In a similar vein, in a Communication on Trade, Growth and

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\*Reader in EU Law, Lincoln Law School; comments are welcome: please send an email to [svelluti@lincoln.ac.uk](mailto:svelluti@lincoln.ac.uk).

<sup>1</sup> COM(2010) 612, 12.

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

Development<sup>3</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.

The 2009 Treaty of Lisbon (ToL) reinforced the EU's external commercial competence in combination with projecting a stronger normative approach in its international relations via Articles 3(5) and 21 TEU,<sup>4</sup> thus advancing values, principles and objectives that are presented as "European" and whose universal application is sought via explicit reference to compliance with international law.

However, the promotion of human rights externally raises many challenges of vertical and horizontal consistency - requiring the EU and all Member States to speak with one voice in their external relations but also the absence of inter-institutional conflict at EU level. In addition, it is also problematic from the perspective of coherence because of the mismatch between the internal and external dimension of human rights promotion and protection, the inevitable clash between the objectives of the different EU external policies and human rights as well as the disparity in treatment between the EU's trading partners.

Against this background, the paper intends to explore and examine selected aspects of the EU's legal obligations in its external trade policies in the light of these Treaty changes.

## 2. Human Rights Protection in the European Union

### *The Lisbon Treaty and human rights in the EU*

Article 2 TEU<sup>5</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 EUCFR, envisages EU accession to the European Convention of Human Rights (ECHR) and makes explicit reference to fundamental rights as general principles of EU law. Together Articles 2 and 6 TEU<sup>6</sup> '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

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<sup>3</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on *Trade, growth and development. Tailoring trade and investment policy for those countries most in need*, COM(2012) 22 final.

<sup>4</sup> As for the obligations provided for by Article 21 TEU, see also Articles 205, 207 and 208 TFEU.

<sup>5</sup> Article 2 TEU 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>6</sup> Article 6 TEU provides that: 1. 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

States), and as minimum standards for action on the international scene (in accordance with international law).<sup>7</sup> No reference is made, however, to territory or jurisdiction in any of these provisions. Similarly, the EUCFR does not contain a jurisdictional clause similar to Article 1 ECHR, which delimits its scope of application.<sup>8</sup> Certainly, the scope of the EUCFR also applies to EU external policies.<sup>9</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, including international agreements concluded by the Union.<sup>10</sup> In particular, 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.

The ToL has injected a normative approach in its external relations through Articles 3(5) and 21(1) and (3)(1) TEU. Article 3(5) TEU<sup>11</sup> establishes the EU objectives to 'promote' 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>12</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>13</sup> According to Bartels Article 21(3)(1) TEU<sup>14</sup> extends the scope of application of the EU's external human rights obligations and is

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<sup>7</sup> V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart: 2014), p. 1660.

<sup>8</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*, Judgment of the Court (Grand Chamber) of 26 February 2013, nyr 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 E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) CMLRev 50: 1411-1432.

<sup>9</sup> Interestingly, in referring to Article 21 TEU, the Commission maintains that 'the Charter also applies to the EU's external action, see European Commission, Communication on a 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM (2010) 573 final, 4.

<sup>10</sup> V. Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade' in G. Di Federico (ed.) *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer 2011), pp. 241-264, at p. 261.

<sup>11</sup> Article 3(5) TEU 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.'

<sup>12</sup> Declaration 41 includes among the objectives of Article 352 TFEU the objectives laid out in Article 3(5) TEU; see also Case C-366/10, *Air Transport Association of America* [2011] ECR I-13755; the CJEU refers to Article 3(5) TEU and states that: 'Under 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' (para. 101).

<sup>13</sup> Article 21(1) TEU provides that: 'the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

<sup>14</sup> Article 21(3)(1) TEU provides that: 'the 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.'

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>15</sup> What this means is that it also covers the external aspects of the EU's internal policies. Taken together these provisions require the EU to respect human rights in its external action and also in its internal policies with an external dimension.

*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>16</sup> However, as posited by de Búrca,<sup>17</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>18</sup>

In part this is explained by the fact that the EU is also a “conflicted” trade power<sup>19</sup> as it is made up of Member States, which hold very different views on how to wield the EU's power through trade. The existence of these opposing goals can be seen also in relation to the underlying reasons for the EU's increasing interest in becoming a global human and social actor on the international plane. To some extent the EU's motivations are hegemonic and protectionist, *i.e.* it seeks to exert political and economic domination over other 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. Indeed, when the EU is a net exporter (as opposed to a net importer) of a certain product, the EU is expected to care more about the standard of the export market than that of its home market. At the same time, however, the EU's externalization 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<sup>20</sup> in the EU involving civil society organizations, transnational networks and

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<sup>15</sup> L. Bartels, ‘The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) *EJIL* 25(4): 1071-1091, at 1074-1075.

<sup>16</sup> In this sense Weiß argues that the ToL challenges the substance and methodology of human rights protection in the EU, W 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>17</sup> G. De Búrca, ‘The Road Not Taken: the European Union as a Global Human Rights Actor’ (2011) *American Journal of International Law* 105: 649-693. Her article 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>18</sup> A. Williams, *EU Human Rights Policies. A Study in Irony* (Oxford: OUP, 2004).

<sup>19</sup> S. Meunier and K. Nicolaidis, ‘The European Union as a conflicted trade power’ (2007) 13 *Journal of European Public Policy* 906.

<sup>20</sup> De Búrca (2011), above.

supranational actors such as the EU Commission, the Court and increasingly the European Parliament<sup>21</sup> “against” the more “resistant” governmental actors as represented by the Council of the European Union, which to a certain degree oppose full Europeanization of human rights.

Indeed, the current constitutional framework places significant emphasis on the autonomy and distinctiveness of the EU’s own human rights regime as exemplified by the Court of Justice (CJEU) Opinion 2/13 on the Draft Agreement on EU Accession to the ECHR<sup>22</sup> and other rulings where the CJEU has rather boldly stressed the autonomy of the EU legal order<sup>23</sup> also in relation to the interpretation of the EU Charter of Fundamental Rights (EUCFR) vis-à-vis the ECHR.<sup>24</sup> In *Elgafaji*<sup>25</sup> the CJEU applied the approach proposed in *Opinion 1/91* concerning the Agreement creating a European Economic Area (EEA), negotiated between the former European Community (EC), its Member States and the countries forming the European Free Trade Association (EFTA) to the ECHR.<sup>26</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

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<sup>21</sup> L. Bartels, ‘The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’, European Parliament DG for External Policies of the Union, Policy Department, EXPO/B/DROI/2012-09, February 2014, available at: <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN\\_ET\(2014\)433751\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf)>.

<sup>22</sup> Opinion of the Court (Full Court) of 18 December 2014, Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, 18 December 2014, nyr, available at: <<http://curia.europa.eu/juris/liste.jsf?num=C-2/13>>; for academic reaction to the Court’s judgment, see C. Barnard, ‘Opinion 2/13 on EU accession to the ECHR: looking for the silver lining’, 16 February 2015, available at: <<http://eulawanalysis.blogspot.co.uk/2015/02/opinion-213-on-eu-accession-to-echr.html>>; L. F. M. Besselink, ‘Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13’, 23 December 2014, available at: <<http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/#.VPMiCnO--8>>; S. Douglas-Scott, ‘Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice’, U.K. Const. L. Blog (24th December 2014) (available at <http://ukconstitutionallaw.org>); T. Lock, ‘Oops! We did it again – the CJEU’s Opinion on EU Accession to the ECHR’, 18 December 2014, available at: <<http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VPMkcSnO--8>>; S. Peers, ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’, 18 December 2014, available at: <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>>.

<sup>23</sup> For critical analysis, see C. Eckes, ‘International Law as Law of the EU: The Role of the ECJ’, in E. Cannizzaro, P. Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff Publishers, 2011, pp. 353-377.

<sup>24</sup> See the *Kadi* ruling (Joined Cases C-402P and 415/05P [2008] ECR I- 6351), which 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 *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’, see Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011 (nyr). This preference for an autonomous interpretative approach has been confirmed in many other asylum cases, e.g. Case C-69/10 *Samba Diouf* [2011] ECR I-07151, and *Puid*, see Case C-4/11 *Federal Republic of Germany v Kaveh Puid*, (nyr); Case C-528/11 *Halaf*, (nyr); Joined Cases C-71/11 and C-99/11 *Germany v Y and Z*, (nyr).

<sup>25</sup> Case C-465/07, *Elgafaji* [2009] ECR I-921.

<sup>26</sup> On this point see Ippolito, in Velluti S. and Ippolito F. (2014) ‘The relationship between the European Court of Justice and the European Court of Human Rights: the case of asylum’ in Dzehtsiarou, K., Konstadinides, T., Lock, T. and O’Meara, N. (eds) *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (London: Routledge), pp.156-187, at p. 158.

does not mean that they must necessarily be interpreted identically.’<sup>27</sup> Hence, the fact that Article 15(c) of the EU Asylum Qualification Directive<sup>28</sup> contained a provision, the content of which was different from that of Article 3 ECHR, justified its autonomous interpretation.<sup>29</sup> In the context of the EU’s external trade relations<sup>30</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 by the Community Institutions,’<sup>31</sup> on the ground of the flexible and imprecise nature of the GATT and WTO rules.<sup>32</sup> Two exceptions have been identified by the CJEU: i. direct effect is recognized where the Union intended to implement a particular obligation assumed in the context of the GATT/WTO (*Nakajima* exception),<sup>33</sup> or ii. where a Union measure refers expressly to precise provisions of the GATT/WTO (*Fediol* exception),<sup>34</sup> which have rarely been applied.

To a certain extent the CJEU’s rationale makes perfect sense when it is situated 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>35</sup> In other words ‘the 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>36</sup>

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<sup>27</sup> *Opinion 1/91* [(1991) ECR I-6079, para 14.

<sup>28</sup> Directive 2004/83 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, replaced by the Recast Directive 2011/95/EU.

<sup>29</sup> According to the Court “it is [ . . . ] Article 15(b) which corresponds, in essence, to article 3 of the ECHR”, while article 15(c) covers “more general risks of harm” than the “particular ones” article 15(a) requires the applicant to be “specifically exposed” (para 28).

<sup>30</sup> With regard to non-trade related cases, see Case C-308/06 *Intertanko* [2008] ECR I-4057, 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 the *Mox Plant* case where the Court held that a Member State could not bring proceedings under UNCLOS against another Member State before an arbitral tribunal, in so far as those proceedings related to matters coming within Union competence, Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

<sup>31</sup> Case C-149/96 *Portugal v Council* [1999] ECTR I-8395, para. 47.

<sup>32</sup> Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219, para. 21. WTO obligations do not have direct effect even if specifically confirmed by the WTO Dispute Settlement Body (DSB), e.g. Case C-377/02 *Van Parys* [2005] ECR I-1465 and Joined Cases C-120/06 P and C-121/06 P *FIAMM* [2008] ECR I-6513.

<sup>33</sup> Case C-69/89 *Nakajima* [1991] ECR I-2069, para. 31; see also Case C-76/00P *Petrotub* [2003] ECR I-79, paras. 53-58 and Case T-45/06 *Reliance Industries* [2008] ECR II-2399, paras. 87-91

<sup>34</sup> Case 70/87 *Fediol* [1989] ECR 1781, paras 19-22; this exception is limited in scope and currently probably applies only to the Trade Barriers Regulation, 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] L40/1.

<sup>35</sup> F. Martines, ‘Direct Effect of International Agreements of the European Union’ (2014) *EJIL* 25(1): 129-147, at 145.

<sup>36</sup> *Ibid.* 146; as the author posits this is confirmed by Article 218(11) TFEU and again by the CJEU in several judgments (in addition to the one cited in this paper) International Agreement on Natural Rubber, Opinion 1/78, [1979] ECR 2871; 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, Opinion 1/91, [1991] ECR I-6079, at para. 46; Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, [1996] ECR I-759, at para. 35; see also Case C-211/01, *Commission of the European Communities v. Council of the European Union*, [2003] ECR I-8913.

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>37</sup> and, more generally, any legal or constitutional discussion of human rights issues concerning the EU is still premised on issues of (a lack of or limited) EU competence and powers.<sup>38</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>39</sup> This 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>40</sup> The 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>41</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.

### 3. The EU context – unilateral regulatory globalization: The Generalized System of Preferences

The EU's GSP is a trade arrangement first set up in 1971<sup>42</sup> (and since then subject to

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<sup>37</sup> De Búrca (2011), above.

<sup>38</sup> *E.g.* the horizontal clauses of the EUCFR, namely, Article 51(2) and 52(2); E. Cannizzaro, 'The EU's human rights obligations in relation to policies with extraterritorial effects: a reply to Lorand Bartels' (2014) EJIL 25(4): 1093-1099. 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>39</sup> *Cfr.* Article 3(3) TEU, 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 Article 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>40</sup> Member States are parties to several international human rights treaties. All Member States have ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child (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 on the Right to Adequate Food and CESCR General Comment No. 15 on the Right to Water; CESCR 1999, 2003); see also the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (ETO) (ETO Consortium 2012); the 2001 International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001 (A/56/10, reproduced in *Yearbook of the International Law Commission 2001*, vol. II(2)); the ILC 2011 Draft Articles on the Responsibility of International Organisations (ARIO), 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 (A/66/10 and Add.1) and Report of the Drafting Committee, Texts and titles of draft articles 1 to 67 adopted by the Drafting Committee on second reading in 2011 (A/CN.4/L.778, 30 May 2011), all of which attempt to clarify the scope of extraterritorial obligations. The analysis of extraterritorial obligations is beyond the scope of this paper.

<sup>41</sup> First developed by the CJEU (*e.g.* Case 11/70 *International Handelsgesellschaft* [1970] ECR 1125) it has been constitutionalized with explicit reference to be found in Article 6(3) TEU.

<sup>42</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.

periodical revision) through which 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>43</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, CLS, sustainable development and good governance.<sup>44</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 United Nations Development Programme ('UNDP') as 'Least Developed Countries' (LDCs) on the Human Development Index ('HDI') 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. In 1997 the Council withdrew GSP status from Myanmar for forced labour practices,<sup>45</sup> which were then reinstated in June 2012.<sup>46</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>47</sup> The EU is reluctant therefore to suspend beneficiary countries from its GSP scheme.<sup>48</sup>

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<sup>43</sup> Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, *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. DS246 *EC- Tariff Preferences*.

<sup>44</sup> For a list of the 27 core conventions, see Annex VIII of Regulation (EU) No 978/2012 which has changed the list so as to remove the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid from the list and adding the 1992 UN Framework Convention on Climate Change.

<sup>45</sup> Council Regulation (EC) No 552/97 temporarily withdrawing access to the generalized tariff preferences from Myanmar/Burma, *OJ* L 85, 27.3.1997, 8.

<sup>46</sup> Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to the generalized tariff preferences from Myanmar/Burma, *OJ* L 181/13.

<sup>47</sup> Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus, *OJ* L 4056/2006, 35.

<sup>48</sup> There have been three more EU official investigations to evaluate allegations of human rights violations: Pakistan in 1997 on the basis of child labour practices, El Salvador in 2008 concerning its effective implementation of said ILO Convention 87, and Bolivia in 2012 on the grounds of insufficiently implementing the Single Convention on Narcotic Drugs.



### *Evaluation*

The EU has not always been applying the GSP scheme consistently. Other countries such as Uzbekistan<sup>49</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>50</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>51</sup> More generally, while it is not clear whether the EU's GSP+ scheme is fully WTO-compliant,<sup>52</sup> its implementation has been subject to criticism because of various GSP+ beneficiary countries having a particularly poor record as regards one or more CLS. In particular, 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>53</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 organize 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>54</sup> 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>55</sup> However, the EU's subsidy cut seems to have had little impact on the garment sector of the country as the demand for and thus exports of Sri Lankan garments remain high.

With regard to the EBA, the case of 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

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<sup>49</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 L 299/72; see further L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40(4) *Legal Issues of Economic Integration Law* 297, 304.

<sup>50</sup> J. Orbie and L. Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 *European Foreign Affairs Review* 663, 679.

<sup>51</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 2010), 487.

<sup>52</sup> In particular, with the Most-Favoured Nation (MFN) principle (Article I:1 GATT).

<sup>53</sup> EP Resolution on promoting decent work for all, adopted on 23 May 2007, Strasbourg (P6\_TA(2007)0206, para. 8 EP resolution on the EU's GSP, adopted on 15 November 2006, Strasbourg (P6\_TA(2006)0489, para. 4.

<sup>54</sup> European Commission, Report of the 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, C(2009) 7934 (2009).

<sup>55</sup> Implementing 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, OJ L 45/2010, 1.

tariffs to facilitate such investment in LDCs have both had quite a devastating human rights impact: forced evictions and land seizures have been part of the development of Cambodia's sugar industry.<sup>56</sup> The application of the scheme to Cambodia has had adverse effects on the population. An EU Parliament resolution adopted in January 2014 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>57</sup> The question is whether this unexpected and unwanted "side-effect" of the implementation of the EBA in Cambodia would be a violation of an EU obligation. Probably the answer is no given that the EU is only obliged to pursue or promote the objective of, *inter alia*, reducing poverty.

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. However, it is not clear whether these provisions require the EU also to protect human rights extraterritorially or to fulfil human rights other than in general terms.<sup>58</sup> In these undesirable situations the EU would have to withdraw its preferential treatment to adhere to its ethical normative role, which would be highly unlikely in practice nor could it take coercive steps with a view to enforcing the other country's own obligations in this regard.<sup>59</sup>

The foregoing provides a mixed picture of the GSP scheme. While a mid-term review shows that the GSP has increased LDCs exports and welfare, that a significant share of the gain accrues to the exporting country and that countries seeking to benefit from the GSP + attempt to ratify various conventions,<sup>60</sup> its impact has been limited. Stevens and Kennan argue that this is partially due to the fact that most of the exports from GSP beneficiaries are goods which would not pay any tariff even if there were no GSP since the EU's MFN tariff is zero and it is thus difficult to have an effective preference for these goods.<sup>61</sup> However, in this regard it should also be pointed out that MFN tariffs faced by exporters differ depending on the particular composition of their exports to the EU under a given GSP scheme. For some exported goods, therefore, particularly those products from GSP+ or EBA beneficiaries the preferential treatment under the scheme does provide a certain level of economic benefit.<sup>62</sup> Another reason is that the GSP arrangements do not provide preferences on all of the remainder, with the exception of the EBA.<sup>63</sup> Added to this, export-led growth strategies might encourage developing

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<sup>56</sup> Inclusive Development International (IDI), '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 2014; International Federation for Human Rights (FIDH), 'Cambodia: Deteriorating Human Rights Situation Calls for Urgent EU Action – A briefing paper prepared for the EU's human rights dialogue with Cambodia, Brussels, March 12, 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 2014.

<sup>57</sup> EP Resolution on the Situation of rights defenders and opposition activists in Cambodia and Laos' 16 January 2014, Strasbourg, P7\_TA(2014)0044.

<sup>58</sup> Bartels (2014) above; cfr. with Cannizzaro (2014), above.

<sup>59</sup> Bartels (2014), above.

<sup>60</sup> CARIS, 'Mid-term Evaluation of the EU's Generalized System of Preferences', Report commissioned by the EC, Brighton: Centre for the Analysis of Regional Integration at Sussex, University of Sussex, 2010 <[http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc\\_146196.pdf](http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf)> accessed 25 July 2014.

<sup>61</sup> C. Stevens and J. Kennan, *Reform of the Generalized System of Preferences*, Study, Directorate-General for External Policies of the Union, Policy Department, INTA, PE 433. 858, Brussels, April 2011.

<sup>62</sup> I would like to thank Lorand Bartels for this counter-point.

<sup>63</sup> Stevens and Kennan (2011), above note 49.

countries to curb the process of standard improvement.<sup>64</sup> For these reasons, and because many beneficiaries also have access to other EU trade regimes such as for example FTAs, the GSP is best seen as a “development safety net”<sup>65</sup> and, in more general terms, the causality between improved labour standards and economic growth remains controversial and difficult to establish.

In 2012 the EU adopted a reformed GSP law with the aim of strengthening the impact of the GSP scheme,<sup>66</sup> which is consistent with the new EU external trade strategy envisioned in the 2010 Communication on *Trade, Growth and World Affairs*.<sup>67</sup> The reform tackles some of the above problems. It reduces the number of beneficiaries to those developing countries most in need<sup>68</sup> and reinforces the incentives for the respect of core human and labour rights, environmental and good governance standards. In addition, the parallel co-existence of different parallel preferential regimes for imports into the EU from the same developing country will no longer be possible. It also reverses the burden of proof on the beneficiary country, which is now under an obligation to demonstrate its compliance with its binding undertakings and makes the withdrawal mechanism faster and more efficient.

#### 4. Bilateral and regional trade agreements

To date the EU has concluded 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>69</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>70</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>71</sup> According to the Commission sanctions under the clause should be reserved only for the most extreme and flagrant violations of human rights.<sup>72</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.” This form of unilateral enforcement is well-illustrated by Article 8(3) of the 2012 EU–Colombia and Peru Trade Agreement,<sup>73</sup> which provides that ‘any Party may

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<sup>64</sup> J.-M. Siroën, ‘Core labour standards, Bilateral Relations and International Trade’, 2013, <<http://www.etsg.org/ETS2013/Papers/083.pdf>> accessed 25 July 2014.

<sup>65</sup> Idem.

<sup>66</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008 OJ L 303/1, 31.10.2012; the revised scheme is in place as of 1 January 2014.

<sup>67</sup> COM(2010)612.

<sup>68</sup> The number of beneficiaries has been reduced from 176 to 90.

<sup>69</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>70</sup> European Commission, *Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements*, COM(95) 216. One of the first agreements to include such clause was the 1990 Argentina-EU Framework Trade and Economic Cooperation Agreement.

<sup>71</sup> E.g. Article 1 of the 2012 EU-Central America Association Agreement; a database with a list of all the agreements can be found at: <<http://ec.europa.eu/world/agreements/default.home.do>> accessed 25 July 2014.

<sup>72</sup> T. King, ‘The European Union as a Human Rights Actor’ in M. O’Flaherty et al. (eds) *Human Rights Diplomacy* (Martinus Nijhoff 2011) 77, 91.

<sup>73</sup> This is the first time that the simplified title of “trade agreement” has been employed omitting the reference to “free” which has been used previously in similar agreements such as the one with South Korea. According to the Commission the decision to proceed with a simplified commercial deal was prompted by the decision of two

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. One of the main objectives of the agreement was to maintain the provisions contained in the GSP Regulation while making access of Colombian and Peruvian products to the EU market easier.<sup>74</sup> According to the Commission the objective has been met since the agreement has GSP+ equivalent content or above, depending on the specific issue concerning labour and the environment. Arguably, the sustainable development chapter of the agreement goes beyond the GSP + in some respects.<sup>75</sup> For example, it contains obligations on the effective implementation of, and non-derogation from, domestic labour laws, recognition of the ILO decent work principles and their relevance for trade and labour. 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>76</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.’ 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>77</sup>

#### *Labour provisions in EU agreements*

Since the mid-1990s, the majority of EU preferential agreements contain provisions on labour standards and cooperation in social affairs.<sup>78</sup> For example, the Preambles of the 1997 EU’s Cooperation Agreements with Cambodia and Laos, Yemen and the Former Yugoslav Republic of Macedonia refer to the need to complement economic with social development as well as the respect for basic social rights. The 1999 EU-South Africa Trade, Development and Cooperation Agreement with South Africa and the 2005 EU-Algeria Association Agreement also refer to the need to respect fundamental social rights and provide for dialogue and cooperation in social matters. The 2000 Cotonou Partnership Agreement (CPA)<sup>79</sup> occupies a particularly prominent position 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. Alston criticizes the clause as being merely promotional in nature, reaffirming standards that do not create binding obligations and which may

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out of four members of the Andean Community, namely Ecuador and Bolivia, to oppose the signature of a traditional FTA (these two countries subsequently withdrew from the negotiations of this agreement).

<sup>74</sup> R. Bendini and Dominique Delaunay, *The EU Trade Agreement with Colombia and Peru*, Internal Study, Directorate-General for External Policies of the Union, Policy Department, DG EXPO/B/PolDep/Note/2011\_145, Brussels, May 2011, 12.

<sup>75</sup> *Idem*.

<sup>76</sup> *E.g.* Article 276.

<sup>77</sup> Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (2013) *Legal Issues of Economic Integration* 40(4): 297-314, at 301. Cfr. With Article 8(1) of the EU-Colombia and Peru Agreement which makes explicit reference to all authorities and government levels of the Parties.

<sup>78</sup> Full text access to European FTAs and their labour provisions can be found at <[http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS\\_115822/lang-en/index.htm#P4\\_728](http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang-en/index.htm#P4_728)>, all accessed 10 December 2014.

<sup>79</sup> The CPA has been revised twice: in 2006 and 2010.

undermine ILO's supervision.<sup>80</sup> According to Kenner Article 50 should not be viewed in isolation but within the broader context of the agreement's trade and development regime.<sup>81</sup> In particular, 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>82</sup> In addition, the CPA provides for the use of dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses.<sup>83</sup> However, with the exception of Article 50 of the 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.

The principle of sustainable development is a case in point. 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>84</sup> The agreements contain provisions on cooperation and obligations to respect and "strive" to improve multilateral and domestic labour and environmental standards.<sup>85</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>86</sup> Since the mid-1990s, sustainable development has become increasingly important in the EU's trade policy<sup>87</sup> and the ToL has elevated it to one of the key principles underlying EU external action.<sup>88</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. Examples of such agreements are the 2010 EU-Korea FTA,<sup>89</sup> the 2012 EU-Central America Agreement and the 2012 EU-Colombia/Peru Agreement. The 2013 EU-

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<sup>80</sup> P. Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) *European Journal of International Law* 511.

<sup>81</sup> J. Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in B. Van Vooren, S. Blockmans and J. Wouters (eds) *The EU's role in global governance: the legal dimension* (OUP 2013), p. 316.

<sup>82</sup> *Idem*.

<sup>83</sup> Cfr. with the EU-Central America Association Agreement, which provides that an affected party can request that an urgent meeting be called to bring the Parties together within fifteen days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties, see Article 355(5).

<sup>84</sup> Bartels (2013), above note 40, 306.

<sup>85</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>86</sup> Bartels (2013), above note 38, 307-309.

<sup>87</sup> The first of the EU's agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement, Bartels (2013), above note 40, 306.

<sup>88</sup> Article 21(2)d and (3) TEU.

<sup>89</sup> 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. On this point see, F. Hoffmeister, 'The European Union as an International Trade Negotiator' in J. Koops and G. Macaj (eds) *The European Union as a Diplomatic Actor* (Palgrave Macmillan 2014), Chapter 9.

Singapore FTA (which is awaiting ratification) also contains such chapter.<sup>90</sup> The 2008 EU-CARIFORUM agreement is worthy of mention as it is the first economic partnership agreement (EPA) concluded with a regional group.<sup>91</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 (FDI)<sup>92</sup> and has a separate chapter on social aspects of trade.<sup>93</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>94</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>95</sup> The agreement also envisages that in the event of continued disagreement a Committee of Experts may be convened.<sup>96</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. The increased involvement and influence of the EU Parliament in the conclusion of trade treaties further to the changes introduced by the TL is pivotal to this development and for a number of years it has been calling for the practice and policy developed in the context of cooperation and association agreements containing chapters on human rights to be extended to “pure” trade agreements.<sup>97</sup>

While these are significant features of the “new generation” of trade agreements, which contribute to injecting a social dimension in the EU’s trade policy, it remains to be seen – in the absence of actions resulting in sanctions against the other party – whether they entail an improvement of the implementation-capacity of developing countries to respect and protect labour standards and thus lead to an effective improvement of labour standards internationally. Some proposals to improve the effectiveness of labour provisions in trade agreements have been put forward. For example, it has been suggested to develop and add time-bound labour-related objectives to trade agreements, to involve greater consultation of social partners and civil society in the negotiations and implementation of labour provisions, to ensure better coherence in the way ILO instruments are included in the various trade agreements<sup>98</sup> and to provide for a mechanism for reviewing the implementation of agreements in accordance with human

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<sup>90</sup> It is the first bilateral agreement concluded by the EU with an ASEAN (Association of Southeast Asian Nations) country and it will probably provide the blueprint for future bilateral agreements with other ASEAN countries.

<sup>91</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.

<sup>92</sup> Article 72.

<sup>93</sup> Articles 191-196.

<sup>94</sup> Article 229(1) of the EU-Cariforum EPA.

<sup>95</sup> Article 195.

<sup>96</sup> *Idem*.

<sup>97</sup> EP Resolution of 25 November 2010 on human rights, social and environmental standards in international trade agreements, P7\_TA(2010)0434, § 12; EP Resolution of 27 September 2011 on a new trade policy for Europe under the EU 2020 strategy, P7\_TA(2011)0412, § 6.

<sup>98</sup> ILO, Report on *The Social Dimensions of Free Trade Agreements*, 6 November 2013, 6-7, <[http://www.ilo.org/global/research/publications/WCMS\\_228965/lang-en/index.htm](http://www.ilo.org/global/research/publications/WCMS_228965/lang-en/index.htm)>, Chapter 4; see also Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’ German Institute for Human Rights, Misereor, February 2014, <[http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_A\\_Model\\_Human\\_Rights\\_Clause.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf)>, accessed 10 December 2014.

rights norms, on the basis of a human rights impact assessment.<sup>99</sup> The US-Cambodia Textile Agreement<sup>100</sup> is often mentioned as an effective model for including labour provisions in FTAs and, in particular, as providing an incentive mechanism for so-called “positive sanctions”. The agreement established that US import quotas would be increased on an annual basis in relation to progress on improving labour practices and thus companies that fulfilled their undertakings would be rewarded fairly quickly. This provided incentives for the private sector and the Cambodian authorities to make an effort to improve labour standards in the textile sector. Siroën argues that such a system of positive sanctions could be introduced and applied more generally in trade agreements targeting companies, not the industry or country concerned as a whole. Incentive mechanisms in the form of additional preferences should promote improved practices and prevent undesirable effects such as companies or workers moving into the informal economy.<sup>101</sup>

## 5. Human Rights Impact Assessment

Extraterritorial obligations 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. One way of ensuring this is via impact assessments.<sup>102</sup> The EU has been conducting *ex ante* ‘trade sustainability impact assessments’ (hereafter “trade SIAs”) prior to the conclusion of each trade agreement, as part of the EU’s sustainable development policy to establish what the impact of a given international agreement could be and to identify certain measures, which may reduce its negative effects.<sup>103</sup>

These trade SIAs have been increasingly subject to criticism as they have failed to provide a proper assessment of how a particular trade agreement will impact on human rights and thus, in general terms they have failed to take into due account the real problems that least developed third countries have, mainly because only certain sectors have been assessed as illustrated by the SIAs carried out in relation to the EU-ACP EPAs, which ignored the impact that market integration had on small-scale farmers. Particular attention of many non-governmental organizations (NGOs) has been on the vulnerability of small-scale farmers due to the incapacity to deal with external shocks but also because of a lack of infrastructure and abuses of human rights by both state and non-state actors. Further to these criticisms, ‘human rights impact assessments’ (HRIAs) have started to be developed<sup>104</sup> with a new generation of EU trade SIAs integrating, albeit partially,

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<sup>99</sup> J. Harrison and A. Goller, ‘Trade and Human Rights: What Does “Impact Assessment” Have to Offer?’ (2008) 8 *Human Rights Law Review* 587.

<sup>100</sup> Signed in January 1999 for a three-year period, and then extended for a further three years, the textile agreement between the US and Cambodia expired in January 2005.

<sup>101</sup> J.-M. Siroën, ‘Labour provisions in preferential trade agreements: current practice and outlook’ (2013) 152(1) *International Labour Review* 85, 98.

<sup>102</sup> The 2011 Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy on *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*, COM(2011)886 final. 2011) explicitly refers to the importance of impact assessments; see also the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, of 25 June 2012. Luxembourg, Luxembourg. 11855/12 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>103</sup> European Commission, Handbook for Trade Sustainability Impact Assessment 2006, available at: <[http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127974.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf)>; further information is available at: <[http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/commission\\_guidelines\\_en.htm](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm)>; for further analysis, see J. Harrison, ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’ (2011) *Journal of Human Rights Practice* 3(2): 162-187.

<sup>104</sup> 2011 Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements

human rights considerations into their research methodologies.<sup>105</sup> While trade HRIAs focus on state obligations, trade SIAs look at policy goals and the outcome of economic processes. For these EU impact assessments 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>106</sup> 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. The EU Trade SIA Handbook is in line with this approach but SIA practice reveals a different picture. The EU trade SIAs, such as the EU–ACP EPAs, focused exclusively on the EU’s 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>107</sup> Hence, more consistency is required in the EU SIA practice. A study of the human rights impact of EU trade agreements<sup>108</sup> also suggests that Member States could mimic the methodologies developed by private companies in their HRIAs conducted in order to comply with their corporate responsibility to respect human rights in accordance with the “Ruggie Principles” human rights risk assessments (HRRAs), which they apply prior to HRIAs in order to identify major risks and thereby enable themselves to carry out “human rights due diligence.”

## 6. Conclusion

The paper’s main purpose was to examine some of the legal obligations of the EU and its Member States particularly in light of the fact that the Union’s external trade policies have a significant human rights impact outside of its borders. In doing so, it assessed the extant limitations of a constitutional, institutional and more practical nature in developing a cross-cutting human rights approach in EU external policies generally. While the ToL has provided the constitutional framework and the legal tools to achieve coherence,<sup>109</sup> the latter is and remains essentially a policy imperative, which largely depends on the political will of the Member States and the EU Institutions. As Muižnieks pithily puts it, ‘despite the new legal and political framework [...] human rights in the EU remain more often than not an issue “for export” than for domestic consumption.’<sup>110</sup> Hence, in terms of EU practice much remains to be done.<sup>111</sup>

Further research needs to examine and identify ways to effectively use the overall body of

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(known as “Guiding Principles on HRIA”), United Nations Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the Right to Food, Olivier de Schutter. 19 December 2011. A/HRC/19/59/Add.5; see also the UN Guiding Principles on Business and Human Rights (United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. Final Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. 21 March 2011, A/HRC/17/31; also known as the “Ruggie Principles”).

<sup>105</sup> E.g. SIA of the EU–Georgia and EU–Moldova Deep and Comprehensive Free Trade Agreements (DCFTAs).

<sup>106</sup> C. George and C. Kirkpatrick, ‘Sustainability impact assessment of trade agreements: from public dialogue to international governance’ (2008) *Journal of Environmental Assessment Policy and Management* 10(1): 67–89.

<sup>107</sup> E. Bürgi Bonanomi, ‘EU Trade Agreements and Their Impacts on Human Rights’, Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). CDE Working Paper 1. Bern, Switzerland: Centre for Development and Environment (CDE), December 2014, available at: <[http://www.wti.org/fileadmin/user\\_upload/ncce-trade.ch/other\\_publications\\_events/01\\_CDE\\_Working\\_Paper\\_Buergi\\_2014.pdf](http://www.wti.org/fileadmin/user_upload/ncce-trade.ch/other_publications_events/01_CDE_Working_Paper_Buergi_2014.pdf)>, p. 14.

<sup>108</sup> *Ibid.*, p. 19.

<sup>109</sup> J. Wouters and T. Ramopoulos, ‘Revisiting the Lisbon Treaty’s Constitutional Design of EU External Relations’, Leuven Centre for Global Governance Studies, Working Paper No. 119, September 2013.

<sup>110</sup> N. Muižnieks, ‘Talk about human rights in the EU’, *European Voice*, 5 December 2013, 15.

<sup>111</sup> EP Report on Human Rights and Social and Environmental Standards in International Trade Agreements, Committee on International Trade, Rapporteur: Tokia Saifi (2009/2219(IN)).



EU human rights legal (primary and secondary) and policy instruments, as questions about accountability and legality need to be addressed. In this context, the EUCFR may have an important role to play. The key question - in the words of Moreno-Lax and Costello- is not whether the Charter applies territorially or extraterritorially, but whether a particular situation falls to be governed by EU law or not.<sup>112</sup> If that is the case, the application of the Charter follows automatically.<sup>113</sup>

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<sup>112</sup> Moreno-Lax and Costello (2014) above, pp. 1682-83.

<sup>113</sup> *Idem*.