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Linking trade and non-commercial interests: the EU as a global role model?

T. Takács, A. Ott and A. Dimopoulos (eds.)



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**LINKING TRADE AND NON-COMMERCIAL INTERESTS:
THE EU AS A GLOBAL ROLE MODEL?**

**TAMARA TAKÁCS
ANDREA OTT
ANGELOS DIMOPOULOS
(eds.)**

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LIST OF ABBREVIATIONS

AA	Association Agreement
APC	African, Caribbean and Pacific Group of States
APRODEV	Association of World Council of Churches related Development Organisations in Europe
BIT	Bilateral Investment Treaty
CJEU	Court of Justice of the European Union
CLS	Core Labour Standards
COPA-COGECA	Committee of Professional Agricultural Organisations – General Committee for Agricultural Cooperation in the European Union
CSF	Civil Society Fora
CSR	Corporate Social Responsibility
DAG	Domestic Advisory Group
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEAS	European External Action Service
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
FET	Fair and equitable treatment
FIDH	International Federation for Human Rights
FTA	Free Trade Agreement
GPA	Agreement on Government Procurement
HRL	Human Rights law
ICJ	International Court of Justice
IEL	International Economic law
IIA	International Investment Agreement
ILO	International Labour Organization
MFN	Most Favoured Nation
NAFTA	North Atlantic Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
SADC	Southern Africa Development Tribunal
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Agreement on Trade Related Aspects of Intellectual Property Rights
TSDC	Trade and Sustainable Development Committee
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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INTRODUCTION

LINKING TRADE AND NON-COMMERCIAL INTERESTS: THE EU AS A GLOBAL ROLE MODEL?

Tamara Takács, Andrea Ott and Angelos Dimopoulos

Advancing non-commercial interest through trade relations is one of the most topical areas of EU external relations law and policy in the aftermath of the Lisbon Treaty, as the latter reinforced the EU's external commercial competence and in the meantime calls for the EU's active international role in promoting values that are said to be 'European' and seeks their universal application. The 'quasi-constitutional' framework of values and objectives that the Lisbon Treaty has thus designed runs through the Treaty: (i) Article 3(5) TEU prescribes the general external objectives of the Union toward the 'shaping of international order', including the contribution to sustainable development and free and fair trade;¹ (ii) Article 21 TEU assigns the EU's role of international cooperation to serve various objectives and 'in all fields of international relations', amongst them trade liberalisation, sustainable developments and human rights;²

¹ See J. Larik, 'Shaping the international order as a Union objective and the dynamic internationalization of constitutional law', 5 *CLEER Working Papers*, 2011.

Art. 3(5): 'In its relations with the wider world, the Union shall uphold and promote its values 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.'

² Art. 21(1) 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. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

(2) The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist

and (iii) Articles 205³ and 207 TFEU ascribe the conduct of external policies and Common Commercial Policy, respectively, to be in line with the general objectives and principles of the EU's external action. Common Commercial Policy has thus become 'an integrated part of EU external relations, characterised by common values that guarantee unity and consistency in the exercise of Union powers.'⁴ In addition to such constitutionalisation of objectives of external policies, Member States agreed to expand the scope of commercial activities by adding investment policy to the exclusively exercised common commercial policy.⁵

The EU's global commercial presence is currently boasting a leading share in world trade and investment flows. With such prominent status, it advocates for market access and clear regulatory framework in bilateral and multilateral trade relations (specifically at the WTO), as well as in regional context. Next to its mission in trade liberalisation, and the promotion of global trade rules, the EU's trade agenda has contained the explicit objective of promotion of non-commercial interest: social interest, such as human rights and social standards, protection of environment and sustainable development. In other words, EU Trade policy is designed as one that helps to secure prosperity, solidarity and security in European and around the globe.⁶ Accordingly, the EU has employed various legal and policy instruments in its commercial relations so as to promote and advance non-commercial social interest in third countries.

Since the 1970's, human rights considerations in trade and development policies emerged, human rights clauses made their way into the 1989 Lomé IV Agreement,⁷ and were more or less systematically included as 'essential elements' in cooperation and association agreements since the early 1990's. With its trading partners, the EU has made use of its commercial negotiating power to promote certain social rights as well and help domestic change. To this effect, many of the EU's bilateral and regional trade agreements introduced

populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance. (3) 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. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

³ 'The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.'

⁴ A. Dimopoulos, The effects of the Lisbon Treaty on the principles and objectives of the Common Commercial Policy, 15 *Foreign Affairs Review* 2010, pp. 153-170 at p. 169.

⁵ Art. 206 TFEU.

⁶ <http://trade.ec.europa.eu/doclib/docs/2013/january/tradoc_150230.pdf> .

⁷ The reference introduced with Lomé IV resulted from massive human rights violations in States like Uganda and Equatorial Guinea which could not be remedied by the then existing contractual relations under Lomé I. See E.Riedel and M.Will, 'Human Rights Clauses in External Agreements of the EC', in D.J. Linan Noguerras and L.M. Hinojosa Martinez, 'Human Rights Conditionality in External Trade of the European Union: Legal and Legitimacy Problems', 7 *Columbia Journal of European Law* 2001, pp. 307.

social incentive clauses, and conditioned trade concessions and market access on the implementation and respect of internationally recognised human rights, social- and environmental standards. In addition, unilaterally, the EU has offered tariff concessions and preferential treatment and subjected such concessions to an increased level of compliance with social standards under its *Generalized System of Preferences* (GSP) scheme.⁸ The incentivising methods used in these instruments as conditionality of granting trade preferences vary between punitive ('stick') method, used to sanction proven human rights standards with the elimination of trade preference, whereas positive conditionally ('carrot') envisages additional preferential treatment, usually in the form of further reduced tariffs and more market access, for achievements in advancing human rights and social-and environmental standards. The enforcement of such conditionality through the monitoring and suspension clauses prescribes continuous dialogue and cooperation between the country in case and the Commission.

The long practice of human rights, social and environmental conditionality in the EU's commercial relations and the Union's firm advocacy to bring these issues on the table at global, multilateral trade talks, do not mean however, that the use and especially enforcement of conditionality policy has been without any criticism. Firstly, political sensitivity of the matter can predict difficulties in commercial negotiations and agreements, especially *vis-à-vis* countries against whom the EU has no particular leverage. Secondly, *consistency* in the use of enforcement mechanisms has been criticised, in particular with respect to instances of potential use of sanctions, where Member States' interest clearly impacted the discussion with respect to the country accused of violations and was claimed to hinder the use of enforcement mechanisms, and those of sanctions.⁹ *Coherence* of external action, including commercial relations, is a particularly challenging area after the Lisbon Treaty, which brought the external policies under one External Action heading, and states in Article 207(1) TFEU that external trade will be conducted within 'the context and framework and objectives of the Union's external action'. Accordingly, external policy instruments and actions will have to be coordinated amongst various institutional actors: on the one hand, the European External Action Service, the Lisbon Treaty's institutional innovation assisting the High Representative and preparing policy proposals and implementing them after their approval by the Coun-

⁸ See T. Takács, 'Human rights in trade: The EU's experience with labour standards conditionality and its role in promoting labour standards in the WTO', in J. Wetzel, (ed.) *The EU as a 'Global Player' in the Field of Human Rights* (London: Routledge 2012) pp. 97-112.

⁹ See *Smith* pointing out inconsistency and differences among Member States when they decide on sanctions to enforce standards, reflecting their own commercial and strategic interest with regard to the country under discussion in K.E. Smith, 'Engagement and Conditionality: Incompatible or Mutually Reinforcing?', in R. Youngs (ed.), *Global Europe Report 2: New Terms of Engagement* (London: Foreign Policy Centre 2005), p. 23-9.

With regard to the implementation of the GSP+ scheme, *Orbie and Tortell* point out that when applying sanctions, the EU 'is consistent with ILO specialist assessment of countries' observance of ILO conventions'; however, 'several countries have received GSP+ trade preferences despite being seriously criticized by the authoritative ILO committees for their implementation of relevant conventions'. See J. Orbie and L. Tortell, 'The New GSP+ beneficiaries: ticking the box or truly consistent with ILO findings?', 14 *European Foreign Affairs Review* 2009, pp. 663-81, at p. 679.

cil, and; on the other hand, the Commission, traditionally in charge of external commercial relations, proposals and implementation of policy instruments. The policy directions conducted by these institutional actors will necessarily have to be aligned but at least synthesised for a coordinated and coherent approach. In addition, coherence at the substantial level is rendered more relevant by Articles 3 and 21 TEU, referring to certain policy objectives relevant across different policy fields, which is to some extent similar to the environmental integration principle or the development cooperation principle that had existed before the Lisbon Treaty entered into force. Thus, human rights considerations employed in different areas of external action will have to be streamlined and used in a more coherent manner. The *efficiency* of conditionality and enforcement can largely depend on the beneficiary countries' cooperation in monitoring so as to allow rigorous scrutiny of the content and implementation of their relevant legislation by the Commission. Finally, while the EU aims at advancing broader societal interest in its commercial relation externally, and strives to promote multilateralism, it has not managed to convince partners in global multilateral organisations (in particular the membership of the WTO) to follow suit in a similar manner, at globally enforceable scale.

CLEER's project on **Commercial power Europe: advancing societal and environmental goals through trade relations** is thus devoted to the modalities which the EU has applied to seek respect for human rights, labour standards, economic development and the environment from its negotiating partners in return for market access, tariff concessions and preferential treatment. The aim of the project is to pool knowledge, stimulate and facilitate academic interaction in a specific area of EU external relations, create synergies between and raise awareness of global societal concerns and convene the widest possible audience to unpack a central, highly topical, yet so far less explored area of the EU's external actions. Specifically, the project aims to assess the EU's mission and potential to, and actions in employing economic ties toward third countries so as to promote 'European values' beyond its commercial interest. By such approach the aim is to identify the normative framework and policy instruments that fit best the EU's ambition to employ its commercial ties and global presence for values and goals that go beyond trade advantages and which can be applied in a consistent and influential manner and even serve for other countries and multilateral organisations as examples to follow. With the involvement of academics, legal and policy experts, policy-makers and stakeholders, the project is set for a critical assessment of normative consistency and functional vitality urged by the ongoing review of trade conditionality measures, the shaping of an EU investment policy, and the EU's increasingly leading role in global environmental, trade and human rights debates. Those involved in the project wish to plant the most pertinent regulatory issues in the legal and policy environment that followed the entry into force of the Lisbon Treaty so as to suggest new, innovative, practicable solutions to the challenges facing the future of the EU's activities in linking its commercial strength with value-laden authority in standard setting globally.

The present Working Paper collects the presentations of the first CLEER Workshop organised under the research project, on 9 November 2012 at the T.M.C Asser Institute in The Hague. The collection devotes focus to the most contentious issues surrounding the EU's practice in linking trade and non-commercial interests. The first two panels focused on conditionality practices so as to detect how successful and indeed exemplary is the EU's conduct of conditionality policy globally. **Ernst-Ulrich Petersmann** looks into the EU's practice in integrating human rights in EU trade relations and calls for the EU's 'cosmopolitan leadership', suggesting increased efforts to transpose human rights clauses in trade agreements through multilateral levels as well, so as to enhance protection of rights and remedies of citizens. The practitioner's and civil society's perspective is offered by **Yorgos Altintzis** who looks into the newly introduced modalities of participation by civil society and special interest groups in discussions, welcoming enhanced participatory rights, but noting critical points in particular the lack of these interests groups' role in securing enforcement of standards in the trade agreement. He illustrates modalities through observations concerning the work of the Domestic Advisory Group (DAG), established by the EU-Korea Free Trade Agreement, which provides advice on the implementation of the Agreement's 'Trade and Sustainable Development Chapter'. The expansive collection and thorough analysis of social norms in the EU's trade agreements from the last 18 years in the joint paper by **Lori Van Den Putte** and her colleagues identifies trends in the use of conditionality policy. In particular, they point to the expansion of the scope of social norms included in bilateral trade agreements adding those that are relevant for social dialogue and social protection as well as ILO standards included, while their research has shown that actual enforcement of these norms by the EU still remains weak.

The next panel discussion revolved around the EU's newly assigned investment policy and how it seems to/should be shaped to serve the purpose of advancing non-commercial societal interest. **Aurora Voiculescu's** analysis focuses on issues of normativity associated with the EU's stance on the 'trade and...' linkages, looking at institutional and conceptual elements of the 'linkage-agenda' that the EU has been promoting. Her analysis reveals the strength that such norm promotion has gained through the extension of EU competences to investment, and the connection that the EU has made to international standards, thus enhancing its status as a global role model. **Anna De Luca** is sketching up policy options for integrating human rights considerations into the investment policy in-the-making and provides an overview of the level of investment protection and means of balancing protection of non-trade values and investment protection that future EU agreements should include. After the account taken from the various institutions' perspectives and initiatives, she looks at ongoing negotiations so as to trace trends, and includes observations from relevant practices of bilateral investment treaties and disputes.

Finally, the last panel examined the connection between trade policy conducted within the Internal Market and external trade policy instruments advancing non-commercial interest. Accordingly, **Laurence Gormley's** paper looks at

relevant case-law of the ECJ concerning the status of third country goods in the Internal Market and finds the Court's strict approach to accepting exceptions construed to pursue social and environmental policies in third countries, welcoming the Court's efforts to upholding the rule that the freedoms and the principles behind EU legislation must be interpreted widely. **Ferdi De Ville's** contribution looks at selected elements that are relevant to linkages between the Internal Market and EU trade policy so as to assess why the EU trade policy can be regarded 'the continuation of the Internal Market by other means'. His paper finds that lack of harmonisation at the EU level, in particular within social policy, the dominance of commercial objectives externally and that of negative integration modalities internally, pull in the direction of reduced influence for norm-exporting abroad. He advocates at the same time the closer nexus between trade and non-commercial interest and suggests better balancing mechanisms between the Internal Market's characteristic 'negative integration' approach and the inclusion of non-commercial considerations (positive integration) so that the Union could be seen as a 'global role model'.

The organisers are grateful to the European Union for funding the research project under its Lifelong Learning Programme. A special word of thanks go to Gareth Davies who was also member of the Organising Board of the event and chaired a panel as well as moderated a subsequent discussion at the workshop. The editorial assistance of Małgorzata Moch, intern at CLEER, was greatly appreciated.

INTEGRATING HUMAN RIGHTS INTO EU TRADE RELATIONS – THE EU AS A GLOBAL ROLE MODEL?

Prof. Dr. Ernst-Ulrich Petersmann

This contribution analyses the subject of this workshop – *Linking Trade and Non-Commercial Interests: the EU as a Global Role Model?* – from the perspective of the human rights clauses inserted, at the request of the EU, since the early 1990s into EU trade and economic agreements with over 130 countries. Since the European Coal and Steel Community Treaty of 1951, the economic goals of Community law have always been linked to broader political and legal goals. Following the *Stauder* case of 1969, the European Court of Justice (CJEU) increasingly recognised human rights as common constitutional principles of Community law. The Lisbon Treaty not only confirms 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’ (Article 2 TEU). It also incorporates the EU Charter of Fundamental Rights as well as the fundamental rights guaranteed by the European Convention on Human Rights (ECHR) into EU law (cf. Article 6 TEU) and commits the EU’s external policies to promoting, *inter alia*, ‘democracy, the rule of law, human rights’ and ‘the universality and indivisibility of human rights and fundamental freedoms’ (Article 21 TEU). Sections 1 and 2 briefly explain why multilevel trade governance in the EU and the EU’s human rights approach have evolved into a unique regional model that differs from all other regional economic integration agreements. Section 3 examines the ‘human rights coherence’ of the EU’s external relations law and of international economic law (IEL). Section 4 asks whether the EU’s human rights clauses have been effective. Sections 5 and 6 conclude with a broader evaluation of the EU’s human rights clauses and of the limits of the EU’s ‘rule of law’ principles.

1. MULTILEVEL TRADE GOVERNANCE IN THE EU: MORE THAN A REGIONAL MODEL?

The EU remains the only customs union that has so far become a member of the World Trade Organization (WTO). Since the Tokyo Round on multilateral trade negotiations in GATT (1973-1979), the EU often plays a leadership role in GATT/WTO negotiations, notably in the field of liberalisation and regulation of non-tariff trade barriers and the strengthening of the GATT/WTO dispute settlement system. The rule-making, monitoring and dispute settlement functions of the WTO could be strengthened if other regional economic integration agreements (such as Mercosur in Latin America, the Caribbean Common Market, the East African and West African common markets, the South African

Development Community) would follow the example of the EU and become WTO members with a common commercial policy. Just as economic integration inside the EU has aimed at promoting also legal and political integration beyond utilitarian economic justifications, so has the EU's common commercial policy also promoted political and legal policy objectives. For instance:

- The EU model of rights-based, multilevel constitutionalism has transformed the EU into the most successful 'civilian power' for multilevel, democratic governance of international 'aggregate public goods' (such as protection of 'democratic peace' and peaceful settlement of disputes in Europe). The EU remains the only regional organisation that has successfully realised the '4-stage sequence' of constitutional, legislative, administrative and judicial 'institutionalization of public reason' (J. Rawls) not only inside constitutional democracies but also on the level of regional law and institutions governing integration among 500 million EU citizens.
- The EU's multilevel human rights guarantees as codified in the EU Charter of Fundamental Rights, like the accession of the EU to the UN Convention on the Rights of Persons with Disabilities (2009) and to the ECHR (cf. Article 6 TEU), continue to develop multilevel human rights guarantees in European governance far beyond those of any other international organisation.
- The EU accession and 'neighbourhood policies', and the EU's accommodation of third countries (like the EFTA countries) requesting participation in the EU's common market without joining the supranational EU institutions, remain models for peaceful change based on respect for legitimate 'constitutional pluralism' and 'cosmopolitan constitutionalism' (e.g., limiting common market regulation by fundamental rights and judicial remedies of EU citizens).
- Many regional economic institutions (such as the Andean Common Market, Mercosur, the CARIFORUM-EU Economic Partnership Agreement) emulate the rule-based EU institutions (e.g., compulsory international adjudication) rather than power-oriented alternatives (like NAFTA institutions).

As the legal and democratic context of European integration remains unique, other regional or worldwide economic integration regimes are unlikely to adopt the 'EU model' of multilevel economic, legal and democratic governance of transnational public goods. The human rights obligations of UN member states protect individual and democratic diversity and legitimate 'constitutional pluralism', including the 'moral powers' of individuals to pursue diverse conceptions for a 'good life' and to agree only on a limited 'overlapping consensus' for a conception of legal, democratic and social justice necessary for peaceful cooperation and collective supply of national and international public goods.¹ The common responsibility of citizens and UN member states for protecting and fulfilling the human right 'to a social and international order in which the rights

¹ On the 'two moral powers' and the need for recognising that 'justice is prior to the good in the sense that it limits the admissible conceptions of the good', see: J. Rawls, *Collected Papers* (Cambridge: Harvard University Press 1999), at 386 and 312.

and freedoms set forth in this Declaration can be fully realised' (Article 28 Universal Declaration of Human Rights 1948) requires empowering citizens through cosmopolitan rights and judicial remedies to limit the ubiquity of abuses of public and private powers in 'Westphalian governance' of international public goods.² The EU sets a worldwide example, as recognised by the conferral to the EU of the 2012 Nobel Peace Prize, for the practical possibility of realising the 'Kantian moral imperative' of transforming intergovernmental power politics into 'democratic peace' based on respect for 'constitutional pluralism' as well as 'cosmopolitan constitutionalism' underlying European economic and human rights law (HRL).

2. THE EU'S HUMAN RIGHTS APPROACH: A MODEL FOR THE 'INDIVISIBILITY' OF HUMAN RIGHTS?

All UN member states have human rights obligations under the UN Charter, under UN human rights conventions and general international law as codified in UN, regional and national HRL like the UN 'Convention on the Rights of the Child' ratified by more than 190 states. Many UN human rights instruments confirm that '(a)ll human rights are universal, indivisible and interdependent and interrelated'; 'it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.³ Yet, HRL has never been effectively institutionalised in UN law and worldwide institutions dominated by power-oriented 'Westphalian intergovernmentalism' based on 'sovereign equality of states' protecting non-democratic rulers against democratic and judicial accountability (e.g., due to lack of jurisdiction of international courts, veto powers of non-democratic governments blocking UN Security Council responses to human rights violations abroad). Human rights are neither mentioned nor effectively protected in most worldwide and regional economic agreements outside Europe. Most national legal systems of UN member states focus one-sidedly on protecting civil and political rights (e.g., in US constitutional law and practices) or economic rights (e.g., in communist countries like China) without comprehensive protection of the 'indivisibility' and 'interdependence' of civil, political, economic, social and cultural rights as required by UN HRL. The fact that more than 2 billion people live on 2 USD per day or less, and without effective legal protection of their human rights and rule of law, confirms that UN HRL fails to be implemented in many UN member states.

² Cf. E.-U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart Publishing 2012).

³ Vienna Declaration and Programme of Action adopted at the UN World Conference on Human Rights by more than 170 states on 25 June 1993 (A/CONF.157/24, para. 5). This 'universal, indivisible, interrelated, interdependent and mutually reinforcing' nature of human rights was reaffirmed by all UN member states in numerous human rights instruments such as UN Resolution 63/116 of 10 December 2008 on the '60th anniversary of the Universal Declaration of Human Rights' (UN Doc A/RES/63/116 of 26 February 2009).

The incorporation of 'inalienable' human rights into positive national and international legal systems confirms the 'dual nature' of modern international law, as illustrated also by the customary law requirements of interpreting international treaties and settling international disputes 'in conformity with the principles of justice' and the human rights obligations of states, as recalled in the Vienna Convention on the Law of Treaties (cf. Preamble and Article 31. VCLT) as well as in other UN agreements (e.g., Article 1 UN Charter). UN law does not limit the 'sources of law' and 'rules of recognition' to 'international conventions ... recognised by states' (Article 38(1)(a) Statute of the ICJ); the additional sources – like '(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilized nations; (d) ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law' (Article 38(1) ICJ Statute) – may depend no less on recognition by citizens, civil society, parliaments and courts of justice than on claims by diplomats that they control the *opinio juris sive necessitatis* as traditional gatekeepers of 'Westphalian international law among states'. It was due to the multilevel guarantees of civil, political, economic, social and cultural rights and their multilevel judicial protection by the CJEU, the European Free Trade Area (EFTA) Court, the European Court of Human Rights (ECtHR) and by national courts in the 30 member states of the European Economic Area (EEA) that EU law, EEA law and European HRL were transformed from 'international treaties among states' into cosmopolitan 'constitutional legal orders' protecting 'European public goods' (like transnational rule of law) for the benefit of citizens and their constitutional rights.

The constitutional commitments of EU law, EEA law and European institutions to multilevel, legal and judicial protection of civil, political, economic, social and cultural human rights and fundamental freedoms (like the EU's 'common market freedoms'), the EU accession to regional and UN human rights conventions, the EU's insistence on including 'human rights clauses' into international agreements with third states, and the EU's willingness to forego such agreements if third countries (e.g., Australia and New Zealand) objected to 'human rights clauses', illustrate a unique European leadership for protecting the 'indivisibility' of human rights as required by European and UN HRL. Inside the EU and the EEA, HRL has empowered citizens and citizen-driven transformation of 'Westphalian international law' through transnational participatory, parliamentary and 'deliberative democracy' and judicial protection of cosmopolitan rights and remedies limiting abuses of public and private power. The innovative elaboration of the EU Charter of Fundamental Rights by a 'European Convention' – composed not only of representatives of governments but also of civil society, national parliaments and the European Parliament – entailed a new multilevel system of 'dignity rights' (Title I), 'freedoms' (Title II), 'equality rights' (Title III), 'solidarity rights' (Title IV), 'citizens' rights' (Title V) and 'other guarantees of "justice"' (Title VI). This multilevel constitutional protection of fundamental rights in Europe – in conformity with the Convention rights protected by the ECHR (cf. Articles. 52 and 53 EU Charter) – has developed HRL

far beyond the traditional categories used in UN human rights conventions. Just as national constitutional courts insist on reviewing whether EU acts remain consistent with the limited powers and constitutional restraints of the EU, the ‘*Kadi*-jurisprudence’ of the CJEU refuses to apply EU acts violating the fundamental rights guarantees of EU law, even if they implement UN Security Council ‘smart sanctions’.⁴ The judicial remedies offered by the human rights jurisprudence of European courts also in the field of IEL are in stark contrast to the jurisprudence of most other regional economic courts outside Europe, as illustrated by Zimbabwe’s refusal to comply with the 2008 judgment of the Southern African Development (SADC) Tribunal against Zimbabwe’s illegal expropriations of white farmers and the subsequent dissolution of the SADC Tribunal by SADC governments.⁵ Regrettably, in the external trade relations of the EU, the explicit exclusion (e.g., in EU Decisions implementing the recent free trade agreements with Korea and Latin American countries) of rights of citizens to invoke EU trade agreements in domestic courts reveals power politics also by EU institutions interested in excluding legal and judicial accountability *vis-à-vis* citizens for welfare-reducing violations of international trade agreements.

3. THE EU AS A MODEL FOR ‘HUMAN RIGHTS COHERENCE’ OF IEL?

Human rights cannot be effective – also in IEL – unless they are ‘institutionalised’ throughout the legal and political system and constitute ‘public reason’. Even though governments have no legitimate powers to exempt international organisations from the constraints of HRL, the law of the Bretton Woods institutions, WTO law and most regional economic organisations mention neither human rights nor other constitutional restraints of intergovernmental power politics. Hence, even though citizens are ‘agents of justice’ whose human rights and democratic consent condition the legitimacy of law and governance, citizens continue to be treated by UN and WTO law as mere objects without effective legal and judicial remedies against intergovernmental power politics. Similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways, private and public, national and international lawyers often perceive IEL in contradictory ways as (1) public international law (e.g., the Bretton Woods agreements), (2) ‘global administrative law’ (e.g., the law of the WTO), (3) ‘conflicts law’ (e.g., commercial law and arbitration), (4) multilevel constitutional regulation (e.g., in EU law) or (5) multilevel economic regulation of the economy based on *national* constitutional

⁴ Cf. ECJ, Joined Cases C-402/05P & C-415/05P, *Kadi v Council of the EU*, 41 *Common Market Law Reports* 2008, 1207, 1240 ff.

⁵ Cf. O.C. Ruppel, ‘The Case of Mike Cambell and the Dissolution of the SADC Tribunal’, in: N. Madolo (ed.), *International Economic Law. The Voices of Africa* (Cape Town: Silber Ink 2012), 141-159. In November 2012, some African non-governmental organisations requested the African Court on Human Rights and People’s Rights to declare in an advisory opinion that this dissolution of the SADC Tribunal deprived African citizens of their human rights to effective judicial remedies.

and economic regulation and interest group politics (e.g., in NAFTA countries) with only limited international legal restraints. ‘Human rights clauses’ acknowledge that IEL must remain ‘constitutionally embedded’ and protect cosmopolitan rights of producers, traders, investors and consumers participating in the global division of labour. IEL regimes with cosmopolitan rights – e.g., in the EU, EEA, NAFTA, investment, intellectual property, commercial law and arbitration agreements – have proven to protect consumer welfare and rule of law more effectively for the benefit of citizens than ‘Westphalian IEL regimes’ prioritising rights and interests of governments over those of citizens (e.g., by failing to protect legal, democratic and judicial remedies of citizens against corrupt rulers).⁶

The need for labouring in order to gain the resources for human survival (*homo laborans*), and the human desire for social recognition through work (*homo faber*) are essential parts of the human *vita activa*.⁷ Hence, economic law (e.g., contract law, property regulation, *lex mercatoria*) belongs to the oldest parts of national and international legal systems. The more the individual and social gains from international trade and from global division of labour were recognised, the more traders, producers, investors, consumers and governments strive for reducing international transaction costs through multilevel legal regulation of international economic cooperation and related disputes. European economic and human rights courts, commercial and investor-state arbitral tribunals, and national courts recognise ever more common market rights, property rights, human, labour and other cosmopolitan rights of citizens participating in the international division of labour. The admission of *amicus curiae* briefs in order to take into account third party interests affected by economic disputes, the ‘judicial balancing’ between legal market access commitments and exception clauses (e.g., GATT Article XX) reserving sovereign rights and duties to protect non-economic values (like human rights), and the judicial interpretation of economic provisions (e.g., on technical regulations, sanitary standards, intellectual property rights) in the light of other treaty provisions protecting non-economic public interests (like protection of public health pursuant to Article 8 TRIPS Agreement) are justifiable also by the customary law requirements of interpreting treaties and settling disputes ‘in conformity with principles of justice’. Human rights are essential for protecting ‘access to justice’, due process of law, democratic and judicial ‘balancing’ of rights and interests affected by economic regulation. Development economists rightly criticise macroeconomists focusing only on gross domestic product (GDP) rather than also on policies securing the basic needs and developing the ‘human capabilities’ for what people are actually able to do and to be. The participation of more than 70% of UN member states in preferential trade agreements with human rights clauses complements such ‘human development approaches’⁸ aimed at empowering citizens through legal rights, democratic participation, legal ac-

⁶ Cf. E.-U. Petersmann, *supra* note 2, chapter II.

⁷ Cf. H. Arendt, *The Human Condition* (Chicago: University of Chicago Press 1958).

⁸ Cf. M.C. Nussbaum, *Creating Capabilities. The Human Development Approach* (Cambridge: Harvard University Press 2011).

countability, judicial remedies and promotion of ‘cosmopolitan public reason’. The more private and public, national and international economic regulations interact, the more important are the customary law requirements of interpreting law and settling disputes ‘in conformity with principles of justice’ and the human rights obligations of all UN member states. As none of the UN human rights conventions provides for effective judicial remedies, some human rights advocates argue that economic agreements offering material benefits for compliance with human rights, changing the ‘cost-benefit calculations’ of human rights violators, and setting incentives for ‘participatory democracy’ may be more important for promoting human rights and satisfying basic needs than pushing more countries to ratify UN human rights conventions.⁹

Human rights clauses in the EU’s international trade agreements have both ‘domestic’ as well as ‘foreign policy functions’, i.e., to prevent violations of law by EU institutions (e.g., by justifying suspension of treaty benefits in response to human rights violations abroad) and to promote ‘human rights coherence’ in the foreign jurisdictions of EU trading partners. Due to the multilevel, constitutional and judicial limitations of governance powers of EU member states and EU institutions by multilevel human rights and judicial remedies, ‘negative human rights coherence’ in the sense of absence of contradictions between EU trade rules and human rights is essentially secured; national and European judgments establishing violations of the EU’s human rights obligations in the implementation of EU agreements remain rare.¹⁰ ‘Positive human rights coherence’ in the sense of mutual synergies remains, however, a permanent challenge, as illustrated by the large number of WTO dispute settlement rulings against illegal, welfare-reducing EU trade restrictions violating WTO law and the EU requirements of ‘strict observance of international law’ (Article 3 TEU). The WTO Appellate Body ruling against the EU’s ‘drugs arrangements’ conditioning preferential tariffs to less-developed countries on their combating the production and trafficking of narcotics¹¹ illustrate that legal linkages of human rights and EU trade regulations may be challenged in foreign jurisdictions; it also prompted the EU to adopt new ‘GSP+ arrangements’ offering additional tariff preferences to ‘vulnerable’ less-developed countries accepting and monitoring 16 human rights and ILO conventions and 7 out of 11 additional ‘good governance’ conventions.¹² The explicit commitment to ‘respect for democratic principles and human rights’ in the ‘new generation’ of EU ‘deep and comprehensive free trade agreements’ (e.g., in Article 1 of the EU-Korea Framework Agreement of 2010) has not prevented the political EU institutions from adopting EU rules preventing EU citizens from challenging EU violations of

⁹ Cf. E.M. Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* (Ithaca: Cornell University Press 2009).

¹⁰ See ECtHR, *Saadi v Italy*, Appl. No. 37201/06, 28 February 2008. In the latter, the ECtHR decided that the deportation by Italy of a Tunisian citizen to Tunisia would breach Art. 3 ECHR and could not be justified by a presumption that Tunisia would respect its human rights obligations as confirmed in the human rights clause of the EU-Tunisia association agreement.

¹¹ WTO Appellate Body Report, *EC-Tariff Preferences*, WT/DS246/AB/R, 20 April 2004.

¹² Cf. Art. 9 of Council Regulation 980/2005 O.J. 2005 L169/1.

these free trade rules in domestic courts, in line with the long-standing policy of EU institutions to prevent citizens from holding EU institutions legally and judicially accountable in European courts for their violations of WTO rules as established in dozens of GATT/WTO dispute settlement rulings against the EU.¹³ The FTA provisions providing for involvement of civil society groups may be important especially in less-developed contracting parties – like the Maghreb countries and the 78 African, Caribbean and Pacific (ACP) contracting states of the Cotonou Convention – for empowering civil society to use the FTA institutions for voicing concerns over the actual operation of these agreements (e.g., by responding to ‘human rights impact assessments’ by the European Parliament of the EU’s external policies).

4. HAVE EU HUMAN RIGHTS CLAUSES BEEN EFFECTIVE?

The EU strategies for promoting human rights coherence of the EU’s international agreements are mainly based on the three tools of ‘human rights clauses’, ‘human rights dialogues’ and ‘human rights assistance’.

Since the 1990s, the initially diverse texts of ‘human rights clauses’ included into the international agreements of the EU were progressively standardised based on model texts for a ‘human rights essential elements clause’, a ‘non-execution clause’ and a joint ‘interpretative declaration’ clarifying some of the terms like ‘appropriate measures’ taken in response to a ‘material breach of the Agreement’ and ‘cases of special urgency’.¹⁴ As an international organisation, the EU could not ratify most UN human rights conventions. Hence, the EU’s human rights clauses refer to the Universal Declaration of Human Rights of 1948 and, in the case of European treaty partners, also to European human rights instruments as shared standards of human rights and democratic principles. As the EU continued to conclude some international agreements (e.g., with industrialised countries, sectoral agreements on textiles, fishing and investment) without human rights clauses, the European Parliament emphasised in 2005 ‘that it is no longer prepared to give its assent to new international agreements that do not contain a human rights and democracy clause’.¹⁵ The human rights clauses have been invoked by the EU mainly in response to violations of political human rights in ACP countries (*coup d’état*, flawed political elections, corruption), Arab countries (civil war in Libya and Syria) and former Soviet countries (Belarus, Russia, Uzbekistan). As some calls for additional sanctions (e.g., *vis-à-vis* Algeria and Israel) remained unanswered and the EU responded to some situations of continuous human rights

¹³ Cf. E.-U. Petersmann, ‘Can the EU’s Disregard for “Strict Observance of International Law” (Art. 3 TEU) Be Constitutionally Justified?’ in M. Bronckers *et al.*, (eds.), *Liber Amicorum for J. Bourgeois* (Cheltenham: Elgar 2011), 214-225.

¹⁴ For a recent analysis see: M. Golabek, ‘Weaving a Silver Thread’, in *Human Rights Coherence in EU Foreign Affairs and Counter-Terrorism* (Florence: EUI Doctoral thesis 2013), chapter 6.3.

¹⁵ European Parliament, Resolution on the human rights and democracy clause in EU agreements, 2005/2057 (INI), para. 10.

abuses only in case of sudden deterioration, the European Parliament and others have criticised such selective EU conditionality practices as power-oriented ‘double standards’. Apart from justifying sanctions in response to violations of human rights, the human rights clauses are also used for cooperating in the promotion and effective protection of human rights (e.g., by strengthening human-rights related institutions).

Based on guidelines for ‘human rights dialogues’ adopted by the EU Council in 2001, the EU has established some 40 dedicated discussion forums for registering EU concerns, gathering information and engaging in consultations on improving political and civil rights (e.g., regarding abolition of death penalties and torture, protection of freedom of expression, freedom of assembly and of religion) as well as economic and social rights (such as rights to health and education, rights of children, gender equality). The major financial tools for offering ‘human rights assistance’ include the European Instrument for Democracy and Human Rights (now providing for some 140 million Euros annually), the European Development Fund, the Development Cooperation Instrument, the European Neighbourhood Policy Instrument and the Instrument for Stability. One reason for the continuing criticism of the inadequate coherence of these diverse policy instruments – at least, prior to the establishment of the EU’s Strategic Framework and Action Plan on Human Rights of June 2012 and the appointment of an EU Special Representative for Human Rights in July 2012 – was related to limited human rights expertise in EU institutions and to the limited influence and insufficient coordination of specialised actors, such as the EU Council’s Working Party on Human Rights, the Human Rights Department in the Commission’s European External Action Service, the European Parliament’s Sub-Committee on Human Rights, and the EU Fundamental Rights Agency, whose mandate is limited to ‘fundamental rights issues in the EU and in its Member States when implementing Community law’.¹⁶ Specialised non-governmental human rights agencies like Amnesty International often complement the EU human rights policy’s focus on civil and political rights by challenging also violations of social and environmental rights, as illustrated by the 2012 judgment by the Court of Justice of the Economic Community of West African States finding the Nigerian government responsible for environmental and human rights abuses by oil companies.¹⁷ Even though the unnecessary poverty and abuses of power in so many countries illustrate the never-ending task of protecting human rights, the EU’s human rights clauses, ‘human rights dialogues’ and ‘human rights assistance’ recognise economic and social rights as a matter of justice also in trade relations and contribute to rendering human

¹⁶ Council Regulation (EC) No. 168/2007, *O.J.* L53/1, para. 2.

¹⁷ The complaint (ECW/CCJ/APP/08/09) was brought by the ‘Socio-Economic Rights and Accountability Project’ with support from Amnesty International, cf. Amnesty International Press Release PRE01/619/2012. The legally binding final judgment found that Nigeria violated Art. 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples’ Rights by failing to protect the Niger Delta and its people from harmful operations of oil companies and other perpetrators devastating this region.

rights and struggles for justice more effective; it is better to light a candle than to curse the darkness.

5. CAN HUMAN RIGHTS 'RUN LIKE A SILVER THREAD' THROUGH EU FOREIGN POLICIES WITHOUT RESPECT FOR 'RULE OF LAW'?

Since the 1948 Universal Declaration of Human Rights, UN human rights instruments emphasise 'that human rights should be protected by the rule of law' (Preamble UDHR). As national parliaments have not delegated powers to the EU institutions to violate international law, EU law emphasises the constitutional limitation of all EU policies by 'rule of law' and 'strict observance of international law' (Articles 2, 3, 21 TEU). In her speech of 16 June 2010, the EU High Representative for Foreign Affairs, C. Ashton, confirmed to the European Parliament that 'human rights, democracy and rule of law ... will run like a silver thread' through the EU's foreign policies. Yet, following some 15 GATT/WTO dispute settlement panel, Appellate Body and arbitration awards since 1991 against the illegal EU import restrictions on bananas, the agreement of 8 November 2012 between the EU and 10 Latin American countries on the final settlement of this longest-running series of trade disputes in the history of the multilateral trading system¹⁸ reminds citizens of how rent-seeking economic lobbies also inside the EU – including the EU's few banana trading companies – may be powerful enough to lobby the political EU institutions to persistently violate the 'rule of law' principles of EU and GATT/WTO law to the detriment of EU consumers, whose annual 'protection costs' from these illegal import restrictions were estimated to be the equivalent of an illegal tax amounting to several billion Euros per year. The persistent refusal of EU politicians to grant EU citizens legal and judicial remedies against EU violations of international trade rules, even if the 'reasonable period' for implementing legally binding WTO dispute settlement rulings has expired, confirms that 'rule of law' also inside the EU risks not being stronger than in a 'banana republic'. The persistent violations – by more than 20 out of the 27 EU member states – of the agreed EU legal disciplines for fiscal, debt and economic convergence policies (cf. Article 126 TFEU) contributed to debt defaults (i.e., violations of contract law) necessitating bailouts in ever more over-indebted EU member states (like Greece, Portugal, Ireland, Spain, Cyprus) and of bankrupt banks at the expense of European taxpayers, undermining also rule of law, protection of human rights (e.g., in Greece) and the legitimacy of European governance.

The EU accession to the ECHR will further strengthen legal and judicial protection of EU citizens against violations of civil and political human rights. As illegal trade restrictions amount to an illegal tax on EU citizens and redistribute 'protection rents' in illegal ways, the lack of effective judicial remedies of EU citizens against welfare-reducing EU violations of world trade rules reflects the EU's neglect – also in its external human rights policies – of economic and

¹⁸ Cf. WTO Press Release of 8 November 2012 on 'Historic signing ends 20 years of EU-Latin American banana dispute'.

social rights and ‘rule of law’ for the benefit of citizens. The CJEU – rather than fulfilling its constitutional mandate ‘that the law is observed’ (Article 19 TEU), including international treaty obligations as integral part of the Community legal system – has endorsed the legally unfounded claims of the political EU institutions to have ‘freedom of maneuver’¹⁹ to violate UN and WTO law without explaining how e.g., EU non-compliance with WTO dispute settlement rulings can serve legitimate ‘Community interests’. Inside states, extending human rights of ‘access to justice’ to economic policies may remain within the discretion of democratic lawmakers. In international organisations based on limited delegation of powers and ‘rule of law’, citizens and national parliaments have good reasons to insist on ‘strict observance of international law’ (Article 3 TEU) and more comprehensive judicial remedies – as guaranteed by Article 47 EU Charter of Fundamental Rights – in order to protect transnational rule of law for the benefit of citizens. For, the more globalisation transforms *national public goods* into *transnational ‘aggregate public goods’*, the more does the welfare of citizens depend on cosmopolitan rights protecting the collective responsibility of citizens for securing ‘strict observance of international law’ and human rights as required by the Lisbon Treaty.

6. CONCLUSION

The EU should strengthen its potential ‘role model’ for protecting fundamental rights and rule of law in international trade by implementing the ‘human rights clauses’ in its trade agreements – also in relations with third countries – through multilevel, legal and judicial protection of cosmopolitan rights of citizens limiting the ubiquity of abuses of public and private powers. As long as ‘Westphalian intergovernmentalism’ prevails in the EU’s external relations over the protection of rights of citizens and the lack of ‘accountability mechanisms’ remains the main reason for the ineffectiveness of UN HRL,²⁰ human rights and rule of law

¹⁹ This term continues to be used by both the political EU institutions and the CJEU (e.g., in ECJ, Joined cases C-120 and C-121/06 P, *FIAMM v. Council and Commission* [2008] ECR I-6513, para. 119) as the only justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings. Since the 1972 *International Fruit Company Case*, the justifications submitted by the EU Commission to the CJEU for denying citizens and EU member states rights to invoke and enforce the EU’s GATT/WTO obligations – e.g., that GATT/WTO rules are less ‘precise and unconditional’ than EU rules, that ‘reciprocity’ and ‘safeguard clauses’ require denying ‘direct applicability’ of GATT/WTO obligations in European courts, or that WTO law accepts compensation and sanctions as alternative ‘options of compliance’ with WTO obligations – continue to be obviously inconsistent with GATT/WTO law and seem to be motivated by bureaucratic self-interests to avoid accountability, just as the CJEU’s endorsement of such ‘political question doctrines’ reveals judicial self-interests in limiting the influence of international courts (e.g., WTO jurisprudence) on the CJEU and avoiding conflicts with the political EU institutions. In its recent case law, the CJEU has similarly refrained from applying UN conventions (like the UN Convention on the Law of the Sea, the ICAO Chicago Convention) as legal standards for reviewing the lawfulness of EU acts.

²⁰ Cf. *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (Geneva: UN High Commissioner for Human Rights 2013). On ‘accountability gaps’ also in EU law, see the recent reports by the EU Fundamental Rights Agency: *Access to Justice in*

for the benefit of citizens remain at risk, as explained by I. Kant already more than 200 years ago: 'the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states and cannot be solved unless the latter is also solved'.²¹ The more globalisation transforms national 'public goods' into global 'aggregate public goods' whose supply depends on multilevel governance and transnational rule of law, the EU should lead by example in interpreting mutually beneficial trade agreements not only in terms of rights and obligations of governments, but as protecting also cosmopolitan rights and judicial remedies for the benefit of citizens. Arguably, Article 21(1) TEU requires such 'cosmopolitan leadership' for protecting economic and social rights also in the EU's external relations as a matter of justice rather than of bureaucratic discretion: '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'.²²

Europe: An Overview of Challenges and Opportunities (Vienna 2011); *Access to Justice in Cases of Discrimination in the EU* (Vienna 2012).

²¹ Cf. I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in H. Reiss (ed.), *Political Writings* (Cambridge University Press 1991), 47.

²² This argument is explained in: E.-U. Petersmann, 'Human Rights Require "Cosmopolitan Constitutionalism" and Cosmopolitan Law for Democratic Governance of Public Goods', in *EUI Working Papers* 2013/04, Department of Law (Florence: EUI 2013).

CIVIL SOCIETY ENGAGEMENT AND LINKAGES IN EU TRADE POLICY

Yorgos Altintzis

Recent changes in the EU's trade policy provide new opportunities for civil society and public interest groups to establish and engage in a constant discussion and exchange of ideas with a view to promote social goals through trade policy. An example of such recent development is the Domestic Advisory Group (DAG), established by the EU-Korea Free Trade Agreement, so as to provide advice on the implementation of the Agreement's 'Trade and Sustainable Development Chapter'. This article aims at describing the structure and functions of the DAG, as well as exploring general issues of civil society engagement in the EU's trade policy.

1. INTRODUCTION

Social conditionality has been one of the main vehicles to develop and implement a trade policy that aligns economic objectives with social goals. Although some trade agreements and arrangements include social conditionality, in general, the trade policy is yet to be reformed so as to be coherent with policies aiming at mitigating the adverse effects of globalisation, e.g., increasing income inequality and environmental deterioration. Amongst the common forms of social conditionality built into trade agreements and arrangements, one can find non-derogation clauses, specific implementation requirements as well as some form of settlement of disputes with social content, including labour abuses and environmental protection. Social goals were thus inserted in the trade legal frameworks after certain movements, progressive institutions, and in general, public opinion found government allies in promoting a social dimension to globalisation. Civil society and interests groups have an interest in trade policy – as they do in other policy areas too – because of its potential impact on social-, economic-, and, increasingly, political development of respective trade partners. Such interest groups comprise of: organisations with (a) economic interests, like business lobbies; (b) social interests, for example trade unions, human rights defenders and women's groups; (c) environmental interests, like animal welfare organisations; and (d) political interests, such as democratic movements. These groups serve legitimate interests in an attempt to exert influence within and through the EU's trade policy. However, the interventions by such groups are not always meaningful because the transparency of and access to trade policy processes globally and in the EU is low. In contrast to the US, where the negotiating goals are approved by the Congress in a public procedure, in the EU, the Council does not publish the negotiating man-

date that it gives to the Commission. In addition, negotiating texts are not released and information concerning on-going negotiations usually comes only in fragmented manner. Sometimes the source of information is an anonymous negotiator or official and the piece of information cannot be verified, nor can one know whether the released information is true or if it simply aims at disorientating foreign negotiators. In the past, some useful information on negotiations has come from leaks made by activists.

2. THE EU'S INTERACTION WITH CIVIL SOCIETY ON TRADE POLICY

Civil society interventions can be delivered through established processes, like the Civil Society briefings. According to the Commission¹ the dialogue with civil society aims at consulting to 'address civil society concerns on trade policy', 'improve EU trade policy-making through structured and qualitative dialogue', and 'improve transparency and accountability'. In current practice, the dialogue comprises of briefings for civil society on specific trade and investment issues or agreements, providing comments on Communications and other working documents, for example as it happened with the 'Trade, Growth and Development Communication', and through civil society seminars.

With regard to a specific trade agreement, negotiations, interventions by interest groups should ideally start in the pre-negotiating period, when mandates, economic goals and scope of concessions are decided upon. In such way, these groups would be in the position to seek to arrange meetings with officials, make public statements or official submissions stating their goals and strategies to achieve them. However, presently in the negotiating period, only few groups, such as business groups, have the necessary access to influence the negotiations. These groups acquire information on the course of talks and subsequently exert pressure in bilateral meetings with negotiators or through higher level contacts in relevant countries, Member States. In general, business groups enjoy far greater access to negotiators, decision-makers and information than any other interest groups. In fact, the involvement of certain business lobbyists in EU's trade policy is so extensive that the relationship between them and the Commission is 'top-down lobbying', where the EU Commission lobbies business to lobby back the Commission with different goals.² Occasionally, after an agreement is concluded and before it is ratified, there has been some room to insert social conditionality upon the instigation by interest groups, as it occurred for instance with the Obama-Santos Labour Action Plan of April 2011 or the EU-Colombia/Peru Road Map on Human, Environmental and Labour Rights, which were concluded after trade unions' insistence on the specific social issues. After ratification, however, there is virtually no channel to influence the agreement itself, except for review committees and complaints mech-

¹ DG Trade website on civil society engagement, available at <http://trade.ec.europa.eu/civilsoc/csd_proc.cfm>.

² Corporate Europe Observatory, 'At your service: the European Services Forum's privileged access to the EU Commission', (15 February 2013), available at <<http://corporateeurope.org/blog/your-service-european-services-forum-privileged-access-eu-commission>>.

anisms that have delivered some marginal change in governmental behaviour with regard to labour issues.

3. DOMESTIC ADVISORY GROUPS (DAGS) AND CIVIL SOCIETY FORA (CSFS)

The EU's new approach to the institutional apparatus of trade agreements with the establishment of Domestic Advisory Groups (DAGs) and Civil Society Fora (CSFs) provides a new channel for civil society to participate in the implementation of the agreement and potentially promote societal interests. At this point in time, it would be premature to judge the DAGs' effectiveness to influence the implementation of agreements. Nonetheless, as the decisions taken in these bodies are not binding at all, the intended and anticipated policy- or legislative change would be rather minimal. Trade Agreements that stipulate the establishment of such bodies include the EU-Central America, EU-Korea, EU-Colombia/Peru, EU-Ukraine, and the EU-CARIFORUM agreements. Although the new trade agreements are not uniform on civil society participation, they establish one DAG in each Party and once a year a Civil Society Forum is held alternatively in the trading Party and the EU with the participation of both DAGs. The DAGs and CSFs established under different agreements have structural and functional differences. For instance, some DAGs might be given the ability to submit opinions on their own initiative, others not; some agreements may reserve access to economic, social and environmental organisations and others may stipulate the inclusion of academia. In general, DAGs and CSFs discuss and make recommendations to the Parties on the implementation or achieving the goals of the sustainable development Chapter of the agreements. The only framework that provides only for a CSF and not for DAGs is the EU-CARIFORUM's Joint Consultative Committee.

3.1. Institutional arrangements of the EU-Korea DAG

At the moment of writing, the only DAGs in operation are those established under the EU-Korea Agreement. The EU DAG is a meeting of 12 representatives from the European Economic and Social Committee (EESC), employers' organisations, trade unions, and NGOs including a farmers' association (COPA-COGECA), an environmentalist group (Eurogroup for Animals), a human rights movement (FIDH) and an association of faith-based development organisations (APRODEV). Other organisations may be invited to provide expertise. Also, official meetings of other civil society organisations with DAG members can be arranged through DG Trade's civil society dialogue. The EU DAG organisations' participation rotates so that all organisations of a subgroup get an opportunity to be represented, should there be more organisations than seats. Also, when a seat becomes vacant, the EESC, the Commission and the members of the DAG decide on the attribution of the seat.

The EESC acts as DAG's Secretariat with its main responsibilities being the provision of appropriate publicity of the DAG's work, liaising with the Korean DAG, the Sustainable Development Committee (TSDC)³ and the Commission, and co-ordinating the organising of the CSF together with the Secretariat of the Korean DAG. The DAG publishes summary reports of its meetings and other documents that are considered by the members of the DAG to be suitable for public dissemination. Meetings may be open to civil society organisations that are not members of the DAG, in particular for specific discussions that would benefit from additional expertise or views. Regular open information and discussion sessions can be organised via DG Trade's civil society platform. The rules stipulate that the DAG convenes at least once a year to prepare the CSF and meets also on the initiative of the Chair, the Commission and the TSDC or when the initiative by one member is supported by four more members. The EU's Group in the EU-Korea FTA has decided to meet four times per year. Its members discuss current developments in different industries, and issues relating to the implementation of economic, social and environmental aspects of the agreement including investment, regulatory cooperation, implementation of the ILO Fundamental Rights at Work Conventions, animal welfare and energy efficiency.

The role of the EU DAG is to 'advise on any issue related to the implementation of the sustainable development chapter of the EU-Korea Free Trade Agreement (FTA), at the request of the Civil Society Forum, the Trade and Sustainable Development Committee, the Panel of Experts, the European Commission (the Commission), or on the DAG's own initiative.'⁴

The DAG issues communications, opinions and reports to circulate its views. At the time of writing, the current DAG is in the process of adopting two opinions; one concerning the implementation of ILO's core labour standards, and the other one about green growth and trade – both requested by the TSDC. Save communications, all instruments of expression need a rapporteur who prepares the document. The DAG may request the assistance of independent experts from a list provided by the Commission. After amendments and discussion, opinions and reports are adopted by the DAG and communicated to the TSDC or other institutional bodies. It may also consult with experts in civil society and other organisations that do not participate in the DAG. The DAG publishes all documents it produces, except if the members decide otherwise. The Group can also be asked to present its decisions, opinions or activities to the European Parliament or to the Council, although this has not yet happened.

The DAG has adopted its work programme and rules of procedure and in each of its session it adopts the agenda of the meeting as well as the minutes of the previous meeting. Upon the request of a member, the rules of procedure

³ The EU-Korea Trade and Sustainable Development Committee consists of Director-level officials from the Korean Ministries of Environment and Labour and the Directorate D (Sustainable Development) of DG Trade. The Committee is the intergovernmental body that oversees the implementation of the Sustainable Development Chapter.

⁴ Rules of Procedure of the Domestic Advisory Group created pursuant to Chapter 13 of the EU-Korea Free Trade Agreement.

can be amended following normal voting procedures. The Commission's consent is needed if amendments are proposed to provisions relating to financing of the DAG meetings and participation in the EU-Korea Civil Society Forum. With regards to voting, the DAG decisions on any matter are taken unanimously, and if this is not possible, the members decide with simple majority.

In addition, the EU DAG has elected its President who is replaced every two years after co-chairing two CSFs along with the President of the Korean DAG. The Presidency should rotate amongst the three subgroups.

The European Commission is invited to participate in the DAG's discussions or make presentations on specific subjects. Depending on the agenda, representatives of the European External Action Service or other EU institutions are invited. The Commission and other EU institutions are not allowed to participate in actual decision-making and they have to leave the room when the DAG is about to get into details of its work or adopt a decision.

3.2. The working programme of the EU-Korea DAG

The current working programme⁵ of the EU-Korea DAG focuses on two opinions related to the implementation of the ILO conventions and the relations between green growth and trade. These two opinions were commissioned by the first CSF which was held in Korea. Further to this, the CSF decided that experts on both sides should address labour standards thoroughly and draft recommendations in this regard as well as organise a workshop ahead of the next CSF meeting so as to define concrete areas of cooperation. The EU DAG has brought several other issues to the attention of the Commission. For instance, it raised the issue of the progress on the direct transport clause, the implementation of the sustainability clause and issues relating to the implementation of the financial services commitments. The Commission answers DAG members' questions and takes note of particular issues it could raise with the Korean government before providing an answer to the DAG. The discussion of current developments on environment, labour and business under the economic, social and environmental pillars of the EU–Korea FTA implementation are permanently on the agenda of DAG meetings. The DAG also discusses certain economic aspects, when possible focusing on different sectors, including investment and business climate, co-operation on regulatory policies, environmental goods and services, research and development as well as consumer protection issues. The social aspects of the FTA that are discussed in the DAG related to the implementation of the core ILO conventions, the involvement of the social partners and civil society in the creation and implementation of social policies, working conditions including occupational health and safety issues, and gender equality. The DAG also debates on the environmental aspect of the agreement, mainly focusing on green growth, sustainable agriculture, protection of the endangered species and water management. In addition, the EU's DAG decided that discussions

⁵ As agreed in 'The Work Programme of the Domestic Advisory Group under the EU-Korea Free Trade Agreement (2012-2014)'.

may also take place at CSF meetings and/or at seminars or conferences organised alongside CSFs on more general issues of common interest such as challenges stemming from demographics, new sources of employment, food security and the diversification of energy supply.

3.3. Overall evaluation of the EU-Korea DAG and the future of civil society's participation in the monitoring of free trade agreements

In general, the EU-Korea DAG presents a good example of civil society participation in the implementation of EU's 'new generation' FTAs. As the EU-Korea DAG takes the first strides in its work, its experience provides many lessons for the participating organisations, the trade Parties and EU trade policy in general. Also, the DAG's activity sets important precedents for future agreements by developing its own procedures and practices. Moreover, it provides for a structured participation of the EESC in trade policy which is important for both the EESC Members and its Secretariat.

The EU-Korea agreement stipulates with some detail the composition of the DAGs and mandates their responsibilities. Although the duties of the two DAGs that operate in EU and in Korea could be more detailed, the FTA and the subsequent agreements and joint decisions that elaborate on the agreement have established a meaningful dialogue on specific issues that can result in specific recommendations and demands. However, the risk of retreating from this practice and establishing DAGs and CSFs with a vague mandate to address general issues is persistent. In this way, civil society's contribution could be lost in general discussions with little to add in practice.

The EU DAG members have discussed appropriate institutional arrangements for DAGs and CSFs. Some of the conclusions, although not unanimously agreed upon observe that compared to monitoring mechanism models presented in other FTAs, the EU-Korea one seems to be the most structured one. The EU-Korea FTA establishes a DAG on both sides, which then join in a CSF that remains limited to their joint membership and has a clear mandate to advise the TSDC. However, civil society's participation would be weaker if the DAG is not structured or if a clear mandate *vis-à-vis* government representatives is lacking. The EU-Korea DAGs keep the essential balance between providing input effectively whilst maintaining a sufficient representativeness across civil society. Although the monitoring mechanism (DAG) does not rule out involving broader civil society as a whole, it is best that the DAGs in future FTAs have limited membership. The participation of other civil society organisations should be best carried out through the initiative of the DAGs' members. Besides, the rotation in participation in DAGs is another safeguard for inclusiveness of civil society.

The EU-Korea agreement as well as future agreements should be more specific on the composition of the DAG. In particular, the Korean DAG includes some interest groups but also some individuals who do not represent civil society, such as trade experts and a former negotiator of the agreement who is now participating in the DAG in academic capacity. The issue of representa-

tiveness of the Korean DAG was raised in the first CSF in Korea in 2012 when the ‘Statement of Korean labour, civil and environmental organizations on the 1st Korea-EU FTA Civil Society Forum’ was circulated. The Korean government and some members of the Korean DAG defended the procedure of setting up their DAG. When back in Europe, some members of the EU DAG stressed that differences in understanding the rules of composition and role of the DAGs might stem from different cultural departures.

The EU DAG briefly discussed the question of improving the efficiency and relevance by outward action, for example when raising awareness of civil society on the benefits of such a mechanism, and by inward action, for instance, by establishing procedures for a better coordination between the EU DAG and the Korea DAG to monitor governmental actions and provide input in a coordinated way.

However, the most important issue is the exclusion of the Sustainable Development Chapter from the dispute settlement procedure. It means that if one of the two parties is found to breach or not comply with the provisions of the Chapter, the other party can only address this issue through the TSDC and other bodies, which, however, do not take binding decisions. The labour movement and the civil society representatives have been constantly asking for the extension of enforcement procedures to issues of sustainable development including environment and labour. If the Sustainable Development Chapter was enforceable by the same dispute settlement procedures as it is in other chapters, the DAGs and the CSF would have a much stronger role in submitting cases, providing information to the dispute settlement panels, assessing compliance and following up complaints.

4. CONCLUSIONS

Overall, the EU took steps to enhance the participation and involvement of civil society in the conduct of EU trade policy, and in particular in the review or post-ratification stage. The EU-Korea FTA establishes a well-structured mechanism with limited membership and agreed procedures that monitors the implementation of the Sustainable Development Chapter and advises government officials. Moreover, the monitoring mechanism’s mandate provides for specific recommendations and making policy interventions on particular matters.

Therefore, it is imperative that the EU-Korea model is used as a basis in trade agreements so that future monitoring mechanisms are not weak or unstructured and recommendations can address specific matters arising from the implementation of the Sustainable Development Chapter. Contrary to that, DAGs with open membership, an unclear mandate and lack of procedures would fail to effectively monitor and efficiently promote specific social goals in the FTAs.

However, the Sustainable Development Chapter is not enforceable by means of dispute settlement. Furthermore, as the DAGs and the CSF do not produce binding results or enforceable decisions, the monitoring and the mechanism’s

recommendations are likely to do little to improve the implementation of the Sustainable Development Chapters by governments.

SOCIAL NORMS IN EU BILATERAL TRADE AGREEMENTS: A COMPARATIVE OVERVIEW

Lore Van den Putte, Jan Orbie, Fabienne Bossuyt, Ferdi De Ville*

I INTRODUCTION

In 2001, the EU committed itself to promoting social norms through trade agreements.¹ It was clear from the outset that trade would be the most important instrument at the EU's disposal to promote social norms. Trade is generally considered the most powerful instrument in the EU's external relations, because the EU can use access to its large market as a leverage towards external partners.² By including social and environmental goals into its trade policy, the EU could become a global role model in managing possible negative effects of globalisation. However, explorative research has shown that the level of commitment to these goals differs between the trade agreements.³ While the number of EU bilateral trade agreements has proliferated in recent years, with many others currently being negotiated, no comparative and systematic research has been conducted on the scope, enforceability and the promotion of these social norms.⁴ In this paper, therefore, we provide a descriptive overview of the incorporation of social norms in trade agreements and examine whether any evolution can be observed in the EU's commitment to include social norms.

Studying the EU's social commitment through trade policy is all the more interesting in light of two contradictory tendencies that are currently noticeable in EU trade policy-making. On the one hand, in the EU's latest trade strategy, 'Trade, Growth and World Affairs', normative goals are pushed towards the sidelines, bearing little resemblance with the 'harnessing globalisation' discourse introduced under Trade Commissioner Pascal Lamy (1999-2004) and continued

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¹ European Commission, 'Promoting Core Labour Standards and improving social governance in the context of globalisation', COM (2001) 416.

² M. Smith and S. Woolcock, 'Negotiating globalization: the foreign economic policy in the new Millennium: a leadership role for the European Union?', 4 *European Foreign Affairs Review* 1999, at 439; S. Meunier and K. Nicolaïdis, 'The European Union as a Conflicted Trade Power', 13 *Journal of European Public Policy* 2006, at 906.

³ R. Peels, 'The inclusion of labour provisions in EU's bilateral trade and investment agreements: What about dialogue and disputes?' (Leuven: Research Institute for Work and Society 2011), available at <https://hiva.kuleuven.be/resources/pdf/publicaties/R1377_PeelsMay2011.pdf>.

⁴ Except for an exploratory special issue of 5 *European Foreign Affairs Review* 2009 and J. Orbie, 'Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?', in R. Whitman (ed.), *Normative Power Europe: Empirical and theoretical perspectives* (Basingstoke: Palgrave 2011).

– albeit in a markedly reduced form – under his successor Peter Mandelson (2004-2008).⁵ On the other hand, the link between trade and social issues has received a new impetus with the Lisbon Treaty, which states that the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.⁶ These objectives include equality and solidarity.⁷ It also establishes the aim of ‘fair trade’ besides free trade.⁸ Furthermore, the European Parliament (EP), a strong supporter of social norms in trade agreements, can influence the debate more than before because of its new competences in trade policy.

The first part of this paper conceptualises the EU’s commitment to include social norms in trade agreements. It does so by making a distinction between the scope, the enforceability and the promotion of these norms. Next, we analyse EU trade agreements concluded over the past 18 years, starting with the EuroMed Association Agreements (AAs) and ending with the most recent agreements. We conclude by summarising the findings, and highlight how the EU’s commitment to social norms in EU bilateral trade agreements has changed over time.

II SCOPE, ENFORCEABILITY AND PROMOTION

In order to systematically and comparatively categorise the inclusion of social norms in EU trade agreements, we draw on the work by Abbott *et al.*,⁹ and Goldstein *et al.*,¹⁰ on legalisation. They see legalisation as a concept that expresses to which extent institutions have obligatory and precise rules that can be interpreted by neutral arbiters. Each institution can be defined along three dimensions: obligation, precision and delegation. *Obligation* refers to the degree to which rules are obligatory.¹¹ *Precision* depends on the extent to which the rules are precisely defined, so that actors know what they are expected to do in a certain situation.¹² The more precise the rules are, the less room for interpretation is left. An important element is furthermore that the rules are coherent. *Delegation* concerns the delegation of the interpretation, monitoring and implementation of the rules to a neutral third party. All combinations of these three characteristics are possible.

For the purpose of our research, we call the first dimension the *scope*. The scope ranges from low precision with general references to social cooperation to precise social human rights. The more precise norms are, the more likely it

⁵ European Commission, ‘Trade, Growth and World Affairs’, COM (2010) 612.

⁶ See Art. 207 Treaty on the Functioning of the European Union (TFEU).

⁷ See Art. 21(1) Treaty on the European Union (TEU).

⁸ See Art. 3 TEU.

⁹ K.W. Abbott *et al.*, ‘The Concept of Legalization’, 54 *International Organization* 2000, at 401.

¹⁰ J. Goldstein *et al.*, ‘Introduction: Legalization and World Politics’, 54 *International Organization* 2000, at 385.

¹¹ *Ibid.*

¹² See K.W. Abbott *et al.*, *supra* note 9.

is that they will be legally enforceable.¹³ This means a clear connection can be expected between the ‘scope’ of social norms on the one hand and their ‘enforceability’ on the other hand. Our second dimension deals with the *enforceability* of these social norms, which consists of the two dimensions previously called ‘obligation’ and ‘delegation’. Here we investigate to which extent the social norms are obligatory and to which extent disputes over them are delegated to third parties. In the third part of our analysis, we include a fourth dimension, not taken up by the authors on legalisation, which we will call *promotion*. This element is added because this is a new trend in EU trade agreements, which is aimed at extending the promotion and monitoring of social norms towards other actors, in our case companies and civil society organisations.

1. Scope: how ambitious are the social norms?

‘Social norms’ is a general term, which can be distinguished in three distinct categories and levels of ambition. A first category concerns any kind of *general social norms* aimed at social cooperation. For norms in this category, no reference has to be made to labour standards of the International Labour Organization (ILO). In practice, almost all agreements concluded by the EU include some commitments to social cooperation. These references are mostly general. Their precision is low and, as a result thereof, not legally enforceable.

For our second and third category, we draw upon the Decent Work Agenda of the ILO.¹⁴ Our second category consists of the four Core Labour Standards (CLS): (a) the freedom of association and the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. Since the CLS are increasingly seen as human rights, we label them as *human rights-based social norms*. If these are incorporated in an agreement, it means that the social commitment is high.

Our third category consists of *social governance norms*. While the goal of social dialogue in the Decent Work Agenda is focused on the relations between workers’ and employers’ organisations and their dialogue with each other and with their government, we will broaden this social dialogue in our analysis to include all dialogue on social issues between the Parties themselves as well as between societal actors of the respective Parties, including civil society organisations. Social protection and social dialogue are categorised under the term ‘social governance norms’, and this for two reasons. Firstly, the term ‘social governance’ was coined by the European Commission (EC) in 2001 to

¹³ See also H. Horn *et al.*, ‘Beyond the WTO? An anatomy of EU and US preferential trade agreements’, in VII *Bruegel Blueprint Series* 2009.

¹⁴ This agenda comprises four strategic objectives: creating jobs, guaranteeing rights at work, extending social protection and promoting social dialogue. What we have termed ‘human rights-based social norms’ refers to the second strategic objective. And our ‘social governance norms’ refer to the two last strategic objectives. The objective of job creation is not taken up in our analysis because we see no sign of this being an element in trade negotiations.

label commitments to social development more generally.¹⁵ Furthermore, the aims of social protection and social dialogue are pursued in a non-hierarchical and cooperative way, which is reflected in the term 'governance'. We thus make a clear distinction between CLS as fundamental social rights and other social goals.

In sum, the scope of social norms consists of a continuum ranging from general social norms over social governance norms to CLS as fundamental human rights at the other end. It is difficult, however, to determine which category is the most ambitious one in terms of social commitment: social governance norms or CLS? Both the EP¹⁶ and the EC¹⁷ see respect for CLS as a minimum requirement, while they see the Decent Work Agenda as the ultimate social objective to be pursued. This may seem logical, since, if a country adheres to the CLS, its citizens are in the possibility of negotiating other objectives such as minimum wages, pension schemes and safety at work. On the other hand, it is possible for a state to provide social security schemes without giving the citizens the right to join a trade union. Therefore, we consider CLS as the most ambitious category. This will be confirmed in our analysis, which shows that the EU first promoted social norms as governance norms before it framed them as fundamental social rights.

Following this categorisation, we explore the scope of the social norms for each trade agreement as summarised in Table 1.

Table 1. Scope of social norms

General Social norms	Social Governance Norms	HR-Based Social Norms
Social cooperation	Social protection Social dialogue	4 CLS

2. **Enforceability: are social norms obligatory and how are disputes managed?**

The enforceability of these social norms concerns, first of all, the extent to which the social provisions are obligatory. The question here is to which extent a Party can take measures in case it believes social provisions incorporated in the agreement are not respected. The second element of enforceability regards the above mentioned delegation to a third party.

In assessing obligation, one needs to consider whether social norms are part of the 'essential elements clause'. Since 1995, every cooperation and association agreement concluded by the EU should mention the need to respect democratic principles and fundamental human rights.¹⁸ There has been a ma-

¹⁵ See European Commission, *supra* note 1.

¹⁶ European Parliament, 'Human rights, social and environmental standards in International Trade agreements', 2009/2219/INI.

¹⁷ See European Commission, *supra* note 1.

¹⁸ *Idem*, at 12.

for debate on whether social/labour rights are part of these fundamental rights¹⁹ and thus whether the essential elements clause can be interpreted to also include core labour rights. Following a narrow approach, social rights tend to be separated from civil and political rights, which have a more solid legal basis. This is presumably the common interpretation of the EU's trade partners, and the EU's sanctioning practice is in line with this.²⁰ However, there is a growing consensus that social/labour rights are part of fundamental human rights. Some argue that this question is already answered in practice,²¹ given that so many states are a member of the ILO. According to the EC, CLS are indeed a part of the essential elements clause.²² They are fully in line with UN Conventions such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political rights, both adopted in 1966.²³ However, it is quite unclear then why the Cotonou Agreement explicitly mentions all fundamental freedoms and human rights, 'be they civil and political, or economic, social and cultural'. If the CLS are in fact already included in any essential elements clause, there is no need to mention this explicitly.

In some agreements, there is a possibility for the Parties to take 'appropriate measures' in accordance with international law in case another Party violates the essential elements. These measures should be in accordance with international law and should be proportionate to the violations. As an ultimate resort, the Party can suspend the agreement. If an agreement contains an essential elements clause and a suspension clause, it is theoretically possible that a violation of CLS could lead to suspension of the agreement. This has been acknowledged by the EC, although there is a consensus that this would only be done as a matter of last resort.

Delegation concerns the extent to which the interpretation, monitoring and implementation of the rules are delegated to a neutral third party. This third party can consist of arbitrators, courts and administrative organisations. Delegation is low if the Parties to the agreement can bargain politically about a dispute, where they can accept or reject proposals from the other Party without

¹⁹ J. Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?', 29 *Comparative Labor Law and Policy Journal* 2007, at 29; I. Manners, 'The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective', 14 *European Foreign Affairs Review* 2009, at 785; P. Alston, *Labour rights as human rights*. (Oxford: Oxford University Press 2005).

²⁰ The violation of CLS by ACP countries has never been used by the EU to impose sanctions. See J. Orbie and O. Barbarinde, 'The Social Dimension of Globalization and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility', 30 *European Integration* 2008, at 467. Also in the analysed bilateral trade agreements the violation of CLS has never been used by the EU for a suspension of the agreement.

²¹ E. Lee, 'Globalization and labour standards: A review of issues', 136 *International Labour Review* 1997, at 173; G. Tsogas, 'Labour standards in international trade agreements: an assessment of the arguments', 10 *International Journal of Human Resource Management*, at 351.

²² See European Commission, *supra* note 1. Also see authors' interview at DG Trade, Brussels, 25 February 2013.

²³ G. Rodgers *et al.*, *The International Labour Organization and the quest for social justice, 1919–2009* (Geneva: International Labour Office 2009).

legally justifying this. Delegation is high when dispute settlement is delegated to a third Party which is authorised to interpret and apply rules.

We discern three types (and, in the same way, three gradations) of delegation.²⁴ In the case of rather weak enforcement mechanisms, Parties can resort to *government consultations* where matters of mutual interest (often under the trade and sustainable development chapter) can be discussed at governmental level. The aim is to arrive at a mutually satisfactory solution. In some cases, the Parties have the possibility to ask for information or views of bodies such as the ILO.

In this first type of delegation, the Parties only consult each other. If, in the eyes of one of the Parties, these consultations have not lead to a satisfactory outcome, a *panel of experts* can be consulted in a second phase. Many safeguards are included to ensure neutrality. Examples are strict deadlines for each step in the procedure and strict rules for the composition of these panels.²⁵ However, delegation is still weak because there is no provision on what will happen if the Parties do not follow or implement the recommendations.

Further up the delegation scale, agreements can contain a *dispute settlement mechanism* (DSM), through which all provisions in the agreement can be discussed following a lengthy procedure. The aim of this mechanism is to come to mutually agreed solutions between the Parties. If needed, they will request a ruling of an arbitration panel, which is binding. Procedures for this dispute settlement mechanism are extensively discussed and many efforts are foreseen to make the Parties comply with the rulings of this panel. This can therefore be considered a rather strong enforcement mechanism. In practice, however, legal enforcement mechanisms in EU trade agreements focus mostly on pure trade issues, and exclude social provisions. The three types of delegation are shown schematically in Table 2.

Table 2. Delegation

Government Consultations	Panel of Experts	DSM
Consultations between Parties Not binding	Neutral Not binding	Neutral Binding

3. Promotion: do non-state actors promote social norms?

The supervision and promotion of social norms can also be extended towards other actors, in our case companies and civil society organisations. More in particular, we look at the promotion of *Corporate Social Responsibility* (CSR)

²⁴ In the agreements examined here, there is variation in how the types of delegation are called. For our analysis we have chosen for a general term.

²⁵ In the agreement with Colombia and Peru, for example, the experts have to be chosen already at the entry into force of the agreement and each Party submits a list of at least 15 persons of whom at least 5 are not a national of one of the Parties. Furthermore, it is explicitly stated that these persons should be real experts in the field and should be independent and not take instructions from any of the Parties.

and *civil society dialogue*. CSR refers to the voluntarily adoption by enterprises of socially and environmentally responsible conduct.²⁶ By complying with CSR, enterprises demonstrate that they are working towards sustainable development, although they are not bound to it by law. Recently, the EP has argued that the inclusion of social clauses in trade agreements has to be complemented with CSR to guide the behaviour of corporations since they are major players in international trade.²⁷

Another recent evolution is that trade agreements include provisions for civil society dialogue, referring to the involvement of civil society actors in the monitoring of the implementation. Whether these dialogues can contribute to the effective implementation of the agreement is beyond the scope of this paper. In the long term, such 'soft' implementation mechanisms might positively contribute to the advancement of social norms in third countries and to increasing the legitimacy of social organisations (e.g., trade unions) within these countries.²⁸ We distinguish between two levels of civil society involvement (see Table 3). It is rather low if civil society cannot advise the Parties, and it is stronger if it is institutionalised (i.e., when it has a formal name and/or if the meeting times are set).

Both evolutions, CSR and civil society dialogue, are important since the Parties of the agreement (*in casu*, the EU and the third countries) have only limited abilities to guarantee and oversee the respect for social norms in trade.

III A COMPARATIVE ANALYSIS

Based on this conceptualisation, we will now analyse the social norms in EU trade agreements concluded between 1995 and 2012.²⁹ In defining what we consider trade agreements, we use similar criteria as Horn *et al.*,³⁰ except that we exclude pre-accession agreements. We distinguish between two periods: agreements of which the negotiations started before the EU's commitment to the social dimension of globalisation in 2001 and agreements negotiated since 2006, i.e., the so-called new generation of trade agreements.

1. The early phase: from EuroMed to Chile

Scope

What is clear from the beginning is that all trade agreements analysed have some references to social cooperation. All the EuroMed agreements incorporate social governance norms. They contain a commitment to a dialogue on social matters and cooperation in the social field. In most of them, improving the

²⁶ European Commission, 'Promoting a European framework for Corporate Social Responsibility', COM (2001) 366 final.

²⁷ European Parliament, 'Corporate social responsibility in international trade agreements', 2009/2201/INI.

²⁸ See J. Orbie, *supra* note 4.

²⁹ We also include the agreement with Ukraine, although it has not been signed yet.

³⁰ See H. Horn *et al.*, *supra* note 13.

social protection system and enhancing the health coverage system are mentioned as two priorities. Jordan (1997)³¹ and Algeria (2002) are the only EuroMed AAs already slowly moving to include HR-based social norms.

In the EU-Mexico Agreement, signed in 1997, no strong commitment to social governance norms can be discerned, apart from a reference to social dialogue and civil society. This contrasts considerably with the very strong commitment in this agreement to democracy and human rights.³² While it has a different name,³³ the agreement with Mexico is in essence also an AA. AAs are special in the sense that the scope of the agreement goes beyond purely trade, and also covers political dialogue and cooperation in a broad range of areas. Therefore, the contrast with the commitment to social governance norms of the EuroMed AAs is high.

In the Trade, Development and Cooperation Agreement with South Africa (1999), there is no real reference to social protection and only to social dialogue. However, it is the first time that the CLS are mentioned. They are specified in the preamble, but are also explicitly mentioned as ILO standards in the agreement itself. Therefore, the agreement can be considered a mile stone with regard to labour rights.

At the time of the conclusion of the above mentioned agreements, the EU was also negotiating the Cotonou Agreement (2000), which provides the legal basis for cooperation between the EU and the ACP (African, Caribbean and Pacific) countries for the period 2000-2020.³⁴ Here, apart from Article 2, a clear commitment to trade and labour standards is also given in Article 50, where the four CLS are mentioned. Cooperation areas in the social field include social dialogue and the development and implementation of systems of social protection and security (albeit without referring in this context to the ILO). The reference to HR-based social norms and social governance norms is remarkable under the Cotonou Agreement.

The Chile Agreement (2003) dedicates an article to social dialogue, and other references related to social protection are also mentioned. The four CLS are summed up and a reference to the ILO is made.³⁵ Concerning social norms, it seems that this agreement, along with the agreement with South Africa, heralds a new evolution towards more concrete social objectives in line with the ILO. This is not surprising, considering that the 2001 Communication had been published in the meantime.

³¹ The date between brackets refers to the year in which the agreements were signed.

³² M. Szymanski and M. E. Smith, 'Coherence and Conditionality in European Foreign Policy: Negotiating the EU-Mexico Global Agreement', 43 *Journal of Common Market Studies* 2005, at 171.

³³ It is called 'Economic Partnership, Political Coordination and Cooperation Agreement'. The reluctance of the Mexican side to call it an AA can be attributed to its membership of NAFTA.

³⁴ The revised versions of Cotonou (in 2005 and 2010) do not include important changes on the social aspects.

³⁵ Although the actual term 'CLS' is not used, we label them as such (see Table 3), because the HR-based social norms here are as ambitious as in the case of South Africa.

Enforceability

In assessing the enforceability of these agreements, we first look at the obligation aspect. It becomes quickly apparent that there is strong obligation only in the Cotonou Agreement. The essential elements clause³⁶ under the political dimension of the Cotonou Agreement explicitly states that fundamental social rights are part of the fundamental human rights and freedoms. Since these fundamental social rights are explicitly described in Article 50 as the CLS, the social ambition of the agreement is very strong. While we remarked earlier that in fact CLS are always part of these essential elements, in the Cotonou case they are stronger than in other cases since they are mentioned explicitly. Article 96 of the agreement foresees the possibility that if one Party considers the other Party not to fulfil the obligations stemming from these commitments, it might start a consultation procedure and take appropriate measures if the matter is not resolved. The commitments refer explicitly to paragraph 2 of Article 9. In other words, not respecting fundamental social rights can have grave consequences. This finding confirms our expectation that the more precise norms are, the better they can be enforced.

The fact that only the Cotonou Agreement contains fundamental social rights in its essential elements clause does not mean that the other agreements lack an essential elements clause. All agreements in our analysis contain such a clause. Although, according to the EU, the essential elements clause also covers above-mentioned fundamental social rights, the latter are considered less obligatory if they are not explicitly mentioned (see Table 3).

If we then turn to delegation, we notice that all agreements contain some kind of 'Association Council', which examines any major issue that might arise within the framework of the agreement. This Council meets at governmental level and can take decisions by agreement between the Parties. These decisions are binding, but nothing is mentioned in case of non-compliance. In the Mexican case, the Association Council is called the 'Joint Council', while under the Cotonou Agreement, it is called the 'Council of Ministers'. The South African case is special in the sense that its 'Cooperation Council' works in the same way as an Association Council, except for the fact that the Parties can also appoint arbitrators. In this way, it is slightly stronger than the other agreements, but not to the extent that we can call this a neutral panel of experts. Therefore, it is not mentioned in Table 3.

Promotion

In the early agreements there are no references to CSR yet. Civil society is mentioned only in the Agreements with Mexico and Chile and in the Cotonou Agreement. The EU-Mexico Agreement states that 'Parties shall hold periodic consultation regarding cooperation activities involving civil society'.³⁷ This cooperation is focused on social affairs and poverty. So while this is the first time that civil society is mentioned in a trade agreement, the possibilities for involve-

³⁶ See Art. 9.

³⁷ See Art. 36.

ment are not strong enough to speak of a true civil society dialogue. In the Cotonou case, the Parties commit themselves to hold regular contacts with civil society actors of both Parties to get their view on the attainment of the agreement's objectives. The agreement with Chile foresees the establishment of a Joint Consultative Committee to promote cooperation and dialogue between civil society actors of both sides, where all social and economic aspects of the relation between the Parties can be discussed. Although the intervals when it should meet are not set, we can say that a civil society dialogue is starting to be institutionalised. Chile is a 'milestone agreement' for two reasons: not only does it mention the four CLS, it also makes a first step towards including civil society in the monitoring of an agreement. Therefore, with respect to social norms, Chile can be considered a transition case towards a new generation of trade agreements.

2. The new generation of trade agreements

In the most recently concluded agreements, we find a larger commitment to social norms in the form of a broad scope, more elaborate enforcement mechanisms and more possibilities for non-state actor involvement.

Scope

The agreement with CARIFORUM (2008) is the first Economic Partnership Agreement concluded with a regional group³⁸ and its social scope is very ambitious. Not only does it include Decent Work, but also the four CLS. Both objectives are often mentioned throughout the agreement. The agreement starts with a chapter on sustainable development and one of the cooperation priorities under this chapter is internationally recognised labour and environmental standards. The agreement also mentions that labour standards should not be lowered in order to attract more foreign direct investment. In addition, the Parties recognise that labour standards should not be used for protectionism. When this agreement was concluded, many supporters of 'social trade' hoped that this strong social dimension would be a blueprint for future agreements.

Indeed, references to CLS and Decent Work can also be found in the case of Korea (2010). Apart from the fact that it explicitly excludes the aim to harmonise labour standards, we can say that Korea follows the path set out by CARIFORUM of increased social norms.

For the trade agreement with Colombia and Peru (2012) we can argue that in terms of scope this agreement is as ambitious as the one concluded with CARIFORUM. The agreement with Central America (2012), in turn, is an AA. Dialogue and cooperation on social norms are spread throughout the agree-

³⁸ The 'CARIFORUM' states are Antigua and Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, The Dominican Republic, Grenada, The Republic of Guyana, Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

ment. Apart from these provisions for cooperation, there is an actual trade and sustainable development chapter that is taken up under the trade part. Here multilateral labour standards and agreements are mentioned extensively. There is an explicit reference to the CLS. The agreement also puts emphasis on the need for implementation of the fundamental ILO Conventions contained in the ILO Declaration of Fundamental Principles and Rights at Work of 1998, which are even explicitly listed. The Parties will also inform each other about the ratification process of other ILO Conventions. Again, labour standards should not be lowered to attract trade or investment. On the other hand, the Parties stress that labour standards should not be used for protectionist trade purposes and that the comparative advantage of any of the Parties should never be questioned.

In the agreement with Ukraine there is also a chapter on trade and sustainable development. Decent Work is mentioned and all the CLS are listed in here. As in the previous cases, labour standards should not be used for protectionist purposes and the comparative advantage should not be questioned.

What we see, is that some sort of blueprint has emerged from the recent trade agreements. These agreements tend to have a chapter on trade and sustainable development (as is the case for Korea, Colombia and Peru and Ukraine) or at least a special article on multilateral labour standards and agreements (as is the case for all but the CARIFORUM agreement).

Enforceability

Looking at the obligation aspect of enforceability, there seems to be a trend towards even less obligation. The CARIFORUM and Korea agreements do not have an essential elements clause as such. The FTA with Korea does not explicitly include an essential elements clause but the whole agreement should be seen in the light of the Framework Agreement for Trade and Cooperation between the European Community and its Member States, on the one hand, and the Republic of Korea, on the other hand, signed in 1996. Therefore, legally the agreement does not need a separate essential elements clause. The CARIFORUM agreement also does not explicitly include an essential elements clause, but refers for this issue to Cotonou. The other agreements do have an essential elements clause, but since it does not explicitly mention social norms there is room for interpretation whether both Parties agree that CLS are also covered in this clause.

With respect to delegation, it appears that the same provisions are incorporated in all five agreements. Starting with EU-CARIFORUM, there is a joint CARIFORUM-EC Council consisting of representatives at governmental level that can examine any major issue arising within the framework of the agreement. They can also take binding decisions, but there are no provisions in case of non-compliance. Specifically for social issues the Parties can consult each other and the CARIFORUM-EC Consultative Committee and they can seek advice from the ILO on these issues for best practices. If they wish so, the Parties can hold consultations and if this leads to no result, a Committee of Experts can write a report, which will be made available to the Parties. These

people should really be an expert in the social provisions in the agreement. The chair of this Panel cannot be a national of one of the Parties, which should guarantee some neutrality. The procedure is not further elaborated upon. The agreement also foresees an extensive DSM, but it explicitly excludes disputes concerning the interpretation and application of the chapters on environment and social aspects to be treated here.³⁹

In the Korea agreement, the Parties can resort to government consultations in case of any dispute under the trade and sustainable development chapter. If this does not resolve the issue, a panel of experts can be set up to examine the matter. This panel should write a report with advice and recommendations on how to implement the chapter, but advice is not binding in any way. This is in sharp contrast with the DSM provided for the trade issues.⁴⁰ It cannot be used for the sustainable development provisions.

The delegation mechanisms are more or less the same in the subsequent agreements with Colombia and Peru, Central America and Ukraine.

Promotion

From CARIFORUM onwards, CSR has become an integral part of any trade agreement, although the wording slightly differs between agreements. As for civil society, the EU-CARIFORUM Agreement foresees dialogue and cooperation between civil society representatives on the economic, social and environmental aspects of the agreement under the form of a Consultative Committee. Meeting times are not set and in this way it resembles the Joint Consultative Committee of the Chile agreement. It is only from Korea onwards that this is the case. To illustrate this we will elaborate on the civil society provisions in the Korea agreement.

The Korea agreement includes several ways for civil society involvement under the trade and sustainable development chapter.⁴¹ Both Parties shall establish a Domestic Advisory Group, which should comprise independent representatives of civil society organisations. These organisations should include environment, labour and business organisations and their task is to give advice on the implementation of the chapter. This dialogue should not be confined to the respective home countries, but it should also include a dialogue between the Parties. They will meet on a yearly basis in a Civil Society Forum. Basically, they will discuss the same issues as the Domestic Advisory Groups and they will be composed of the same people. The civil society dialogue forum as monitor of the agreement is in this case clearly present and institutionalised.

In the agreement with Colombia and Peru, civil society is involved through yearly meetings with the Sub-Committee on Trade and Sustainable Develop-

³⁹ There is, however, a possibility to use the consultation procedure within the dispute settlement mechanism if the matter has not been resolved within 9 months after its initiation.

⁴⁰ See Chapter 14.

⁴¹ See the paper by G. Altintzis on civil society engagement in trade discussions earlier in this volume where he discusses in detail the institutional arrangements and working programme of the EU-Korea DAG and gives a preliminary assessment of the initial work of these Domestic Advisory Groups.

ment. This civil society monitoring possibility is not institutionalised, since no specific name (for example Civil Society Dialogue Forum) is given to the meeting, nor are the meeting times set. The rather low involvement of civil society (compared to the other recent agreements) here is remarkable, given the strong calls from the EP⁴² and civil society groups themselves to have a strong monitoring mechanism.

In contrast, civil society dialogue is institutionalised in the agreement with Central America and Ukraine. In sum, while recent agreements contain more enforcement mechanisms (government consultations and panels of experts), these remain rather weak compared to the enforcement of the trade provisions. On the other hand, a civil society dialogue is being institutionalised.

IV CONCLUSIONS

In this paper, we have given a systematic and comparative overview of social norms in trade agreements concluded by the EU in the last 18 years. Since our aim has explicitly been to be descriptive, explanations will be taken up in further research. Nevertheless, important trends can already be discerned from the table below.

Three broad conclusions can be drawn. Firstly, the scope of social norms has broadened from general references on social cooperation, to social dialogue and social protection to ILO standards (as human rights). Secondly, enforceability remains weak, but there is a tendency to delegate disputes to more neutral experts. Lastly, CSR and civil society dialogue seem to have become an integral part of any trade agreement.

So as it currently stands, it seems that CLS, a more professional delegation of social disputes and the inclusion of CSR and civil society dialogue are four integral parts of the current agreements. The first time that all these elements were taken up was in the Korea Agreement. That this agreement serves as template for negotiating agreements, has also been acknowledged by the EC. Whether this pattern will hold in the coming agreements with Asian countries and the US and Canada, is a very interesting question indeed. Especially the ongoing negotiations with Asian trade partners will serve as a test case for the social ambition of the EU. India, for example, was the strongest opponent of a social clause in the WTO and has a bad record in terms of child labour issues. However, the EC believes that the current template of the sustainable development chapter is acceptable for the Indian government.⁴³ If this turns out to be true, one may then question the real nature of the EU's social ambition in its external trade policy.

⁴² European Parliament, 'European Parliament Resolution on the EU trade agreement with Colombia and Peru', B7-0301/2012.

⁴³ Authors' interview at DG Trade, Brussels, 25 February 2013.

Table 3. Social norms in EU bilateral trade agreements⁴⁴

	SCOPE				OBLIGATION	ENFORCEABILITY			PROMOTION	
	General Social Norms	Social Governance Norms	HR-Based Norms	Panel of Experts		Government Consultations	DSM	CSR	Civil Society Dialogue	
										DELEGATION
Tunisia (1995)	X	XX			X					
Israel (1995)	X	XX			X					
Morocco (1996)	X	XX			X					
Jordan (1997)	X	XX	X		X					
Mexico (1997)	X	X			X				X	
South-Africa (1999)	X	X	XX		X				X	
Cotonou (2000)	X	XX	XX		X					
Egypt (2001)	X	XX			X					
Algeria (2002)	X	XX	X		X					
Lebanon (2002)	X	XX			X					
Chile (2003)	X	XX	XX		X				XX	
CARIFORUM (2008)	X	XXX	XX		X			X	XX	
Korea (2010)	X	XXX	XX		X		X	X	XX	
Colombia/Peru (2012)	X	XXX	XX		X		X	X	X	
Central-America (2012)	X	XXX	XX		X		X	X	XX	
Ukraine	X	XXX	XX		X		X	X	X	

⁴⁴ Here we give some guidance to understand Table 3. We describe what every cross (X) means within each column, which can be attributed a higher score than one cross. Two crosses do not mean that they are twice as strong as one cross. If there is no explanation on the column below, this means that only zero or one cross is possible. Regarding social governance norms, X means there is a reference to social protection or social dialogue. XX means there is reference to both social protection and social dialogue. When XXX is written, this means there is a reference to the whole Decent Work Agenda. Then turning to HR-based social norms, X means there is a reference to some kind of basic social rights while XX means there is a reference to CLS. Concluding with the civil society dialogue under promotion, X means that there is a civil society dialogue provision, but it is not institutionalised. XX means that the civil society dialogue is institutionalised (in the sense that the meeting times are set and a formal name is given).

HUMAN RIGHTS, CORPORATE SOCIAL RESPONSIBILITY AND THE SHAPING OF THE EUROPEAN UNION'S LINKAGE STRATEGY: 'A PEACEFUL REVOLUTION'?

Aurora Voiculescu*

1. INTRODUCTION

Speaking at the 1st United Nations Forum on Business and Human Rights, the EU CSR Coordinator (DG Enterprise and Industry) emphasised the EU's determination to influence the Corporate Social Responsibility (hereinafter CSR) agenda using its policy and legislative competences as well as its engagement in the global dialogue. On the same occasion, Stavros Lambrinidis spoke, from the newly created position of EU Special Representative for Human Rights, about the EU engaging in a 'peaceful revolution' by re-stating its commitment to human rights around the world through adopting a strategic framework for human rights in which CSR plays an integral part. Both statements¹ refer to the EU's role in the promotion of a *linkage* between the normative paradigm underscoring the free market economy system and the paradigm afforded by the international human rights law discourse. Could this role be that of a 'role model'? Such a question is rather complex, depending on many socio-political factors the analysis of which is beyond the scope of this paper. However, we can hope to shed some light on this question obliquely, by looking into issues of normativity associated with the EU (and international) linkage agenda and by interrogating some of the institutional and conceptual elements of such a linkage within the EU context. This paper contends that, while the linkage discourse depends on a multitude of actors, the EU encompasses a number of features that facilitate an interrogation of the existing normative set-up that holds between human rights and market economy generally.

Three elements in particular contribute to such an interrogation: the dynamics of the EU competences and of the dialogue between the EU and the Member States regarding the linkage agenda, the EU process of 'constitutionalisation' of the human rights linkage and, finally, the EU conceptual refinement

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¹ Tom Dodd, Policy Adviser on CSR at the Directorate-General for Enterprise and Industry, European Commission. Panel contribution to the 1st UN Forum on Business and Human Rights, 4-5 December 2012, Geneva (conference notes with the author). Stavros Lambrinidis, EU Special Representative for Human Rights, Plenary Session contribution at the 1st UN Forum on Business and Human Rights, 4-5 December 2012, Geneva (conference notes with the author).

of CSR. The first part of this paper re-visits the ‘*trade and*’ or linkage debate that started already some decades ago and which carries distinct nuances within contemporary international economic law.² This implies looking at the normative points of contact and at the normative tension that are inherent in the contemporary linkage agenda. Such normative conflicts still need to be addressed conceptually. The EU position as a global role model in linking the free market normative discourse on the one hand with the non-commercial social expectations on the other hand depends on its contribution to the resolution of these primarily conceptual tensions. In the second part, the potential as well as the challenges brought about by the EU as a socio-political entity will highlight the bringing together of normatively competing issues. Lastly, the paper will consider the EU conceptual inroads in developing the necessary tools for consolidating and addressing the linkage agenda.

2. LINKAGE ISSUES AND NORMATIVE TENSIONS

Domestic governments have a long history of linking both economic and trade demands with social and environmental expectations within the same social policies. In particular, the welfare state concept was influenced to a certain extent by such a marriage of goals.³ This does not mean that inasmuch as the modern welfare state is concerned there have been no conflicts between the various normative platforms. Some of these platforms promoted less state interference and promised a trickle-down approach to social welfare, while others maintained that the only scope of trade liberalism would be that society benefits in a more direct and obvious way from its processes. In spite of these tensions, governments, still in charge of the regulatory orchestra, managed to a certain extent to keep the main normative conflicts among the various spheres of social action under control. However, in the context of the globalising market economy, proposing a socio-politico-economic entity such as the EU as a role model of a ‘peaceful revolution’ that links organically market economy to social agendas is likely to add new challenges. Joining these agendas on the domestic platform has never been without difficulties. Joining them at the regional and global international economic level raises new problems, given the absence of solid institutional mechanisms that would ease the eventual embedding of the market processes in society at a global scale.⁴

Nevertheless, a linkage discourse has been developed as an answer to various signals of conflicting expectations and to unsatisfactory normative set-ups on the international economic arena. Human rights, labour standards, corporate and global governance, the environment, have thus become sources of normative negotiations, transplants that – conscientiously or not – aim at

² T. Cottier *et al.*, (eds.), *Human Rights and International Trade* (Oxford; New York: OUP 2005), 2ff.

³ P. Pierson (ed.), *The New Politics of the Welfare State* (Oxford; New York: OUP 2001), 1–15.

⁴ J. Kirshner, ‘Keynes, Capital Mobility and the Crisis of Embedded Liberalism’, 6(3) *Review of International Political Economy* 1999, 313–337, 326 ff.

a change of the normative paradigm in international economic law.⁵ All these elements inevitably have an important impact on trade and investment policies. The linkage agenda denotes a multitude of dimensions. It implies proactive human resources management, training and career development, employee participation, quality of working conditions in general and along the supply chains in particular, support to local and general interest causes, respect for human rights, elimination of child labour. Linking an environmental component to the internal normative logic of market economy implies the incorporation of exogenous considerations such as pollution prevention, protection of water resources, biodiversity, to mention only a few, into the design, manufacturing and distribution of products. Lastly, linking a governance component implies the firms' respect for shareholders, customers, suppliers and other stakeholders alike, transparency, prevention of corruption practices, consumer protection, integration of CSR in the supply chain.⁶ These linkages challenge the segmentation of the public sphere and, to a certain extent, challenge the neo-liberal division of social responsibility within the various segments. It is against this backdrop of social expectations for the normative rearrangement of the public sphere that the business and human rights agenda came to life. This took place predominantly through the corporate social responsibility discourse and lately, through the translation of all components of CSR into the language of human rights.

The issue of linkage areas draws importantly on the concept of normative spheres.⁷ By normative spheres we refer to those sets of concepts and propositions that are used for guiding social action in a particular area. In this sense, one can understand the ethical sphere and the legal sphere as distinct normative spheres.⁸ Equally, however, one can speak of the normativity of other discourses, such as research or religion as social practices. From this point of view, one can also speak of the normativity of the market economy as a relevant sphere of social practice, referring to those concepts and propositions – such as the (market-shaped) supply and demand tenet, the market-driven allocation of goods, the prevalence of private property rights – that guide social action such as it is produced by the free-market economic discourse and in particular by the neo-liberal economic discourse.⁹ In this paper, the focus is in particular

⁵ A. Voiculescu, 'Human Rights, Corporate Social Responsibility and International Economic Law: In Search of Strong Answers to Strong Questions?', in Amanda Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (London: Routledge 2013) 222–234.

⁶ J. Moon et al., *Analysis of the National and EU Policies Supporting Corporate Social Responsibility and Impact. Working paper 2. Deliverable to 'IMPACT Project' funded by the Directorate General for Research, European Commission (Framework 7 Program 2012)*, available at <<http://csr-impact.eu/documents/documents-detail.html?documentid=5>>.

⁷ S. Robertson (ed.), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford: Oxford University Press 2009).

⁸ T. Spaak, 'Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification', 16(4) *Ratio Juris* 2003, 469–485.

⁹ For the link between the latter and the market structures, see Harvey's definition of neoliberalism as 'political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework char-

on the points of contact and tension between the normative set of propositions regulating the market discourse and the human rights normative framework that purports the protection of the individual human being and of communities from the abusive exercise of any type of power, irrespective of their position within the economic market. Human rights themselves, therefore, already display a rather complex type of normativity. On the one hand, the human rights discourse draws upon the deep natural law, ethically inspired normativity, and on the other hand it feeds upon the procedural capacity of the law for 'stabilising normative expectations'.¹⁰

Given the rather distinct development of the various normative discourses, in particular of the free market economy discourse and of the human rights discourse, a solid conceptual framework is required to warrant the grafting of new, ostensibly exogenous normative parameters onto what otherwise may appear as operationally autonomous normative systems.¹¹ The international trade and co-operation system, focusing predominantly if not exclusively on economic parameters, profit-oriented and a commodification rationale¹² is an example of such an operationally autonomous normative system, as is the human rights system.¹³

The demand for a re-conceptualisation that would address the normative/cultural clashes between market economy and human rights has generally been addressed in two ways. Firstly, a re-formulation of the exogenous normative parameters – the *corpus alienum* – has taken place, in ways that try to negotiate or conceal the fundamental conflicts.¹⁴ This would function as a 'normative transplant'.¹⁵ The proposed argument of the 'business case for human rights' and of the 'business case for CSR' is a good illustration of this approach.¹⁶ Much of the human rights and CSR discourse within the business and manage-

acterized by strong private property rights, free markets and free trade.' Harvey, David, *A Brief History of Neoliberalism* (Oxford: Oxford University Press 2007), at 2.

¹⁰ G.-P. Calliess and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance', 22(2) *Ratio Juris* 2009, 260–280.

¹¹ B. Jessop, 'The Social Embeddedness of the Economy and its Implications for Economic Governance', in Fikret Adaman and Pat J. Devine (eds.), *Economy and Society: Money, Capitalism and Transition (Critical Perspectives on Historical Issues)* (Montreal: Black Rose Books 2002), 199–222.

¹² S. Frerichs, 'Law, Economy and Society in the Global Age: A Study Guide', in Amanda Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013), 36–49, at 48.

¹³ N. Whiteside and A. Mah, 'Human Rights and Ethical Reasoning: Capabilities, Conventions and Spheres of Public Action', 46(5) *Sociology* 2012, 921–935.

¹⁴ T. Epps and A. Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham: Edward Elgar Publishing Ltd 2010); K. Bagwell and R.W. Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues', 15(3) *Journal of Economic Perspectives* 2001, 69–88.

¹⁵ Bearing in mind that, while legal transplants may support a wider normative transplant, they are by no means identical or simultaneously successful. See A. Watson, *Legal transplants: an approach to comparative law* (Athens: University of Georgia Press 1993), 21 ff.

¹⁶ Kurucz *et al.*, for instance, identify four categories of benefits that firms may attain from engaging in CSR activities: (1) cost and risk reduction; (2) gaining competitive advantage; (3) developing reputation and legitimacy; and (4) seeking win-win outcomes through synergistic value creation. Cited in A.B. Carroll and K.M. Shabana, 'The Business Case for Corporate So-

ment environment is indeed premised on the rather precarious conceptual tenets of this contention that proposes CSR and human rights social demands as primarily 'good for business'. This line of argument may largely be seen as a 'normative immunosuppressant', deployed so as to prevent the rejection of the exogenous normative parameters¹⁷ brought forward by the human rights and the CSR discourses.¹⁸ This approach may leave the system weaker rather than stronger, its life-course depending on normative immunosuppressants. 'Good for business' cannot be proposed as the overriding principle without ignoring a more human development-oriented system of social values.

A second approach to addressing the normative points of tension between trade and human rights on the CSR platform is to create a certain normative indeterminacy that, at best, offers some limited opportunity for change, while at worst creates a smokescreen and conceptual confusion preventing genuine change. Referring, for instance, to the various CSR-induced terms used increasingly in the international human rights and CSR arena despite their indeterminacy, Wheeler writes about 'concepts imprisoned in their contemporary context, waiting for a time of moral commitment to give them the force of real intent.'¹⁹ An example in this sense is the human rights and development talk displayed in the international trade circles.²⁰

Of course, both of the above strategies – often part of a mixed approach – can bring more problems than solutions. While a certain level of normative indeterminacy may be constructive in the case of diplomatic negotiations related to a regional conflict, the same approach is unlikely to be long-term fruitful when the issue at stake is itself a normative point of tension referring to the realisation of imperative universal human rights values for instance. Similarly, transplanting normative parameters from the human rights discourse into the trade and business arena often puts forward questions and problems related to the operationalisation of the transplanted parameters (problems other than the immediate 'rejection' issues mentioned above). A normative transplant of human rights values into the trade and business discourse risks to unsettle the trade framework and business patterns of governance – which may not be an altogether an undesirable outcome – as well as to subvert the consistency (never absolute) of the transplanted human rights values.

cial Responsibility: A Review of Concepts, Research and Practice', 12(1) *International Journal of Management Reviews* 2010, 85–105, at 95.

¹⁷ Analysing the ontological tenets of neoliberal globalization and human rights, O'Connell speaks about the former creating a 'inhospitable battlefield, devoid of empathy and solidarity.' P. O'Connell, 'On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights', 7 *Human Rights Law Review* 2007, 483–509, at 497.

¹⁸ D.J. Vogel, 'Is There a Market for Virtue? The Business Case for Corporate Social Responsibility', 47(4) *California Management Review* 2005, 19–45; Carroll and Shabana, *supra* note 16, 100.

¹⁹ S. Wheeler, 'Corporate Respect for Human Rights: As Good as It Gets?', in Amanda Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (London: Routledge 2013), 209–221, at 221.

²⁰ P. Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development', 17(4-5) *Development in Practice* 2007, 597–606.

While the international trade structures are strewn with declarative statements focusing on social and environmental issues for instance, the reluctance as well as the difficulty with which the international trade dispute resolution system handles social and environmental issues²¹ are also acknowledged. Similarly, outsourcing the fulfilment of social expectations related to human rights, labour and environment to a system more versed in assessing contractual rather than social justice claims, might not bring the desired result. These weaknesses of the linkage process so far suggest the need for a more deep-seated 'peaceful revolution' approach that would address what some would call ancillary market and political failures²² and that ultimately would stimulate a more organic socialisation of the economic actors.²³ A credible solution therefore to the issues of linking trade and human rights normative platforms would address the normative tensions at a deeper level, eliminating the need for what otherwise may feel as normative *inter-regnum* transplants. In the next section, we will look into the institutional and conceptual potential of the EU agencies to address convincingly the expectations for social justice and to propose a viable new paradigm of social goals and social responsibilities to be undertaken in the international and European trade and co-operation. In order to be successful, this paradigm should allow for the recognition of the epistemic and normative distinctiveness of the linked normative areas.²⁴

One way in which the risk of normative rejection can be minimised is by negotiating among the various sets of normative parameters in order to emerge with one set of consistent and compatible values. In this sense, the notion of 'development' has often come across as a platform that brings together international trade and investment as well as human rights, while the CSR discourse itself has built bridges based on the notion of 'sustainable development'. Certainly, in this context, convergence of vocabulary should not be confused with convergence of views and meaning.²⁵ There is still a lot of work to be done in putting in agreement the various meanings with which the word 'development' and other related notions are deployed by the various international, European and civil society agencies in order to achieve a common language.

²¹ See Tom Dodd intervention at the UN 1st Forum, *supra* note 1.

²² See for instance Brown writing about the ILO-WTO normative clash regarding labour rights, '...Taking steps to reduce forced labour, child labour, and discriminatory behaviour, or to support free association and collective bargaining will often have a mixture of effects. Realizing the potential efficiency, equity and humanitarian benefits of core standards may depend on first correcting ancillary market or political failures.' D.K. Brown, 'Labor Standards: Where Do They Belong on the International Trade Agenda?', 15(3) *Journal of Economic Perspectives* 2001, 89–112, at 97.

²³ A. Voiculescu, "'Etiquette and Magic": Between Embedded and Embedding Corporate Social Responsibility', November 2013 (Special Issue 'Harnessing the Regulatory Capacity of a Social Sphere: Perspectives on Transnational Risk Regulation') *Studies in Law, Politics, and Society*.

²⁴ F.J. Garcia, 'The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century', 19(2) *University of Pennsylvania Journal of International Economic Law* 1998, 201–208.

²⁵ C. Geertz, *Local Knowledge* (Waukegan, Illinois: Fontana Press 2010), at 221; W. Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context', 1(1) *International Journal of Law in Context* 2005, 5–40, at 34–35.

A second type of approach – with which the EU must be fairly conversant within its own internal market – is based on consensus-building processes.²⁶ The linkage between trade and labour standards offers an interesting example in this sense, with negotiations aiming to build the linkage by focussing on process-related standards. The latter have a greater chance of an emergent consensus than outcome-related standards, which would be much more difficult to negotiate within the present international trade framework.²⁷

However, the universalist, value-based approach and the consensus building one often manage to merge with respect to linkage issues. In the case of the link between trade and labour standards, for instance, the human rights arguments are often combined with a more practical, consensus-building approach.²⁸ An equally interesting and challenging issue to mention here though is that in the case of the linkage between human rights and free market discourses, one is faced with two universalist discourses rather than one only. Both human rights and the international trade discourses propose competing universalist claims that challenge the finding of a common lexicon of values.²⁹ The values proposed through the essentially universalist discourse of human rights comes into competition and conflict with the neo-liberal market paradigm when proposed as equally and objectively universal. To put it in O'Connell's words, '[even] if we just confine ourselves to the foundational document of the international human rights regime, the Universal Declaration of Human Rights (UDHR), we can see that the ontological foundation of the human rights approach is completely at variance with the view underpinning the neo-liberal project'.³⁰ The search for a conceptual framework that would work in practice is, therefore, not easy and the answer cannot be superficial. Could the EU contribute to the debate in a distinct way, towards a paradigm change? In the next section we will look into the specificity of the EU normative and regulatory mosaic in order to identify potential signals problematisation of the existing normative paradigm associated with the free market economy model.

3. THE EU'S INSTITUTIONAL LINKAGE POTENTIAL AND CHALLENGES

Several factors influence the potential of the EU to problematise the business and human rights agenda and to affect the international debate related to the linkage between international trade and investment on the one hand and social issues on the other hand. These factors feature prominently in the European corporate social responsibility debate of the last decade. Admittedly, this debate does not overlap completely with the human rights linkage debate. The two are, however, intimately dependent on each other conceptually. First of all, the human rights discourse has been increasingly deployed to conceptualise the

²⁶ F.J. Garcia, 'Globalization and the Theory of International Law', 11 *International Theory* 2005, 9–22.

²⁷ D.K. Brown, *supra* note 22, 92.

²⁸ *Ibid.*, 93.

²⁹ See B. Jessop, *supra* note 11, at 199.

³⁰ P. O'Connell, *supra* note 17, 498. See also at 507, section 5D.

CSR normative expectations. This took place not only with respect to issues related to wider civil, political and socio-economic values inspired by the international human rights covenants, but also with respect to labour standards, increasingly conceptualised as labour rights, as well as with respect to environmental protection, increasingly conceptualised as environmental rights. The human rights discourse became, therefore, the privileged normative discourse in the conceptualisation of CSR.

In the past two decades of intense development of linkages at the European level, the Commission has consistently seen human rights as part of both an internal and an external dimension of the CSR processes.³¹ This was uncontestedly linked to a trade and development dynamics that was proposed both as an enlightened approach to the market and, at the same time, as a policy meant to tame this very market through protecting workers, the environment, stakeholders, *while* stimulating innovation and increasing productivity. This approach was rooted in the EC Treaty, the Treaty on European Union and subsequently in the consolidated version of the Lisbon Treaty provisions that set out the protection and promotion of human rights as one of the main objectives of the Union. In this sense, Article 21 TEU can be seen as both a potential constitutional path as well as agenda setting for the EU external relations objectives. As constitutional path, the EU Treaty provisions can facilitate the mainstreaming of the human rights clause into all of the EU trade, development and co-operation agreements and can stimulate the development of a monitoring infrastructure related to the clause. At least at the level of the political rhetoric, if not constitutional aspirations, the clause is therefore understood to guide all EU business activities. Since the mid-1990s, for instance, this clause has been regularly associated with a 'suspension' clause³² that in principle governs an agreement even with respect to human rights issues that may be un-related to the actual direct object of the agreement.³³ To a certain extent, this renders the trade and co-operation agreements into potential vehicles of human rights policies,³⁴ albeit built on a tenuous rationale.³⁵ Further on the path of implementation of the human rights clause, the European Parliament's (EP) initiative to associate the clause with compliance mechanisms that would

³¹ J. Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights', 29 *Comparative Labor Law & Policy Journal* 2007, 29–66, at 43; but also R. Howse and M.J. Trebilcock, 'The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment', 16(1) *International Review of Law and Economics* 1996, 61–79, at 65.

³² European Commission, 'Agreements Containing a Suspension-Human Rights Clause' (2011), available at <<http://ec.europa.eu/world/agreements/viewCollection.do?fileID=58582>>.

³³ H. Hazelzet, 'Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy?', *European Centre for Development Policy Management* 2005, 1–23.

³⁴ L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', 24 *University of Cambridge Legal Studies Research Paper Series* 2012, 1–20, 5ff. Related to this potential, see also the EU Special Representative for Human Rights, Stavros Lambrinidis speaking at the 2012 UN Forum on Business and Human Rights about the number of bilateral CSR and human rights dialogues that speak of the commitment 'to make respect for human rights a reflex' (speech notes with the author), *supra* note 1.

³⁵ E. Jones, 'Competitive and Sustainable Growth: Logic and Inconsistency', 6(3) *Journal of European Public Policy* 1999, 359–375.

regulate all external trade and development agreements should also be mentioned. Commenting on the Commission's 2001 initiative on CSR, the EP Report advanced the idea that a public human rights report and a sustainability and social impact report should constitute mandatory requirements for all businesses under the EU trade policy.³⁶

3.1. Constitutionalising linkages?

The evolution of the human rights and CSR agenda in the EU development co-operation agreements is a good illustration of the evolution of the EU's linkage strategy. While agreements creating special conditions for trade and investment have constituted an important item on the EC/EU international agenda from the very beginning, it is only in the past decade that this agenda has seen an increased presence of the linkage issues and in particular of those issues couched in the language of human rights.³⁷ Emphasising the inescapable link between the EU's trade and development co-operation activities and the human rights impact of those activities, the European Commission acknowledged the social dimension of the globalisation of the free market economy.³⁸ Aiming to address this dimension in some of the EU development-cooperation agreements, the Commission affords business organisations and other stakeholders active agency status via the principle of participation. This principle has the potential to empower agreement stakeholders, including business organisations, to use the human rights clause as well as the implicit social agenda of the agreements in order to pursue complementary interests.³⁹ Of course, the success of such provisions will continue to depend on the political commitment of the signatory governments as well as on the coincidence of interests between the various actors and in particular, between business actors and social stakeholders.⁴⁰

The EU agreements appear, therefore, to be complemented with a normative toolkit rooted in the human rights clause and the participation principle, all enhanced by the constitutional platform provided by Treaty provisions stating that Union's action on the international scene

³⁶ European Parliament, *Report on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility* (COM (2001) 366 – C5-0161/2002 – 2002/2069(COS)), A5-0159/2002 Final (Luxembourg: European Parliament), at 14.

³⁷ A. Hadfield, 'Janus Advances? An Analysis of EC Development Policy and the 2005 Amended Cotonou Partnership', 12(1) *European Foreign Affairs Review* 2007, 39–66, at 43.

³⁸ European Commission, *Communication on the social dimension of globalisation: the EU policy contribution on extending the benefits to all* [COM (2004) 383 Final] 2004, at 6, available at <http://ec.europa.eu/europeaid/what/social-protection/documents/1com_2004_383_final_en.pdf>; European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* [COM(2006) 136 final] (Brussels: European Commission, 2006) <<http://www.eea.europa.eu/policy-documents/com-2006-136-final>>.

³⁹ A. Hadfield, *supra* note 37, at 39. See, for instance, the provisions of the Art. 2 and Art. 9 in the Cotonou Agreement between the EU and the ACP countries.

⁴⁰ Multi-Stakeholder Forum, (2009), 7f, available at <www.ec.europa.eu/enterprise/csr/index_forum.htm>.

... 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.⁴¹

These features generate a platform for regulatory mechanisms and normative frameworks that reinforce the search for an organic linkage of trade and human rights within the CSR discourse. From this shaky yet persistent platform, business organisations appear both under the normative obligation to abide by national legislation and international standards, as well as to be empowered with a (complementary) human rights agency. This means that the various normative elements increasingly get situated on a wide spectrum between voluntarism and regulatory patronage, between a (traditional) CSR voluntary platform and 'command and control regulation'.⁴² In this context, law and regulation acquire an increasing role, though not always the traditional one. Voluntary CSR policies are induced through 'smart' regulatory mechanisms that foster 'voluntary' CSR initiatives. As McBarnet puts it, 'new legal tools are being evolved, and old ones used creatively, to make what businesses have perceived as voluntary, or beyond the law, in fact legally enforceable'.⁴³ Through complex moves combining stimuli for voluntary action and 'smart' regulatory initiatives, the EU adds complexity to the dynamics of normative and regulatory expectations, while catering for a search for a deeper compliance momentum.

3.2. The dynamics of the EU domestic and regional debate

The dynamics of the linkage issues within the EU depends both on the EU institutional drive that formulates and encapsulates 'constitutional' instruments such as the human rights clause as well as upon the way in which the debate develops at the Member States level. The various domestic CSR and human rights initiatives have the power to inform, influence, and stimulate the EU institutional debate. In this sense, the domestic-EU channel of CSR initiatives is developed across various dimensions. There is, first of all, a host of research and policy development initiatives at the Member States and regional levels that contribute to a certain *linkage narrative*. In a number of EU Member States, CSR and human rights linkage issues have gained a stable place on the public policy agenda. This echoes as much as influences the EU institutional discourse on human rights and business. Reflecting the importance of these

⁴¹ Article 21 TEU under Title V, Chapter 1 'General Provisions on the Union's External Actions'.

⁴² J. Moon *et al.*, *supra* note 7, at 5.

⁴³ D.J. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability', in D.J. McBarnet *et al.*, (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2007), 9–58, at 31.

domestic signals, the European Commission has put into place a High-Level Group of National Representatives on CSR that functions as a two-way channel for information and good practice dissemination between Member States and the EU institutions. Such channels, some more formalised than others, contribute to the process of normative negotiation and to the search for a *linkage equilibrium* that can be reflected in policy.

The last European Commission report mapping the national public policy initiatives and frameworks across the EU Member States identified a number of important areas where the domestic contribution has been most notable for implementing as well as feeding into the EU linkage policy. Among the dimensions identified in the EC report⁴⁴ are the socially responsible supply chain management, with a special focus on human rights; reporting and disclosure frameworks focusing on CSR, human rights and the environment; the use of CSR mechanisms in addressing climate change; the embedding of CSR in the policies and culture of small and medium-sized enterprises; the development of socially responsible investment mechanisms; the design and implementation of socially responsible public procurement frameworks; the dissemination and re-enforcement of the CSR-strong environments through the educational channels at all levels.⁴⁵

However, the EU Member States do not offer a uniform socio-economic and political context for the linkage debate. The mosaic of initiatives depends largely upon the various economic and market models practised in each Member State. This will inevitably influence the Member States' choice of linkage instruments. Using the typology designed by Fox, Ward and Howard,⁴⁶ these choices could be classified in four broad categories. Some Member States will favour predominantly domestic policies that *endorse* voluntary CSR policies⁴⁷ as 'base line' policies. This approach favours the use of the market forces as the main tool of guiding normative choices.⁴⁸ Other Member States, characterised by the presence of strong governments, with the willingness to intervene and correct the market, will favour *facilitation*. This approach requires a more active and creative governmental input, involving schemes that enable and incentivise business organisations to engage with new normative parameters emerg-

⁴⁴ For the design of the typology see R. Steurer, 'The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe', 43(1) *Policy Sciences* 2010, 49–72.

⁴⁵ European Commission, *Corporate Social Responsibility: National Public Policies in the European Union* (2010) available at <<http://ec.europa.eu/social/BlobServlet?docId=6716&langId=en>>.

⁴⁶ T. Fox *et al.*, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (Washington DC: The World Bank Group 2002) <<http://pubs.iied.org/pdfs/16017IIE.pdf>>.

⁴⁷ According to Knudsen *et al.*, this type of policies would cover general information campaigns, websites, political rhetoric, award and labeling schemes. J. Knudsen *et al.*, 'Government Policies for Corporate Social Responsibility in Europe: Support and Institutionalization' (2012), at 18f, available at <<http://papers.ssrn.com/abstract=2176347>>.

⁴⁸ D. Brown and J.S. Knudsen, *How Do Domestic Institutions Influence Corporate Social Responsibility (CSR)? An Examination of Government Policies and Company Initiatives in Denmark and the UK* (Rochester, NY: Social Science Research Network 2012), available at <<http://papers.ssrn.com/abstract=2139898>>.

ing from the linkage horizon.⁴⁹ Another distinct ground for linkage initiatives is the one offered by government set-ups based on a tradition of consensus and deliberation on public policies, a tradition that would favour *partnering* type CSR policies. In this case, public agencies participate in the scheme or act as convenor for private participants.⁵⁰ Last but not least, governments with stronger propensity towards a rule-based approach to economic and social management will be generally more likely to develop *mandating* policies. These instruments can involve the setting of minimum standards for the business conduct. The mandating government will be promoting certain perspectives on CSR through regulatory tools that fall nevertheless short of a 'command and control' approach.

Endorsement, facilitation, partnering, mandating; such a variety of economic and policy models represents both a challenge for the normative linkages associated with human rights and CSR, as well as a strength of the EU model. This model is now compelled to refine its linkage narrative in a much denser and demanding normative environment. Through the Member States' participation, the range of concepts and linkage formulas is greatly enriched in a constitutional set-up designed to stimulate nuanced normative conversations across the rich economic governance spectrum identified by Fox, Ward and Howard.

3.3. The linkage discourse and the EU conceptual dynamics

There are a number of elements, therefore, that contribute to the EU linkage debate and to the European voice in the linkage debate. There is a complex institutional structure, where the European Commission, European Parliament, the Council of the European Union as well as the European courts bring their own institutional voice to the linkage debate. Second, there is a semi-constitutional, treaty-based set-up that can represent a fertile ground for refining linkages. Third, the complex socio-economic and political domestic mosaic, displaying varied approaches to the relationship between the state and the market, offers challenging voluntary/regulatory arrangements that can foster creativity and flexibility in addressing the linkage issues.

Apart from these elements, the evolution of the conceptual framework that facilitates the linkage debate and, ultimately, *the linkage itself*, is also meaningful. The conceptual platform upon which the EU has built its CSR, human rights and, more generally, its linkage strategy and policy has known various stages. While CSR and linkage signals have been present earlier, these issues have indeed come firmly on the EC/EU agenda in the mid-1990s, with Jacques Delors' European Commission Presidency. During this period, several appeals were made, inviting businesses to take an active part in the shaping and resolving of the problems related to Europe's economic and social agenda, addressing Europe's structural problems such as social exclusion and unemployment.

⁴⁹ T. Fox *et al.*, 2002, at 3 cited by J. Knudsen *et al.*, *supra* note 47, at 20.

⁵⁰ J. Knudsen *et al.*, *supra* note 47, 22f.

In this context, for about a decade, the European Commission's strategy was supported predominantly by an *endorsement* rhetoric and by attempts to use the market forces in order to provide for the linkage being made. Businesses were therefore invited to find themselves solutions for integrating social and environmental expectations into their normative frameworks. In the years following Jacques Delors' intervention, for instance, business adopted the European Business Declaration against Social Exclusion (calling for the development of a European network for the exchange of information and experience). One year later, in 1996, the European Business Network for Social Cohesion was created and in 1997 there were initiatives for engaging businesses against racism. Many other similar initiatives were also supported by the EU at the domestic level. It is with this kind of initiatives and the 'new development model' initiated by Jacques Delors that a European linkage agenda started taking shape,⁵¹ with both an internal and an external market vision.

Conceptually, however, this was also just the beginning of a long road. The domestic signals received by the Commission concerning the linkage agenda were mixed and the international context complex. The Commission therefore pained to make both the social and the business case for CSR and for linking the social and the economic agendas more generally, on the internal as well as on the external market. The chosen formula for CSR promoted 'going beyond legal obligations' in the social sphere, on the premise that this would have a direct impact on productivity and innovation.⁵² As to the EU linkage agenda addressing international trade and cooperation, the Commission has been arguing already since the early 2000s that merging the social and economic agendas could 'contribute to ensure that the international trade markets function in a more sustainable way.'⁵³

However, this kind of position was far from settling the normative points of tension between the market agenda and the social expectations related to that agenda. How were these tensions to be resolved? The European signals were – and to some extent remain – mixed. The Commission made it clear in its 2001 Green Paper that business engagement with the various normative conundrums would be at the heart of its linkage agenda. The terms of this engagement were largely reflected in the Commission's definition of CSR as:

... a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis* [emphasis added].

⁵¹ E. Jones, *supra* note 35, at 359.

⁵² European Commission, *Communication on promoting core labour standards and improving social governance in the context of globalization* [COM (2001) 416] (Brussels: European Commission), at 19.

⁵³ European Commission, *Communication concerning corporate social responsibility: a business contribution to sustainable development* [COM(2002)347 final] (Brussels: European Commission, 2002), at 9, available at <<http://www.eea.europa.eu/policy-documents/com-2002-347-final>>.

At the same time, echoing signals received from various Member States, the European Parliament and other stakeholders, the Commission also acknowledged the need for a better EU regulatory framework for voluntary action and that this need should be reflected in the European linkage agenda.⁵⁴ This was consistent with previous positions taken on linking CSR and business at the EU policy level. The Commission, for instance, persistently argued that CSR should not be used as a substitute to taking legislative measures in the area of social rights or environmental standards.⁵⁵

These signals from the European Commission established a specific normative dynamic between two distinct approaches. First of all, an approach to the linkage areas specific to CSR, based on voluntary negotiations of normative parameters. This encouraged the development of policies based on an *endorsement* and *facilitation* approach, dominated by the use of the market forces in order to encourage businesses to resolve the normative conflicts between the market demands and the social ones. The second type of signals, however, also encouraged linkage policies, but these focused instead on regulatory instruments for resolving the points of tension. This creates an environment favourable to *mandating* policies, which set out specific norms that ought to be internalised by the economic actors themselves. As to the processes of internalisation, they are left up to the specific business organisations, industry or trade structures.

This dynamic voluntary/regulatory relation established with the Commission's 2001 Green Paper position on CSR registered recently, however, a somewhat unexpected turn. The Commission's well-crafted CSR definition from the 2001 Green Paper, focussing on social and environmental concerns, on the business interaction with stakeholders and, most importantly, founded on the notion of voluntary action, was sublimated in the Commission's new definition, as simply: '... the responsibility of enterprises for their impacts on society'.⁵⁶

Doing away with enumerating the domains of desirable normative linkage, giving up on prescribing 'integration' of exogenous parameters into the business operations, the Commission brought instead the 'R' into the CSR, thus affirming the market actor's *responsibility for impact*.

The move away from a definition focusing on voluntary action to a definition centred on the notion of 'responsibility for impact' is presented by the Commission not simply as a reformulation for the sake of clarity, but as a move towards 'a modern understanding' of CSR. The key elements related to the conceptual 'modernisation' of the notion of CSR is not only that 'impact' now covers po-

⁵⁴ European Commission, 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility [COM(2006) 136 final]', *supra* note 38, at 2.

⁵⁵ European Commission, 'Communication on promoting core labour standards and improving social governance in the context of globalization' [COM (2001) 416], *supra* note 52, at 10.

⁵⁶ European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility: Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions; COM(2011) 681 final* 2011, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>>.

tentially much more, but also – very importantly – that the key notion of voluntarism, persistently assimilated so far by business actors and the various international economic agencies with the notion of CSR, has now been written out of the EU definition.

Some portrayed the change in the Commission's definition of CSR as a mere quest for clarity, while others – ignoring the documented dynamic relationship between norms and regulations⁵⁷ – chose to ignore the re-definition of this key linkage instrument on the basis that the Commission's 'Renewed Strategy 2011-14' would be 'legally non-binding' anyway.⁵⁸ Generally, however, business actors perceived the reformulated definition as a 'paradigm shift' in the European policy on CSR and declared it regrettable that 'the voluntary engagement of companies *is no longer seen by the Commission as a key feature of CSR*'.⁵⁹

The conceptual re-centring that appears to take place through the Commission's 'Renewed Strategy 2011-14' aims to further increase the impact of the EU CSR policy. For this purpose, on the one hand, the Commission emphasised 'the need for a balanced multi-stakeholder approach', for enhanced transparency and for further promoting the 'market reward for responsible business conduct' (including through the use of investment and public procurement policies). On the other hand, the Commission also emphasised 'the need to consider self- and co-regulation schemes' as an important dimension of the normative settling, 'complementary regulation' as support to 'voluntary' action, as well as the need for paying 'greater attention to human rights', now seen as a 'prominent aspect of CSR'. Both these directions are proposed against the backdrop of further conceptual consistency afforded by 'international principles and guidelines'.

Of course, although the Commission is hoping for 'an increasingly coherent global framework',⁶⁰ the conceptual consistency of the linkage framework remains elusive for the time being. There is, however, a consistency of 'linkage pointers' within the EU strategy. The Commission's 'Renewed Strategy 2011-14' refers to a set of five international linkage/CSR initiatives that business and economic actors are expected to work with and embed in their activities: the updated OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights.⁶¹

⁵⁷ D.J. McBarnet, *supra* note 44.

⁵⁸ N. Croquet, *EU Strategy 2011-14: Climate Change Insights* (2011) Climate Change Insights, available at <<http://www.climatechangeinsights.com/tags/eu-strategy-201114/>>.

⁵⁹ Eurocommerce, 'EuroCommerce Position Paper on CSR Strategy', available at <<http://www.eurocommerce.be/media/docs/CSR/ECPositionPaperCSRstrategy07.03.2012.pdf>> [emphasis added].

⁶⁰ T. Dodd, *supra* note 1.

⁶¹ European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility: Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions'; COM(2011) 681 final, *supra* note 57, at 6.

4. CONCLUSIONS

A peaceful linkage revolution? It is possibly not the first paraphrase that would come to mind. However, as this paper tries to show, there are elements within the EU socio-political ecosystem that create conditions for the interrogation of the existing normative set-up within the globalised market economy system. Through the mosaic of national economic governance models, EU has a constant supply of ideas, policy models and challenges that enrich the debate. On the other hand, its competency has allowed it to work towards a 'constitutional' rooting of the human rights linkage. Last but not least, the EU interrogated its own definition of CSR – currently a key discourse in the linkage debate – and decided that it did not like it any longer. Through the new formulation, it took a bold conceptual step, raising the normative bar, while at the same time it encouraged the link to existing key international initiatives. This connection to the international platform affords the EU both support and influence. Setting out a dynamic linkage between the economic development model and the social model and coupling this with a conceptual rethinking may just increase the chances of matching the so far rhetorical persuasiveness of the linkage discourse with conceptual coherence and policy consistency.

INTEGRATING NON-TRADE OBJECTIVES IN THE ONCOMING EU INVESTMENT POLICY: WHAT POLICY OPTIONS FOR THE EU?

Anna De Luca

1. INTRODUCTION

The subject-matter of foreign investment protection *versus* host states' regulatory powers has been one of the most discussed issues in international investment law in recent years. The issue is a relatively novel one not only in connection with the elaboration of EU investment policy¹ but also in regard to the international practices of Member States, which generally do not explicitly protect or integrate non-trade objectives in their BITs. As is well known, the Treaty of Lisbon has broadened the exclusive external competence of the EU over Common Commercial Policy to include 'foreign direct investment' (Art. 207 of the Treaty on the Functioning of the European Union – TFEU).² Furthermore, the Treaty of Lisbon provides for the Common Commercial Policy 'to be conducted in the context of the principles and objectives of the Union's external action' (Art. 207(1) TFEU), and, therefore, in accordance with the general provisions set forth in Articles 21-22 of the Treaty on the European Union (TEU).³ Among the non-trade values to be integrated in the EU investment policy, pursuant to Articles 21-22 TEU, are the protection of health, safety and environment, and the promotion of the rule of law, human rights, environment, and sustainable development.

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the EU institutions started to debate the exact scope and features of the EU competence over investment matters. The issue of the exact scope of the EU exclusive competence over foreign investments is not going to be examined here. It is sufficient to say that the correct delimitation of the competences over investment matters between the EU and its Member States is still disputed between the Commission on the one hand, claiming that the EU exclusive external competence in investment matters covers the admission of foreign direct investments as well as the treatment and protection of both direct investments and portfolio investments; and Member States, on the other hand, op-

¹ In this regard, A. von Walter, 'Balancing Investors' and Host States' Rights-What Alternatives for Treaty-makers?', in M. Bungenberg *et al.*, (eds.) *International Investment Law and EU Law* (Heidelberg Dordrecht London New York: Springer 2011), 141 ff.; L. Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', in *Ibid.*, 145 ff.

² For the consolidated version of the Treaty on the Functioning of the European Union, see *Official Journal of the European Union*, 9 May 2008, C-115/47.

³ For the consolidated version of the Treaty on the European Union, see *Official Journal of the European Union*, 9 May 2008, C-115/13.

posing such an overreaching scope of EU competence.⁴ This notwithstanding, the Commission, the Council and the European Parliament (EP) are currently discussing the level of protection for investors, as opposed to non-trade values protection, under future chapters on investment protection to be included in EU free trade agreements (FTAs) with third countries. FTAs are to be concluded by both the EU and its Member States as 'mixed agreements'.

The present contribution will provide an overview of the level of investment protection and means of balancing protection of non-trade values and investment protection that future EU agreements should include. This overview will be based on the general indications given by the Commission, the Council and the EP in their official documents available to the public at the time of writing this paper. These documents are the Commission's Communication, *Towards a comprehensive European international investment policy*, of July 2010⁵ (hereinafter the 'Communication'), Council Conclusions on a comprehensive European investment policy of 25 October 2010,⁶ EP Resolution on the future European international investment policy of 6 April 2011.⁷ This contribution will, first, consider the positions of the Commission, the Council and the EP, separately (sections 2, 3, and 4, respectively). Secondly, it will deal with the latest developments as to the level of protection to be granted to protected investors and the related issue of balancing non-trade values protection and investment protection (section 5). These latest development are the guidelines given by the Council to the Commission in the negotiating mandate for the chapters on investment protection in the EU FTAs with Canada, India, and Singapore.⁸ Some indications on the possible basic elements of future chapters on investment protection in EU FTAs with Singapore, Canada, and India will be given on the basis of the above analysis (section 6). Finally, the contribution will conclude with some reflections on the widespread concern about the limitations

⁴ A. De Luca, 'New developments on the scope of the EU Common Commercial Policy under the Lisbon Treaty, Investment liberalization vs. investment protection?', in K. P. Sauvant (ed.) *Yearbook on International Investment Law & Policy 2010/2011* (New York: Oxford University Press 2012), 165–215; F. Ortino and P. Eeckhout, 'Towards an EU Policy on Foreign Direct Investment', in A. Biondi et al., (eds.) *EU Law After Lisbon* (Oxford: Oxford University Press 2012), 312–27; A. Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press 2011); J. A. Bischoff, 'Just a little BIT of "Mixity"?: The EU's role in the field of International Investment Protection Law', 48 *Common Market Law Review* 2011, 1527 ff.; W. Shan and S. Zhang, 'Treaty of Lisbon: Half Way toward a Common Investment Policy', 21 *The European Journal of International Law* 2010, 1049 ff.

⁵ Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, COM(2010) 343 final, pp. 2-3 available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

⁶ Council of the European Union, *Conclusions on a comprehensive European international investment policy*, 25 October 2010, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.

⁷ European Parliament, Resolution of 6 April 2011, *On the future European international investment policy*, 2010/2203(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>.

⁸ Council of the European Union, *Negotiating mandates for investment protection chapters in free trade agreements of the EU with Canada, India and Singapore*, available at <http://www.bilaterals.org/spip.php?article20272&lang=en>.

deriving from BIT obligations to states' right to regulate in the public interest and the arbitral case law thereon (section 7).

2. THE POSITION OF THE COMMISSION

The Communication contains the Commission's view as to the core elements of the European international investment policy. The Communication has great significance in elucidating the European Commission's view as to the scope and level of protection for EU investors as well as the balancing between investment protection and non-trade values protection.

As to the level of protection for EU investors, it is the Commission's position that future European agreements should cover both direct investment and portfolio investments and include all aspects of treatment and protection of foreign investments, which Member States' BITs deal with. These aspects encompass, not only the relative standards of treatment (namely, the national treatment and most favoured nation (MFN) standards), but also the absolute standards to be applied at the post-entry stage set out in Member States' bilateral investment treaties (BITs). These standards are the fair and equitable treatment standard, full protection and security, and protection from expropriation, nationalisation, and equivalent measures as well as protection of contractual rights granted by the host state to foreign investors (namely, the so-called umbrella clauses) and clauses on free transfer of funds.⁹ Moreover, future EU agreements on investment protection will include investor-state dispute settlement clauses. Therefore, they will provide investors with the right to commence international arbitration proceedings in order to obtain compensation for breaches of the standards of protection by the host contracting party.

The inclusion of the above core elements in the EU investment policy, as envisaged by the Commission, is coherent and in line with Member States' international practices on the protection of their investors abroad, generally speaking of course.¹⁰ As observed in legal literature, the main purpose of Member States' BIT 'was historically that of protecting investments from industrialized party into the developing one, thereby (hopefully) attracting capital into the latter's economy'.¹¹ Member States have never viewed their BITs as a means of liberalising foreign investments and removing the restrictions thereon. Instead, Member States' BITs aimed to provide the highest possible level of post-establishment protection to their nationals' economic interests abroad. The great majority of Member States still stick to the above traditional purpose of BITs. It

⁹ Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, *supra* note 5, at 8.

¹⁰ This is because not all clauses, listed by the Commission in its Communication, can be considered as standard clauses in respect of all European models of BIT. For instance, this is the case with the so-called umbrella clause and the full protection and security standard clause.

¹¹ G. Sacerdoti, 'Bilateral treaties and multilateral instruments on investment protection', 269 *Recueil des Cours* 1997, 251 ff. and at 327–8. In this respect, see also P. Juillard, 'Freedom of establishment, freedom of capital movements, and freedom of investment', 15 *ICSID Review – Foreign Investment Law Journal* 2000, at 322 ff. at 328.

is the view of the Commission that the EU investment policy should be based on Member State best practices. Moreover, the Union's action should be aimed at achieving better results than the results that have been obtained or could have obtained individually by Member States.¹² First, this implies that, when negotiating new International Investment Agreements (hereinafter: IIAs) with any given third country, the EU has to consider the level of post-establishment protection already granted to EU investors by Member States' BITs. In other terms, the protection under future EU agreements should be above, or at least equivalent to, the overall level of protection granted by existing Member States BITs to EU investors. Secondly, being the main focus of the Union's action the liberalisation of restrictions on foreign direct investments, EU agreements will include market access commitments, generally not included in Member States' BITs. This action will integrate admission and post-establishment protection of foreign investments into single international settings.

With regard to protection of non-trade values and investment protection and their balancing, the Commission refers to two issues in particular. The first issue concerns the protection of the freedom of action of the contracting parties to investment treaties in regulating in the interest of non-trade values, such as health, safety, or environmental concerns. The second issue concerns the need to take into account the promotion of non-trade values, such as the rule of law, human rights, environment, sustainable development, in elaborating the investment policy of the EU and to integrate non-trade objectives in the investment protection, as required by Articles 21-22 TEU. As to the first issue, namely the safeguarding of host parties' regulatory space for regulation in the public interest, it is the Commission's view that the common investment policy has to 'continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives'.¹³ As to the type of regulatory interests deserving protection, in its Communication the Commission explicitly mentions the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.¹⁴ In this respect, the Commission does not specify the means, which will concretely safeguard the right of parties to EU investment agreements to adopt and enforce regulatory measures in future investment agreements. As to the second issue, namely the promotion of the rule of law, human rights, environment, and sustainable development, the Commission explicitly makes reference to the OECD Guidelines for Multinational Enterprises as an important instrument in order to balance investors' rights and responsibilities.¹⁵ The Commission paves the way for a possible inclusion of a reference to the Guidelines in future investment agreements or chapters on investment protection in its FTAs.

¹² See *supra* note 5, at 6.

¹³ *Ibid.*, p. 9.

¹⁴ *Idem*

¹⁵ *Idem*

3. THE POSITION OF THE COUNCIL

In its Conclusions on a comprehensive European international investment policy of 25 October 2010 the Council took its position on the core elements of EU's investment policy as envisaged by the Commission. As far as regards the level of protection for EU investors, it is sufficient to say that the position of the Council is close to the position of the Commission. With regard to the protection of non-trade values and investment protection and their balancing, the Council emphasises that 'in keeping with existing practices by Member States' and in accordance with Article 205 TFEU and Article 21 TEU, the European policy in investment matters should be guided by principles such as the rule of law, human rights, and sustainable development.¹⁶ Apparently, the Council's position is that a European investment policy, elaborated on the basis of Member States' BITs, will continue to allow the EU and Member States to pursue public policy objectives as Member States' BITs do. It is the position of some Member States that BITs foster the economic development of contracting parties by promoting the rule of law, while protecting the right of Contracting Parties to regulate. The principal aim of Member States' BITs in force is the post-establishment protection of investments. Nevertheless, in providing high standards of protection of foreign investors against arbitrary conducts of host states, BITs have the further effect of generally promoting the rule of law, which is also in the interest of national investors.¹⁷ In turn, the promotion of the rule of law has been argued as a means of (indirectly) fostering economic development.¹⁸ By including 'in accordance with local laws' provisions in their BITs, Member States have protected their territorial sovereignty, and their right to regulate from time to time in the public interest. To give some examples, the 2008 Germany Model BIT in Article 2(1), provides that: '[e]ach Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments *in accordance with its legislation*'. With similar wording, Article 2 of the 2006 France Model BIT provides that: '[e]ach Contracting Party shall promote and admit on its territory and in its maritime area, *in accordance with its legislation* and with the provisions of this Agreement, investments made by nationals or companies of the other Contracting Party' [emphasis added],¹⁹ and Article 2(1) of the 2005 UK Model BIT provides that:

¹⁶ Council of the European Union, Conclusions on a comprehensive European international investment policy (25 October 2010), *supra* note 6, at 17.

¹⁷ In this respect, see R. Echandi, 'What do developing countries expect from the international investment regime?', in J. E. Alvarez and K. P. Sauvant (eds.), *The evolving international investment regime: Expectations, realities, options* (New York: Oxford University Press 2011), 3 ff. pp. 13–4.

¹⁸ In this respect, see T. W. Wälde, 'Improving the mechanisms for treaty negotiation and investment disputes, competition and choice as the path to quality and legitimacy', in K. P. Sauvant (ed.) *Yearbook on international investment law and policy, 2008–2009* (New York: Oxford University Press 2009), 505 ff. pp. 513–4.

¹⁹ Clauses worded in similar terms are included in BITs, (see online, available at <http://www.unctadxi.org/templates/docsearch___779.aspx>) between the UK, the Netherlands, and Belgium on the one hand, and third countries on the other. See Art. 2, Namibia-Netherlands BIT providing that 'Either Contracting Party shall, within the framework of its laws and regulations,

[e]ach Contracting Party shall encourage and create favourable conditions for nationals and companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.²⁰

BITs between Member States and third countries, following a ‘controlled entry’ approach, do not generally contain any market access commitments. To be more precise, the admission and initial establishment of covered investments and investors is regulated through a *renvoi* to domestic laws of the parties to the treaty.²¹ Since Member States’ BITs concluded with third countries usually

promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments’. (See also Art. 2, Bolivia-Netherlands BIT and Art. 2, Czech Republic-Netherlands BIT); Art. 2(1) Hong Kong-UK BIT of 1998 stating that: ‘Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its right to exercise powers conferred by its laws, shall admit such investments’. and; Art. 2(1) South Africa-Belgo-Luxemburg-Economic Union BIT of 1998 providing that: ‘Chacune des Parties contractantes encouragera, dans le cadre de ses lois, les investisseurs de l’autre Partie contractante à réaliser des investissements sur son territoire en créant des conditions favorables pour ces investissements et, sous réserve de ses droits à exercer les pouvoirs qui lui sont conférés par sa législation, admettra ces investissements’.

²⁰ Other Member States’ BITs include the compliance with local laws requirement in the provision containing the definition of covered investments rather than in the provision concerning the admission of investments or in both provisions. For instance Art. 1(1) of the 2005 China-Spain BIT states that: ‘Por «inversión» se entenderá todo tipo de activos invertidos por inversores de una Parte Contratante *de conformidad con las leyes y reglamentos de la otra Parte Contratante* en el territorio de ésta [...]’ (emphasis added) and Art. 1(1) of the 2007 Libya-Spain BIT states that: ‘Por «inversión» se entenderá todo tipo de activos invertidos por inversores de una Parte Contratante en el territorio de la otra Parte Contratante *de conformidad con las leyes y reglamentos de esta segunda Parte Contratante* [...]’. Sometimes the ‘compliance with local laws’ requirement is included in both the provision concerning the admission of investments and provision containing the definition of covered investment. See for example Art. I(2) of the Philippines-Belgo-Luxembourg-Economic Union BIT of 1998 providing that: ‘“Investment” shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting Party’ and Art. II of the same BIT stating that ‘Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its Constitution, laws and regulations’; 2007 Mexico-UK BIT, Art. 1 stating that ‘“investment” means an asset acquired in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made’ and Art. 2(1) stating that ‘Each Contracting Party shall admit investments in accordance with its laws and regulations’. Likewise, Art. 1(1) of the Philippines-Germany BIT stating that: ‘the term “investment” shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively’ and Art. 2(1) under the heading Promotion and Acceptance providing that ‘Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Art. 1 paragraph 1’.

²¹ *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award 16 August 2007, at 394 where the compliance by foreign investors with local laws in structuring and initially establishing their investment operations in the host State is regarded as an issue (not only of domestic but also) of international significance since the BIT contains a provision subjecting the admission of foreign investments to local regulations (‘[t]he BIT is, to be sure, an international instrument, but its Arts. 1 and 2 [of Germany-Philippines BIT] and Art. 2 of the Protocol effect a *renvoi* to national law, a mechanism which is hardly unusual in treaties and, indeed, occurs in the Washington Convention. A failure to comply with the national

subject the admission and establishment of foreign investments to domestic regulations of contracting parties,²² Member States retain their rights *vis-à-vis* third countries to regulate from time to time the admission and establishment of foreign investments and lay down the condition of their operation. The *renvoi* to domestic laws of the contracting parties is not limited to domestic regulations on admission and conditions of operation of foreign investors under the dominant strand of case-law. It encompasses the fundamental principles of host States' legal system and relevant international rules (general principles of law included). The 'in accordance with local laws' clauses therefore, broadly speaking, safeguard the sovereign right of the Parties to regulate, as outlined below in Section 6.

Contrary to the position of the Commission on the OECD Guidelines for Multinational Enterprises, the Council does not make an explicit reference to such Guidelines. The Council makes it clear that 'the main focus of international investment agreements should continue to be effective and ambitious investment protection and market access'.²³

4. THE POSITION OF THE EP

While the Commission and the Council seem to have quite converging views regarding the level of substantive and procedural protection to be granted to EU investors under future EU investment agreements as well as the balancing between investment protection and contracting parties' right to regulate in the public interest, a divergent view has been expressed by the EP in its Resolution of 6 April 2011 on the future European international investment policy.²⁴

In its Resolution, the EP first puts emphasis on the need to protect the right to regulate in the public interest in new investment agreements,²⁵ based on the assumption that BITs of Member States with third countries are too one-sided in favour of investors and a too investor-oriented arbitral practice interpreting and applying the fair and equitable treatment standard exists at the moment.²⁶ In this respect, a clear (although implicit) reference is made by the EP to the

law to which a treaty refers will have an international legal effect'). It is worth noting that the *Fraport* award has been annulled in December 2010 because the ad hoc Committee found that the Tribunal committed a serious departure from a fundamental rule of procedure, namely the violation of parties' right to be heard before the arbitral tribunal (Art. 52(1)(d) ICSID Convention). In this respect, see *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Annulment decision, 23 December 2010, at 218 ff.

²² Sacerdoti, *supra* note 11, pp. 327–9; G. Sacerdoti, 'The admission and treatment of foreign investment under recent bilateral and regional treaties,' 1 *The Journal of World Investment* 2000, 105 ff. at 107; R. Dolzer and C. Schreuer, *Principles of international investment law* (New York: Oxford University Press 2008), pp. 80–2 in general and pp. 84–8 with reference to the case law on provisions requiring the compliance by investor with host state laws.

²³ See *supra* note 6, at 16.

²⁴ See *supra* note 7.

²⁵ *Ibid.*, at 6, at 17, at 23 and 25.

²⁶ *Ibid.*, at 24.

first generation of decisions concerning Argentina's emergency measures.²⁷ Given these considerations, according to the EP, future European agreements should include (not all standards listed by the Commission and Council but) only non-discrimination standards drafted so as to include the 'in like circumstances' requirement, a fair and equitable treatment standard with an express linkage to customary international law (namely, the international minimum standard of treatment), and protection against direct and indirect expropriation provided that a definition which balances in a clear and fair manner public welfare objectives and investors' interests is given.²⁸ In order to safeguard host contracting parties' regulatory space in the public interest, according to the EP, all EU agreements have to include specific clauses on the right of contracting parties to regulate in the public interest.²⁹ Among the type of regulatory interests mentioned are the protection of national security, the environment, public health, workers' and consumers' rights, industrial policy, and cultural diversity.³⁰ Furthermore, according to the EP, sector specific reservations/exceptions and carve-out clauses concerning 'sensitive sectors such as culture, education, public health and those sectors which are strategically important for national defence' should be included in future agreements.³¹ Finally, the EP 'strongly supports' the inclusion in all European agreements of a reference to the OECD Guidelines for Multinational Enterprises³² as well as the inclusion of the corporate social responsibility clauses, and effective social and environmental clauses.³³ In this respect, the EP draws the attention of the Commission to the clauses that prevent the watering-down of social and environmental legislation in order to attract investment contained in some recent investment agreements,³⁴ such as the US-Panama Trade Promotion Agreement,³⁵ the US BIT model of 2012,³⁶ and some

²⁷ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, at 274-5 and at 280; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at 52 ff.; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, at 88 ff.; and *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at 259-68. The latter two ICSID awards have been annulled in 2010. (See *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision, 19 June 2010 and *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Decision, 30 July 2010, respectively)

²⁸ See *supra* note 7, at 19.

²⁹ *Ibid.*, at 25.

³⁰ *Ibid.*, at 25.

³¹ *Ibid.*, at 26.

³² *Ibid.*, at 27.

³³ *Ibid.*, at 28.

³⁴ *Ibid.*, at 30.

³⁵ Chapter Sixteen (Labour) and Chapter Seventeen (Environment) US–Panama Trade Promotion Agreement of 28 June 2007.

³⁶ Art. 12 (Investment and Environment) and Art. 13 (Investment and Labour) US BIT model of 2012.

recent BITs between Belgium-Luxembourg and third countries³⁷ as well as in some recent FTAs such as the EU-South Korea FTA.³⁸

5. BALANCING INVESTMENT PROTECTION AND NON-TRADE VALUES IN THE INVESTMENT CHAPTERS IN EU FTAs WITH CANADA, SINGAPORE, AND INDIA

In September 2011, the Council authorised the Commission to negotiate investment protection chapters to be included in the EU FTAs with Canada, India and Singapore.³⁹

Pursuant to the mandate, the general objective of the Commission in negotiating the Chapters on investment protection with Canada, India and Singapore should be to obtain the highest possible level of legal protection and certainty for EU investors. At the same time, the provisions of the new chapters should preserve the right of the EU and the Member States to adopt and enforce measures necessary to pursue legitimate public policy objectives in a non-discriminatory manner. As to the type of regulatory interests, the mandate lists social and environmental security, public health and safety, and cultural diversity. The chapters should include broad definitions of both covered investors and investments and provide investors with all standards of protection listed by the Commission and the Council in their Communication and Conclusions, respectively. In delineating the desirable level of protection for EU investors abroad, the Council restates the objective to provide EU investors with the highest possible level of protection in its mandate. The linkage of the fair and equitable standard (the FET standard) to the customary international minimum standard of treatment of foreigners and their economic interests has been under consideration in recent years. This linkage seems as a suitable rulemaking option in order to call arbitral tribunals on a more balanced interpretation of the absolute standards of protection. The same is true with regard to the state practices to assist the FET standard and the provision on expropriation, nationalisation and measures having equivalent effect with interpretative notes. All above options have been adopted by the NAFTA Contracting Parties and have been referred to by the EP with approval. Contrary to the EP, the Council seems to disregard the rulemaking options recently exploited by the NAFTA Contracting Parties and other third countries in order to restrict the scope of application of the absolute standards of protection (namely, the protection from indirect expropriation and the FET standard). Furthermore, the Council calls upon the Commission to include in the chapters 'unqualified' national treatment and most-favoured nation treatment standards. The relative standards of the European models of BIT do not generally include the 'in like circumstances'

³⁷ Art. 5 (Environment) and Art. 6 (Labour) Belgium-Luxembourg-United Arab Emirates BIT of 2004; Art. 5 (Environment) and Art. 6 (Labour) Belgium-Luxembourg-Ethiopia of 2006; and Art. VII (Environment) and Art. VIII (Labour) Belgium-Luxembourg-Colombia of 2009.

³⁸ Art. 13.3, Art. 13.4.3, Art. 13.7 EU-South Korea FTA.

³⁹ See *supra* note 8.

requirement, as opposed to the wording of the relative standards in the US and Canada models of BIT which explicitly mention the above requirement.⁴⁰

State-to-state dispute settlement mechanisms included in the other chapters of the FTAs should not interfere with the right of investors to pursue international arbitration directly against the host contracting parties. Indeed, this is an important indication. According to the Council's mandate, on the one hand, the same measure might be challenged by the Contracting Parties under the state-to-state mechanism and by investors under the treaty-based international arbitration. The two dispute settlement mechanisms might be exploited in parallel. On the other hand, the new Chapters will not include mechanisms that allow Contracting Parties to stop investment arbitration proceedings commenced by investors, or influence the final outcomes of arbitral tribunals with their binding decisions (such as the clauses on prudential measures in financial services and tax matters included in the US BIT models of 2004 and 2012).⁴¹

The new Chapters on investment protection should include, in principle, just post-establishment standards of treatment and protection, unless the other contracting party insists upon the inclusion of market access commitments in the chapter on investment protection. Market access commitments, included in the Trade Chapters, should be excluded from the scope of investor-state dispute settlement clauses. Once again, this is in line with Member States' BITs, which do not include commitments on foreign investors' and investments' admission and initial establishment, generally speaking of course.⁴² The new Chapters will include the so-called 'in accordance with local laws' provisions, which are standard clauses of Member States' BITs. Finally, the mandate of the Council to the Commission does not make any reference to investors' responsibilities or to the OECD Guidelines.

6. THE RULEMAKING OPTIONS DISCUSSED AT THE EU LEVEL

First of all, it is likely that future chapters on investment protection will include 'best endeavours' clauses on corporate social responsibility, possibly making

⁴⁰ In this respect, for instance compare Art. 4(1) French model BIT of 2006 ('Each Contracting Party shall apply on its territory and in its maritime area to the nationals and companies of the other Party, with respect to their investments and activities related to the investments, a treatment not less favourable than that granted to its nationals or companies, or the treatment granted to the nationals or companies of the most favoured nation, if the latter is more favourable.') and Art. 3(1) German model BIT of 2008 ('Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State') with Art. 3 and 4 of the US model BIT of 2012 and Art. 3 and 4 of the Canadian model BIT of 2004, that are worded in almost identical terms and all include the 'in like circumstances' requirement. As an example, Art. 3(1) of the US model of BIT of 2012 provides that 'Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, *in like circumstances*, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory' [emphasis added].

⁴¹ Art. 20 and Art. 21 US BIT models of 2004 and 2012.

⁴² In this respect, the 2003 Italy BIT model is worthy of mention as an exception.

a reference to the OECD Guidelines for Multinational Enterprises, in order to balance foreign investors' rights and their obligations and responsibilities. This would be in line with the EU Commission's indications and the strong call coming from the EP for the inclusion of such clauses in future European agreements. Such clauses might be worded in similar terms to the clauses or preambular sentences already found in some recent international investment treaties. For instance, they might provide that each party to the investment agreement '...should encourage its investors to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as standards and principles that have been endorsed or are supported by the Parties, notably the OECD Guidelines for Multinational Enterprises'. Notwithstanding the Council's silence on the inclusion of clauses on corporate social responsibility in future IIAs and the absence of such clauses in the great majority of Member States' BITs in force, many Member States (such as Italy) do not oppose the reference to the OECD Guidelines for Multinational Enterprises or other standards and principles on Corporate Social Responsibility endorsed by the other Party. These clauses, coupled with 'in accordance with host State's laws' provisions,⁴³ might promote and strengthen the compliance by foreign investors of domestic legislations and regulations of the host contracting party, which include international rules on human rights, environment protection and ILO core labour standards.

Following the indication by the Council in the mandate, the new chapters should include 'in accordance with host State's laws' provisions. In fact, market access commitments should not be enforceable by foreign investors against host contracting parties under investor-state arbitration, but only by contracting parties against each other under state-to-state dispute settlement mechanisms. As already said above in section 3, these provisions primarily preserve the sovereign rights of each party to the agreement to regulate the admission and the initial establishment of covered investments.⁴⁴ At the same time these provisions require foreign investors to comply with fundamental regulations laid down by the host State and have been the basis on which some arbitral tribunals have developed the concept of 'illegal investments'.

According to treaty-based case-law, the 'in accordance with host State's laws' provision 'refers to the validity of the investments rather than to its definition', and specifically 'it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal'.⁴⁵ Irrespective of where the compliance with a host State's laws require-

⁴³ See *supra* section 5.

⁴⁴ In this respect, see A. De Luca, *supra* note 4, pp. 203-11 and references cited there.

⁴⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, at 46 with reference to the compliance with domestic laws requirement included in the definition of covered investment of Art. 1(1) of the Italy-Morocco BIT. It is worth noting that the said requirement is also found in Art. 2(1) concerning the promotion of investments. According to Art. 2(1) each Contracting Party shall encourage investors of the other Party to make investments in its territory and authorise these investments in conformity with its laws and regulations in force; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at 84 referring with approval to the Salini decision quoted

ment is located in the treaty (or even in the absence of such a requirement in the international investment agreement concerned),⁴⁶ investments that are illegal because they are made in violation of local laws or international law⁴⁷ are excluded from the protection of the BIT. Any violation of such domestic rules or applicable international law by a foreign investor would exclude its investment from the protection of the BIT,⁴⁸ either substantive⁴⁹ or procedural (i.e., the right to resort to a treaty-based arbitration against the host State).⁵⁰

Among the national regulations that foreign investors must respect when they initially establish, structure their investments and carry on their business activities in the host State are certainly those national provisions regulating the admission and establishment of foreign investments.⁵¹ The relevance of other domestic regulations of a fundamental nature and international law (general

above. In legal literature, see Sacerdoti, *supra* note 11, at 329; C. McLachlan, *et al.*, *International investment arbitration: Substantive principles* (New York: Oxford University Press 2007), at 181.

⁴⁶ See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (ECT), Decision on Jurisdiction, 8 February 2005, at 126–30 and 229–30; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at 138 ff., in respect of the Energy Charter Treaty that does not contain a provision requiring the conformity of investments with domestic laws.

⁴⁷ As to the conformity of covered investments with fundamental principles of host State's law *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, at 83(iii); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, at 104; *Plama Consortium Limited v. Republic of Bulgaria*, Award, *supra* note 51, at 143–5; in this respect see also *Tokios Tokelés v. Ukraine*, *supra* note 50, at 86 'Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty. In our view, the Respondent's registration of each of the Claimant's investments indicates that the 'investment' in question was made in accordance with the laws and regulations of Ukraine'. As to the conformity of covered investments with international law, see *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, at 231–4, 240–2, 245–9 and 253; on this award see C. Knahr, Investments 'In accordance with host State law', in A. Reinisch and C. Knahr, *International investment law in context* (Den Haag: Eleven International Publishing 2008), 27 ff., pp. 34 where she critically observes: 'Prima facie it does not seem obvious that general principles of law would be the appropriate reference for determining the existence of a violation of the domestic law of a host state'; *Plama Consortium Limited v. Republic of Bulgaria*, Award, *supra* note 51, at 138, at 140–2; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at 106–13.

⁴⁸ See U. Kriebbaum, 'Illegal investments,' in P. Klein *et al.*, (eds.) *Austrian Arbitration Yearbook 2010* (The Hague: Kluwer Law International 2010), 302 ff.

⁴⁹ For example *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, at 119.

⁵⁰ *Phoenix Action, Ltd. v. Czech Republic*, *supra* note 52, at 102.

⁵¹ See *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, Award, *supra* note 21, at 345; *Phoenix Action, Ltd. v. Czech Republic*, *supra* note 21, at 103. In respect of Art. 2(2) of the Netherlands-Turkey BIT ('[t]he present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made') the ICSID Tribunal in the case *Mr. Saba Fakes v. Republic of Turkey* expressed the view that 'the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments', *supra* note 54, at 119.

principles of law included) under BIT provisions requiring the conformity of investments with host States' domestic laws, as well as the concept of legal investment, has been endorsed by the great majority of investment tribunals but not unanimously approved.⁵² For example, according to the tribunal in the case *Fakes v. Turkey*, violations by investors of domestic rules that do not regard admission or establishment of foreign investments—even when they incorporate international law rules on human rights or against corruption—would not amount to a breach of the legality requirement and, therefore would not lead to denial of international protection to investments performed and made in contrast with such domestic rules or international rules.⁵³

Considering the inconsistency in the arbitral case law as to the scope of application of the 'in accordance with local laws' provisions, the reference to the OECD guidelines or other corporate social responsibility principles might support a broad interpretation and application of the concept of 'illegal investment' and strengthen the strand of arbitral cases already endorsing such an approach.

Secondly, an additional consideration has to be made. The new generation FTAs of the EU and its Member States will contain specific clauses that prevent the watering-down of social and environmental legislation in order to encourage trade and investment, probably worded as the ones included in the EU-South Korea.⁵⁴

Finally, the chapters on investment protection will safeguard explicitly the right of Contracting Parties to regulate in the public interest. There are at least three possible means of protection of the right to regulate under discussion at the EU level. First, the right of the parties to an agreement to regulate in the public interest could be mentioned in the Preamble of the agreement, following the new practice of the EU in trade matters. In this respect, the Preamble of the EU-South Korea FTA is worthy of mention. In the Preamble of the EU-South Korea FTA, the Parties recognise their right 'to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction on international trade, as reflected in this Agreement'.⁵⁵ The preambular sentence is clearly

⁵² *Mr. Saba Fakes v. Republic of Turkey*, *supra* note 54, at 112–4 and 121 where the Tribunal addresses criticism to the notion of legal and bona fide investment as the object of the international protection guaranteed by IIAs and ICSID Convention developed by the ICSID Tribunal in the case *Phoenix Action, Ltd. v. Czech Republic*, *supra* note 52, at 76–78, 100, 106–113 and at 120 where the Tribunal states that a violation of domestic regulations not concerning the admission and promotion of foreign investments 'would not trigger the application of the legality requirement in Article 2(2) of the BIT'.

⁵³ *Mr. Saba Fakes v. Republic of Turkey*, *supra* note 54, at 119 where the Tribunal states that 'In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic law'.

⁵⁴ Art. 13.3, Art. 13.4.3, Art. 13.7 EU-South Korea FTA. Apart from the specific clauses just mentioned, the EU-South Korea FTA includes also a Chapter devoted to Trade and Sustainable Development.

⁵⁵ Preamble of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, sixth sentence.

modelled after the text of Article XX of the General Agreement on tariffs and trade. Moreover, the sentence clearly echoes WTO case law on the necessity test for the application of the general exception of Article XX.⁵⁶ Second, contracting parties' regulatory powers could be made the object of a specific and autonomous clause of a general character, following the indications of the EP. A clause worded similarly to the terms of Article 7.1(4) of the EU-Korea FTA might be included. Article 7.1(4), which is among the general provisions opening the Chapter on trade in services, establishment, and electronic commerce provides that '[c]onsistent with this Chapter, each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives'. Third, the provisions on indirect expropriation and the fair and equitable treatment standard could be assisted with annexes to the investment agreement including interpretative notes emphasising the Parties' right to regulate in the public interest. This approach has been followed by the NAFTA Parties and other countries (such as Singapore) in order to give arbitrators some guidance on the balancing between investors' protection and the right of Parties to regulate in the public interest when they interpret and apply the absolute standards of protection.⁵⁷

It is highly likely that the chapters on investment protection currently under negotiation with Canada and Singapore will include all the rulemaking options listed above with the view to protecting the right of contracting parties to regulate in the public interest. While the preambular sentence and the inclusion of an autonomous clause both mentioning the contracting parties' right to regulate in the public interest reflect the practice of the EU in trade matters, the interpretative notes option should not be considered as illustrative of the EU practice, because this option seems to be in line with the practice of Canada and Singapore but in contradiction with the guidelines of the Council in the mandates. The NAFTA practices, linking the FET to the customary international minimum standard and annexing interpretative notes to the provision on indirect expropriation and the fair and equitable treatment standard clause, will not be discussed here. It is sufficient to say that the linkage of the FET to the customary international minimum standard does not seem to have added more clarity in the interpretation and application of the FET, if one looks at the NAFTA case-law looking for the contents of the international minimum standard of treatment of aliens.⁵⁸ Furthermore, the U.S. interpretative notes, reproducing verbatim the principles stated by the U.S. Supreme Court under the Due Process and Taking Clauses, elucidate the U.S. position that the protection of foreign inves-

⁵⁶ See, *inter alia*, WTO Appellate Body, *US-Gambling*, at 306-8.

⁵⁷ For instance, see Art. 13 Canadian model BIT of 2004, which is assisted with the interpretative note included in Annex B.13(1) clarifying the concept of indirect expropriation, and Art. 5 (Minimum Standard of Treatment) and Art. 6 (Expropriation and Compensation) US model BIT of 2012, which are assisted with the interpretative notes contained in Annexes A and B.

⁵⁸ For instance, compare *Glamis Gold v. United States of America*, Ad hoc- UNCITRAL Arbitration Rules, Award, 8 June 2009, at 22 to *Merril & Ring Forestry LP v. Canada*, Ad hoc- UNCITRAL Arbitration Rules, Award, 31 March 2010, at 210 and 213. In legal literature I. A. Laird *et al.*, 'International Investment Law and Arbitration: 2010 in Review', in K. P. Sauvant (ed.), *supra* note 18, 63 ff., pp. 85-88.

tors' economic interests under international law should not be above the protection granted by the U.S. Supreme Court to nationals' economic interests and rights. On the contrary, the interpretative notes do not clarify the level of protection due to foreign investors under the absolute BIT standards and under customary international law. Moreover, they seem to be a contemporary proposal of the Calvo doctrine in an American fashion.

7. SOME CONCLUDING REMARKS ON THE CONTRACTING PARTIES' RIGHT TO REGULATE

Looking at the approach followed by international investment agreements and corresponding current arbitral case law the widespread concern over the limitations deriving from BIT obligations to contracting states' right to regulate in the public interest appears to be overstated. First, clauses of BITs as well as customary international law on protection of foreigners' property rights, rather than preventing States from implementing regulatory measures in the public interest, have a more limited effect, namely, to impose upon states an obligation to compensate foreign investors in certain instances. They follow a compensatory approach. That said, it is difficult to understand why lowering the level of protection of foreign investments under new IIAs in respect to the overall protection granted by Member States' BITs should *per se* promote, or contribute to, the protection of non-trade values. Second, it is true that some investment treaty-based tribunals granted to foreign investors' expectations absolute protection from changes introduced by regulatory measures of general application without any consideration of the reasons for those changes and their modalities.⁵⁹ This is the case with the arbitral tribunals in *CMS Gas Transmission Company v. Argentina*, *Sempra v. Argentina*, and *Enron v. Argentina*.⁶⁰ On the otherhand, it is also true that, when a host State's legislative measures are at stake, other tribunals have followed a more balanced interpretation and application of the fair and equitable treatment standard as well as of the other BIT standards of protection. The question is whether or not, by judging changes in national legal systems introduced by legislative measures under bilateral investment treaties 'one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose'.⁶¹ When foreign investors complain

⁵⁹ B. Kingsbury and S. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality', in S. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010), 75 ff. at 75-77.

⁶⁰ See, for instance, *CMS Gas Transmission Company v. The Argentine Republic*, Award, *supra* note 27, at 274-5 and 280; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. The Argentine Republic*, *supra* note 27, at 121-39; *Sempra Energy International v. The Argentine Republic*, Award, at 298 and 303-4; *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic*, Award, *supra* note 27, at 259-68.

⁶¹ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. The Argentine Republic*, *supra* note 27, at 194 with reference to the discussion and evaluation of the indirect expropriation claim of LG&E against Argentina, only.

of state regulatory actions under a BIT, in order to decide whether the measures amount to an indirect expropriation (a so-called 'regulatory taking') or to a breach of the fair and equitable treatment standard, a tribunal should take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. Tribunals have to take into account also the purpose and the causes of State regulatory measures (together with their adverse effects on the foreign investment). These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors, unless they do not annihilate the investments protected under the treaty. More specifically, Tribunals have to consider the method and procedure followed by State authorities in adopting and enforcing the regulatory measures in order to evaluate whether they are arbitrary in light of the circumstances of the case. This approach is more in line with international case-law and customary international law.⁶² It has been followed by ICSID Tribunals in number of cases regarding Argentina's emergency measures or other types of changes, introduced by law or other unilateral acts, to the general legal framework regulating the protected investment, in the absence of specific stabilisation promises of the host State towards foreign investors.⁶³ To give an example, following this approach, the Tribunal in the *Total* case found, on the one side, that the so-called pesification of public service tariffs was not in breach of the BIT.⁶⁴ On the other hand, it found that the prolonged freezing of the gas tariffs, together with the failure to re-adjust them, and the radical alteration of electricity price determination mechanism, being arbitrary, were in breach of the BIT, and, more specifically, of the fair and equitable treatment standard.⁶⁵

Furthermore, it is worth noting that some arbitral awards belonging to the first generation of decisions concerning Argentina's emergency measures (namely, *Sempra v. Argentina* and *Enron v. Argentina*), which have been criticised for being too investor-oriented, have at the moment limited precedential value as legal authorities.⁶⁶

⁶² In this respect, see F.V. Garcia-Amador (Special Rapporteur), Fourth report on State Responsibility, Doc. A/CN.4/119, at 24, at 26, and at 40-2.

⁶³ *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, at 113–23. See also, *inter alia*, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at 233-43 (with regard to the interpretation of BIT provision protecting foreign investors from indirect expropriation), and at 350-8 and 364-74 (with regard to the interpretation of the FET standard); *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June, 2011, at 290-291 and at 319-331; and *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, at 150-66 and at 242-6.

⁶⁴ *Total S.A. v. The Argentine Republic*, *supra* note 68, at 159–65 and 317–24.

⁶⁵ *Ibid.*, at 168-175 and 325-328.

⁶⁶ The arbitral awards in *Sempra Energy International v. The Argentine Republic* and *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic* have been annulled in 2010 for not having properly examined the applicability of Art. XI of the Argentina-U.S. BIT on non-precluded measures and for not having dealt adequately with the plea of necessity under customary international law raised by Argentina; see *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision, 19 June 2010, at 194 ff. and *Enron Corporation*

The issue of balancing investment protection and non-trade values protection seems to be a matter of interpretation and application of the absolute substantive standards of protection, rather than a matter connected with the drafting of IIA's clauses. This notwithstanding, the reference to contracting parties' right to regulate in the public interest in new international agreements, as well as the other two options discussed above, could clarify the scope of the standards of protection of foreign investors against State regulatory measures. In this respect, a specific clause restating that 'each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives', as laid down in Art. 7.1(4) of the EU-Korea FTA, might prove particularly helpful in suggesting arbitral tribunals to follow a cautious approach when they interpret the FET as entailing an obligation of contracting parties to the stability of their legal systems. This statement, opening the Chapters on investment protection, might be regarded as a *iuris tantum* presumption that regulatory measures are to be considered as generally legal under the Chapters, unless foreign investors do not show and prove their arbitrary nature. These means can strengthen the case law already endorsing a balanced approach in interpreting and applying the FET and might prove to be also sufficient in overcoming the inconsistency of case law on the application of substantive standards in respect of regulations in the public interest, without undermining the international protection of EU investors abroad.

and Ponderosa Assets, L.P v. The Argentine Republic, ICSID Case No. ARB/01/3, Annulment Decision, 30 July 2010, at 367–95, respectively. The arbitral award in *CMS Gas Transmission Company v. The Argentine Republic* still stands but has been partially annulled for failure to state reasons where the Tribunal found a breach of Article II(c)(2), that is the so-called umbrella clause, and severely criticised by the Annulment Committee as to the interpretation and application of Art. XI of the BIT; see *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007, at 96 ff. and 128 ff., respectively.

THIRD-COUNTRY GOODS IN THE INTERNAL MARKET: SOME ISSUES

Laurence W. Gormley

1. INTRODUCTION

While the internal market is principally concerned with the movement of goods, persons, services, and capital within the European Union, it is not, and cannot be, immune from the influence of external factors and impacts. Sometimes there is a clear preference given to Union citizens, as in the free movement of persons, and the prohibition of discrimination on grounds of nationality, but many rights are extended to some or even all third country goods and/or nationals in certain circumstances. Thus the European Economic Area benefits from the freedoms of the internal market, and numerous freedoms benefit the Swiss; so too, third country spouses of EU citizens, and other family members can benefit from the Citizenship Directive, no matter how distressing blinkered politicians may find it. The treatment of third-country goods, however, raises political blood pressure rather less.

2. THE APPROACH TO THIRD-COUNTRY GOODS

The treatment of third-country goods in EU law is a subject of not inconsiderable practical importance. Yet the published version (at least) of the Treaty on the Functioning of the European Union (TFEU) initially got it wrong through what was obviously a clerical error¹ that has now been rectified.² By virtue of Article 28(2) TFEU the free movement of goods provisions extend to products coming from third countries which are in free circulation in Member States. Article 29 TFEU provides that such products are considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges. Although the Treaty requires not only completion of formalities but also that duties or charges payable actually be levied, it does not actually require them to have been paid: the Customs Code permits release of the goods when the customs debt has been paid,

¹ Which was pointed out in L.W. Gormley, 'Some Problems of the Customs Union and the Internal Market', in N. Nic Shuibhne and L.W. Gormley (eds.), *From Single Market to Economic Union, Essays in Memory of John A Usher* (Oxford: Oxford University Press 2012), 87-88.

² See Art. 28(2) TFEU, OJ 2012 L 326/47, at 60 (as to the earlier version, see OJ 2010 C83/47, at 60).

guaranteed, or deferred.³ Drawback of duties means in effect repayment or reduction of the import duties or charges concerned, but it does not refer to suspension or reduction granted by EU legislation, as the amount paid takes account of the suspension or reduction, nor does it refer to overpayments.

On the basis of Article 28(2) TFEU the rule is that once they are in free circulation, products coming from third countries are treated on all fours with products originating in the European Union. This was emphasized by the Court of Justice in 1975 in Case 41/76 *Criel, née Donckerwolcke et al., v Procureur de la République, Lille et al.*, in the following terms:

It appears from Article [28] that, as regards free circulation of goods within the Community, products entitled to “free circulation” are definitively and wholly assimilated to products originating in Member States.

The result of this assimilation is that the provisions of Article [34] concerning the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products.⁴

Other examples of this approach can be seen in Case 288/83 *Commission v Ireland*⁵ and in Case 119/78 *SA des grandes distilleries Peureux v Directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort*.⁶ In the latter judgment, the Court stated that:

the prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade has the same scope as regards products imported from another Member State after being in free circulation there as for those originating in the same Member State.⁷

The relevance of this last statement in the discussion about the mutual acceptance of goods is discussed below. Consistent with this approach, in relation to internal taxation on imports, the expression ‘products of other Member States’

³ See Regulation 2913/92 (OJ 1992 L 302/1), latest consolidated version available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992R2913:20070101:EN:PDF>>. This is because of the general rule that where the acceptance of a customs declaration gives rise to a customs debt, the goods covered by that declaration must not be released for free circulation until the customs debt has been paid (except in the case of temporary importation with partial relief) or secured, see Regulation 2913/92, Art. 74(1). If payment is deferred it must be secured: Art. 225. Hence Art. 74 makes no express reference to deferment (as to which, see Arts. 224-228). See further, L.W. Gormley, *EU Law of Free Movement of Goods and Customs Union and Customs Union* (Oxford: OUP 2009), 145-148.

⁴ ECJ, Case 41/76, *Criel, née Donckerwolcke et al., v Procureur de la République, Lille et al.*, [1976] ECR 1921 at 1933 (paras. 17-18).

⁵ ECJ, Case 288/83 *Commission v Ireland* [1985] ECR 1761.

⁶ ECJ, Case 119/78 *SA des grandes distilleries Peureux v Directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort* [1979] ECR 975.

⁷ *Ibid.* at 986 (para. 26).

in Article 110 TFEU is interpreted to include third-country products imported from other Member States.⁸

The major deviation from this principle of assimilation concerns industrial and commercial property rights, so that third country products bearing a trade mark applied in a third country and imported into the European Union by a person other than the mark holder in the Union without the latter's consent, do not benefit from free movement rights throughout the Union.⁹ But there is an additional problem to which Oliver has rightly drawn attention,¹⁰ namely the rather strange situation of bananas imported from the Canary Islands into Spain: Article 4(2)(a) of Protocol 2 to the Act of Spanish and Portuguese Accession¹¹ provided that bananas imported from the Canary Islands were to be exempt from customs duties on release into free circulation in the rest of Spain (apart from Ceuta and Melilla) and bananas imported under those arrangements were deemed not to be in free circulation in Spain for the purposes of what is now Article 29 TFEU when they were reconsigned to another Member State. Although the Canary Islands are now within the customs territory of the Union,¹² so that goods from the Canary Islands are no longer assimilated to third country goods, Article 10(3) of that regulation provides that the provisions of the Protocol continue to apply in respect of bananas, Article 10(2) providing for the expiry of the Protocol for other products. Given that there has for many years been a common organisation of the market for bananas within the European Union,¹³ the reason for the continued existence of Article 4(2)(a) of the Protocol is something of a mystery, and it is submitted that the better view that it is otiose but should still be formally repealed. Finally, it is worth recalling that it is no longer possible for the Member States to refuse Union treatment to goods

⁸ ECJ, Case 193/85 *Cooperativa Co-Frutta Srl v Amministrazione delle Finanze dello Stato* [1987] ECR 2085 at 2111-2113 (paras. 24-29); ECJ, Case C-130/92 *OTO SpA v Ministero delle Finanze* [1994] ECR I-3281 at 3299 (para. 16); ECJ, Case C-284/96 *Tabouillot v Directeur des Services Fiscaux de Meurthe-et-Moselle* [1997] ECR I-7471 at 7491 (para. 23), confirming the view advanced in 52 *Halsbury's Laws of England* (4th. ed., London: Butterworths 1986) para. 20.07.

⁹ This approach, originally in ECJ, Case 51/75 *EMI Records Ltd v CBS United Kingdom Ltd* [1976] ECR 811 and in the parallel German and Danish cases, demonstrates that the exhaustion of rights doctrine does not apply in such circumstances, see e.g., ECJ, Case C-355/96 *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* [1998] ECR I-4799; ECJ, Case C-173/98 *Sebago Incet et al. v G-B Unie SA* [1999] ECR I-4103; ECJ, Joined Cases C-414-416/99 *Zino Davidoff et al. v A & G Imports Ltd et al.*, [1999] ECR I-8691. See further, Directive 2008/95 (OJ 1995 L 299/25), Art. 7.

¹⁰ P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union* (5th. ed.: Oxford, Hart 2009), 26-27.

¹¹ OJ 1985 L302/1 at 400-403.

¹² This was effected by Regulation 1911/91 (OJ 1991 L 171/1), last amended by Regulation 1105/2001 (OJ 2001 L 151/1); see now, Regulation 2513/92 (as consolidated, note 5), Art. 3(1).

¹³ See now Regulation 1234/2007 (OJ 2007 L 299/1, as amended on myriad occasions). Regulation 1234/2007 repealed the old Regulation 404/93 (OJ 1993 L 47/1), which originally established the common organisation of the market in bananas; the penultimate recital to the latter expressly takes account of the social, economic, cultural and environmental importance of banana-growing in the Canary Islands.

coming from third countries imported from other Member States;¹⁴ since the abolition of border controls on the movement of goods between Member States with the completion of the internal market on 1 January 1993, refusal of Union treatment had in any event lost its practical importance.¹⁵

3. MUTUAL ACCEPTANCE AND THIRD-COUNTRY GOODS

The concept of the mutual acceptance of goods is celebrated by EU lawyers and by traders throughout the European Union. Its most renowned association is of course with thoughts of Kir or Kir royale, and thus of Cassis de Dijon. But the judgment in *Cassis de Dijon*¹⁶ contained an apparently exclusive statement that the Court has never formally rectified.¹⁷ The famous statement:

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.

In its reference to 'lawfully produced and marketed' failed to take account of third country products lawfully marketed in a Member State. Technically there was no need to do so, because the facts solely concerned the marketing in Germany of Cassis de Dijon produced in France. Yet it clearly cannot have been the intention of the Court to limit mutual acceptance of goods so as to exclude third country products lawfully marketed in a Member State. This view is reinforced by the observation on assimilation cited earlier from the judgment in Case 119/78 *Peureux*, which was handed down shortly after the judgment in *Cassis de Dijon*. Relatively recently, in Case C-88/07 *Commission v Spain*¹⁸ the Court found that:

The mere existence of legislation or of a practice in a Member State applicable without distinction to domestic and imported products is likely to deter traders from importing into that Member State goods lawfully produced or marketed in another Member State and therefore has the effect of restricting the free movement of goods.¹⁹

¹⁴ Article 134 EC was not taken over into the TFEU. In a previous version as Article 115 EC its use had declined significantly, and its demise is wholly unlamented.

¹⁵ The former EEC Treaty Art. 115 ought to have been repealed by the Single European Act (OJ 1986 L 169/1), but that provision (which became Art. 115 EC) was actually strengthened by the amendments made at Maastricht (Treaty on European Union, OJ 1992 C 191/1); it most certainly ought to have been repealed along with other otiose provisions by the Treaty of Amsterdam (OJ 1997 C 340/1) but, endowed, it appeared, with the quality of survivorship, it then became Art. 134 EC and also survived the Treaty of Nice (OJ 2001 C 80/1) unscathed.

¹⁶ ECJ, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

¹⁷ The other 'mistake' in *Cassis de Dijon* was including the protection of public health in the list of mandatory requirements, although that has now been rectified, see L.W. Gormley in A. Arnall *et al.*, (eds.), *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs* (Oxford: OUP 2008) 189, at 193.

¹⁸ ECJ, Case C-88/07 *Commission v Spain* [2009] ECR I-1353 at 1402.

¹⁹ *Ibid.* at 1402 (para. 108).

On the basis of *Peureux* and *Commission v Spain* it is submitted that any suggestion that the mutual acceptance of goods should be limited to goods lawfully produced and marketed in a Member State is wholly misguided.

It is clear, though, that third country goods imported into a Member State to be marketed there must satisfy the lawful requirements applicable in that Member State; those may be requirements implementing EU legislation, or they may be unilateral measures, depending on the intensity of such legislation (the extent to which it occupies the field) and whether there is EU legislation involved at all. Such products may not necessarily have to comply with domestic requirements of the country in which they are produced. Some third country products may be placed in free circulation in a Member State without being marketed there; they would not then benefit from the mutual acceptance presumption as such, but would still benefit from the principle of free movement and could only be refused entry onto the market of another Member State if refusal could be justified under EU law. Third country goods imported into, for example, the Netherlands but moving under suspensive arrangements to Germany, and being placed in free circulation there, would have to satisfy the relevant rules applicable in Germany, as first marketing would take place there.

4. THIRD COUNTRY GOODS AND PUBLIC PROCUREMENT

In pursuance of its obligations under Article III of the Agreement on Government Procurement²⁰ (the GPA) no less favourable treatment is offered to the products, services and suppliers offering products, services and supplies from other Parties to the GPA than that afforded to domestic products, services and suppliers; and than that accorded to products, services and suppliers of any other Party. Moreover, EU entities may not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership. Nor may EU entities discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the GPA. These obligations in the plurilateral context are reflected in Article 5 of Directive 2004/18 on public procurement²¹ and in Article 12 of Directive 2004/17 on utilities procurement.²²

Where no multilateral or bilateral agreement for comparable or effective access exists, Article 58(2) of Directive 2004/17 permits contracting entities to reject tender where the products involved are more than 50% of non-EU origin.²³ Subject to this provision, where two or more tenders are equivalent in the light of the contract award criteria, preference is to be given to those tenders which

²⁰ OJ 1994 L 336/273.

²¹ OJ 2004 L 134/14 (as amended).

²² OJ 2004 L 134/1 (as amended). A number of agreements concluded by the EU also have implications for procurement, such as those with Chile, CARIFORUM, Korea, Mexico, Switzerland, and Annex XVI (as amended) to the EEA Agreement also embraces procurement provisions.

²³ Software is treated as a product.

may not be rejected, i.e., those where the products involved are more than 50% of EU origin, and those tenders from countries covered by access arrangements. The prices of those tenders are considered equivalent for these purposes if the price difference does not exceed 3%.²⁴ For these purposes too, third country products are treated (albeit to a limited extent) in a disadvantageous manner.

Not infrequently politicians or activists seek to express their disapproval of practices in third countries, or to encourage the production of goods under better conditions. Procurement policies tend to be the vehicle they tend to use to give expression to these ideas, although they may also seek to have national measures adopted which would prevent the marketing on their territory of goods that do not satisfy the conditions the politicians or activists are seeking to promote. Those latter steps can sometimes give rise to calls for retaliation, and even to international trade disputes, although it may be thought that EU-level action or pressure might have a better chance of promoting changes in practices elsewhere than pious local expressions of self-importance.

Social and environmental conditions in particular are not infrequently invoked in the procurement context, and indeed are important issues for bargaining in the discussion of the Commission's proposals for a new procurement regime, just as they were important in the discussions leading to the adoption of the 2004 procurement package.²⁵ The Court of Justice has had the opportunity to respond to the use of fair trade requirements in Case C-368/10 *Commission v Netherlands*, often referred to as the *EKO & Max Havelaar* judgment.²⁶ This case involved the procurement of the supply, installation and maintenance of dispensing machines for hot drinks, and the supply of tea, coffee and other ingredients: questions of sustainable purchases and socially responsible business were high on the agenda. While the use of products bearing the EKO and/or the Max Havelaar label was not as such compulsory, such products would be favourably weighted in the assessment of the most economically advantageous tender. The EKO label was awarded to products which were made up of at least 95% of ingredients of organic agricultural production; the Max Havelaar label was intended to promote the marketing of fair trade products and certified that the products in respect of which it was granted were purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries. The grant of that label is based on compliance with four criteria: the price must cover all the costs; it must contain a premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relation-

²⁴ Directive 2004/17, Art. 58(3). However, preference will not be given where this would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

²⁵ See, generally, S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge: Cambridge University Press 2009); C. McCrudden, *Buying Social Justice* (Oxford: Oxford University Press 2007).

²⁶ ECJ, Case C-368/10 *Commission v Netherlands* [2012] ECR I- not yet published (10 May 2012).

ships with the producers. The Fairtrade Labelling Organization audits and certifies compliance with these requirements.

The Court found that by requiring, in the contract documents, that certain products to be supplied were to bear a specific eco-label, the contracting authority had acted in breach of Article 23(6) of Directive 2004/18. Thus contracting authorities are free to use the detailed specifications defined by that eco-label, but not to prescribe the label as such. The Court also set its face against the unbridled use of social policies to determine or heavily influence the outcome of procurement exercises: it found that there had to be a sufficient link between the award criteria and the subject-matter of the contract concerned. The criteria for the grant of the Max Havelaar label were found by the Court not to correspond to the definition of the concept of technical specification in paragraph 1(b) of Annex VI to Directive 2004/18, as that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer. However, the Court found that compliance with those criteria did fall under the concept of 'conditions for performance of contracts' within the meaning of Article 26 of the directive. That provision permits the conditions governing the performance of a contract in particular to refer to social considerations. Hence a requirement that the tea and coffee to be supplied had to come from small-scale producers in developing countries, subject to trading conditions favourable to them, fell within those considerations. While the lawfulness of such a requirement fell to be examined in the light of Article 26, the Commission referred to that provision only at a very late stage, so the Court ruled its submissions on that point inadmissible.

The Court expressly accepted that contracting authorities were authorized to choose award criteria based on considerations of a social nature, which could concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.

In order to assess the validity of the claim that there was an insufficient link between the award criterion at issue and the subject-matter of the contract, the Court looked at the criteria underlying the EKO and Max Havelaar. It had little difficulty in concluding that organic agriculture and fair trade amounted to social and environmental characteristics for the purposes of Article 53(1)(a) of Directive 2004/18. Organic production promotes environmental protection, through inter alia significant restrictions on the use of fertilizers and pesticides; as for fair trade, the criteria applied for the authorisation to use the Max Havelaar label promoted the interests of small-scale producers in developing countries while maintaining trading relations with them which took into account the actual need of those producers, and not only the dictates of the market.

Moreover, the contract concerned in particular the supply of coffee, tea and the other ingredients required for the manufacture of the drinks available in the dispensers. The award criterion was actually drafted so that it covered only the ingredients to be supplied in the framework of that contract; it had no any bearing on the general purchasing policy of the tenderers. The Court was able to conclude on that ground that the criteria related to products the supply of which constituted part of the subject-matter of that contract. Given that there was no

requirement that an award criterion relate to an intrinsic characteristic of a product, there was nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin. For these reasons the Court concluded that the award criterion at issue was indeed linked – as required by Article 53(1)(a) of Directive 2004/18 – to the subject-matter of the contract concerned.

The Court then turned to examine the requirement of the possession of specific labels in its award criterion, which would be rewarded in the assessment weighting, noting that Article 23(3)(b) of Directive 2004/18 provided that the specifications had to be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract. Article 23(6) of the directive authorised the contracting authorities to have recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product, but not to make an eco-label a technical specification, use of such a label being allowed only in order to create a presumption that the products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed. Labelitis as it were, was thus impermissible.

Finally, the Court turned to the criteria of sustainable purchasing and socially responsible business, noting that this was wholly unconnected to the factors on which a contracting authority could evaluate and assess the technical and professional abilities of the tenderers; it was indeed permissible to establish minimum capacity levels that tenderers had to satisfy in order for their tender to be considered, but those levels had to be fixed by reference to the factors listed in Article 48 of the directive, concerning technical and professional ability. Demanding explanations of how a tenderer satisfied the criteria of sustainable purchasing and socially responsible business and contributed to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production' did not fall within those factors.

From this judgment it is clear that the Court is unwilling to let social and environmental considerations be used as a cover for all sorts of preferential policies in relation to procurement. In respect of procurement not covered by the directives, it is submitted that such policies would merely have to comply with the normal case-law on the free movement of goods, workers, establishment, services, and capital and payments. However, the indications which the Court has given in the context of the procurement directives will form useful guidelines outside that field, when looking at the necessity, appropriateness, and proportionality of national measures which it is sought to justify on these or similar grounds. The writing is clearly on the wall for abuse, and in any event, given that the Court has a good track record in sniffing out indirect or disguised discrimination,²⁷ attempts to keep third-country good out on spurious grounds will most likely be treated with the ignominy they deserve.

²⁷ E.g., ECJ, Case 61/77 *Commission v Ireland* [1977] ECR 417 (disguised discrimination through apparently objective conditions for fishing vessels); ECJ, Case 207/83 *Commission v*

It is also worth recalling the problem with widespread use of social and environmental criteria, namely that they increase the opportunities for corruption, for favouring pet projects or hobbies of local or national politicians, or of entrenched administrations where the civil or local government service is too cosily involved with political interests. Thus the unstated, but certainly recognized menace should not be forgotten or consigned to the list of details with which politicians are too uninterested to be bored with.

5. CONCLUDING OBSERVATIONS

The above discussion demonstrates that for third-country goods, their status in the Internal Market, is not quite what it might seem on reading the TFEU. Yet the situation of third country goods within the EU is not really an unhappy one. Legitimate channels of trade find the procedures relatively straightforward; those involved in illegitimate trade find them rather less so,²⁸ and the parallel importer of goods from outside the EU is certainly not the darling of EU law, as the intellectual property cases demonstrate. In relation to attempts to promote the pursuit of social and environmental policies in third countries, the Court has been strict in what it will accept; this approach is to be commended as upholding the rule that the freedoms and the principles behind EU legislation must be interpreted widely, and exceptions must be construed strictly. It also strikes a blow against the temptation to indulge in mere hobbyism and gesture politics. These issues are still live issues in the debates on the revision of the EU's procurement regime that are presently underway. They have also featured in the renegotiation of the GPA.²⁹ There is no doubt that these and other issues will remain live for some time to come. Sufficient food for thought for further research!

United Kingdom [1985] ECR 1201 (apparently non-discriminatory rule found in reality a measure disadvantaging imports).

²⁸ As to counterfeit goods, see L.W. Gormley, *supra* note 3, 92-98. The European Parliament has in first reading proposed a considerable toughening of the Commission's proposals for new legislation in this field, see EP Document TA-2012-272, and the debate on Monday 2 July 2012.

²⁹ See, S. Arrowsmith and R.D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and reform* (Cambridge: Cambridge University Press 2011), especially the contributions by P. Trepte *et al.*, As to the revised GPA (not yet in force), see WTO Document GPA/113 of 2 April 2012.

EU TRADE POLICY AS THE CONTINUATION OF INTERNAL MARKET POLICY BY OTHER MEANS

Ferdi De Ville

Et c'était là ma première approche de l' Uruguay Round. Je l'appréhendais comme la continuation, à l' extérieur, du dessein d'ouverture que j'avais formulé, pour l'intérieur, tout comme une contre-attaque afin de mettre en lumière le protectionnisme de nombre de partenaires

(Jacques Delors)¹

We have used the theme of compliance (...) where necessary [to] drive our own side in a WTO compliant direction (...) on new potential cases such as chemicals

(Pascal Lamy)²

1. INTRODUCTION: IN SEARCH OF A DEFINITION OF EU TRADE POLICY³

'What is EU trade policy?' The website of the European Commission's Directorate-General Trade, notwithstanding it posits the question explicitly, is of little help in answering it.⁴ It states beside the point that 'trade policy is an exclusive power of the EU – so *only* the EU, and not individual member states, can legislate on trade agreements'. Some cynics might take this as proof that turf wars about trade competence are more important than substantial issues. In the next lines, the DG Trade does sum up some issues that are covered by EU trade policy: 'the scope of EU's exclusive powers covers not just trade in goods, but also: services; commercial aspects of intellectual property; foreign direct investment'. Let us, then, turn to the Treaty on the Functioning of the European Union (TFEU) for clarification. Article 206 TFEU on the Common Commercial Policy (the official term for trade policy) says that [through this policy] 'the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. Article 207(1) TFEU adds that '[...] The common commer-

¹ H. Paemen and A. Bensch, *Du GATT à l'OMC. La Communauté Européenne dans l'Uruguay Round* (Leuven: Leuven University Press 1995), at 10.

² P. Lamy, *Trade policy in the Prodi Commission 1999-2004: An assessment* (Brussels 19 November 2004).

³ I would like to thank the reviewing editors for their valuable comments on an earlier version of this essay.

⁴ See the website of the Directorate-General Trade, available at <<http://ec.europa.eu/trade/>>.

cial policy shall be conducted in the context of the principles and objectives of the Union's external action'. We thus get an impression of the issues trade policy covers, the means it uses and principles it is based upon. But none of this is particularly exhaustive or profound. Similarly, most textbooks and overview chapters on EU trade policy do not explicitly define what this policy implies. This might of course be deliberately so. The international trade agenda is of an evolutionary nature, and EU trade policy has followed (and itself influenced) this development.⁵ Still, I advocate that EU trade policy, often being coined the EU's most powerful (external) policy domain, merits a deeper reflection and better definition of what it aims, does and is to allow a more profound understanding.

In this essay, based on several years of research into and reflection about the policy domain, I propose to define EU trade policy, paraphrasing von Clausewitz' famous quote⁶ and following Delors' citation above, as 'the continuation of internal market policies by other means'. This should, on first sight, not be a particularly world-shattering proposal. It alludes, *first*, to what trade policy has been to a large extent in all times for all countries: the pursuit of the maximization of domestic economic gains through trade instruments based on an assessment of comparative advantages. *Second*, it may be argued, this definition is all the more pertinent in the case of the European Union. The EU's original exclusive competence for trade policy since the Treaty of Rome is primarily a necessary practical and legal side-effect of the ambition to establish a customs union among the six founding states, the EU's *raison d'être*. *Third*, I argue, it is *increasingly* pertinent for the European Union, as the relationship between the internal market and external trade policies is more and more recognised by European decision-makers themselves. For example, the latest strategic communication by the European Commission on trade presents the policy domain as 'a crucial element of the external dimension of the Europe 2020 strategy'.⁷ However, as will be explained in the remainder of this paper, this definition is meant to cover, and indeed uncover, a much more complex relationship between the internal market and external trade policies.

The link between the internal market and external trade (policies) of the EU in the above mentioned ways has recently been recognised by some authors. In the law literature, Cremona has defined 'external economic policy' as 'the external dimension of the core of the Single Market'.⁸ She concludes that the EU's external economic policy has moved 'from an essentially instrumentalist view [...] a view that is based on the needs of the internal market and which sees the external dimension as an expression of ultimately 'internal' objectives,

⁵ See M. Hilf, 'The ECJ's Opinion 1/94 on the WTO: No surprise, but Wise?' 6 *European Journal of International Law* 1995, at 6.

⁶ 'War is merely the continuation of policy by other means'. See C. von Clausewitz, *On War*, (Princeton: Princeton University Press 1976 [1832]) at chapter 1, section 24.

⁷ Communication from the European Commission COM(2010) 612 final of 9 November 2010 on Trade, Growth and World Affairs, at 2.

⁸ M. Cremona, 'The External Dimension of the Single Market: Building (on) the Foundations' in C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises* (Oregon: Hart Publishing 2002).

towards a growing sense of the Single Market as having distinctively external interests and objectives [... which are ...] increasingly perceived in terms of international competitiveness and opportunities in third country markets'.⁹ I will concur with this conclusion further onwards in this essay. Meunier and Nicolaïdis¹⁰ argue that the EU is both a formidable power *in* trade, securing market access conditions from other countries in exchange for access to its own single market (a *quid pro quo* of commercial concessions), as a power *through* trade, exporting its laws and standards, norms and ideas through manipulating access to its market. Bach and Newman have characterised, following Majone, the EU as a 'regulatory state' that is increasingly shaping global public policy, especially market rules (cf. *infra*).¹¹ Based on this and other previous work, Damro has argued that the best *role-concept* for the European Union is 'Market Power Europe' because it 'exercises its power through the externalization of economic and social market-related policies and regulatory measures [... via] intentional or unintentional behaviour'.¹²

I argue that these conceptualisations, while reasonable contributions to our understanding, remain too one-dimensional. The interaction between the EU's internal market policies and its trade policy is a two-way street. Indeed, paraphrasing von Clausewitz, and thus using the analogy with war, is illuminating for two reasons. First, as many examples through history show, while war may be conceptualised, and legitimised, as the (ultimate) continuation of domestic politics with other means, often the military and the defence department occupy a special place within a state's politico-administrative structure, relatively autonomous from and privileged above other parts of the administration. This is quite similar in the case of trade policy, especially within the European Union. The Directorate-General for Trade is generally acknowledged as one of the most powerful departments within the European Commission, in terms of autonomy (from other institutions and within the Commission), knowledge and resources. It is no coincidence, notwithstanding the relevant Treaty articles on external policy coherence (see *supra*), that while, for example, development cooperation has been (partly) subsumed under the European External Action Service (EEAS), the DG Trade has kept its complete autonomy. Second, when a country is in a state of war, this external challenge mostly dominates all other considerations of politics and economics (think about the 'war economy'). Something similar might – under certain circumstances – be the case with regard to trade policy. And indeed can be increasingly observed to a large extent within the European Union, especially since the adoption of the Lisbon Strategy in 2000, which formally put 'competitiveness' on top of the EU's socio-economic priorities or *social purpose*. As the dominant competitiveness discourse sees the EU in a permanent state of 'war for market shares', domestic

⁹ *Ibid.*, at 353.

¹⁰ S. Meunier and K. Nicolaïdis, 'The European Union as a Conflicted Trade Power', 13 *Journal of European Public Policy* 2006, at 906.

¹¹ D. Bach and A.L. Newman, 'The European Regulatory State and Global Public Policy: Micro-institutions, Macro-influence', 14 *Journal of European Public Policy*, at 827.

¹² C. Damro, 'Market Power Europe', 19 *Journal of European Public Policy* 2012, at 682.

politics and policies should be constrained by this state of affairs, thus goes the hegemonic reasoning. This can be illustrated by some characteristic quotes from the European Union's two most recent trade strategies, Global Europe (2006) and Trade, Growth and World Affairs (2010): 'As globalisation collapses distinctions between domestic and international policies, our domestic policies will often have a determining influence on our external competitiveness and vice versa';¹³ '[o]ur policy-making process should factor in global competitiveness challenges (...) we must [thus] also take account of the external dimension in making our regulatory and other standards';¹⁴ and '[i]n an ever more global economy (...) our own rulemaking must be increasingly sensitive to the international context and of the need to help our businesses remain competitive. Indeed, the link between external trade opening and internal market reforms is often a *two-way street*, given that in both cases we are aiming to reduce the cost of unnecessary regulatory barriers that hamper the flow of goods, services and investment'.¹⁵

In this essay I argue that we might indeed fruitfully conceptualise trade policy as 'the continuation of internal market policy by other means'. This should not be interpreted as that trade policy is fully put into-service of non-commercial internal market objectives. Just as the state of war may dominate domestic politics, trade policy challenges and objectives may effectively constrain and govern internal market policies. In the European Union, there is a continuous struggle about this interaction between internal and external (socio-)economic policy goals and actions, but this struggle is institutionally, materially and ideationally structured.

Finally, besides that EU trade policy is influenced by internal competences (as already recognised in the literature) and objectives, it also tends to build on the instruments that the EU is internally used to apply. In EU external trade policy, as has traditionally been the case in its internal economic policies, *negative integration* has prevailed above *positive integration*.¹⁶ Put differently, the rules that the EU has exported through its trade policy have been of a *market-making* rather than a *market-correcting* character. This is also reflected in the quote by Delors at the beginning of this essay, where he talks about his goal of the external continuation (through the Uruguay Round) of the scheme of internal *market opening* (via the Europe 1992 project). Of course, 'classic trade' policy was all about the elimination of tariffs and quota, trade barriers at-the-border. But also when EU trade policy moved beyond-the-border, when a new trade agenda appeared, it has focussed primarily on either removing or reducing trade-hampering domestic regulation or about installing rules that should (in theory) facilitate cross-border business (meanwhile protecting property rights). The first instance of positive integration within the international

¹³ Communication from the European Commission COM(2006) 567 final of 4 October 2006 on Global Europe: Competing in the world, at 2.

¹⁴ See *supra* note 12, at 9.

¹⁵ See *supra* note 6, at 7, [emphasis added].

¹⁶ The two authoritative references on the dominance of negative integration in internal European integration are Fritz W. Scharpf (who is critical for this pattern) and Giandomenico Majone (who is supportive).

trading system, the Uruguay Round's trade-related intellectual property rights (TRIPS) agreement, obliging governments to develop TRIPS protection rules and institutions, is market-making, not market-correcting.

I will illustrate the relevance of defining EU trade policy as the continuation of internal market policies through other means in this complex, dialectical way below with some recent examples. I will thereby focus on the three main, mutually reinforcing, mechanisms that govern this interaction: the constraint of the possibility of externalising objectives by the internal division of competences; the dominance of the internal integrationist method of 'negative integration' externally; and the increasing overriding of non-commercial objectives by purely commercial goals.

2. THE IMPACT OF INTERNAL DIVISION OF COMPETENCES

A first mechanism that affects the interaction between the internal market and external trade policy is that the internal division of competences constrains the ability of the EU to export its preferences to the rest of the world. It is well known that the evolution of the EU's external trade competences has followed (with a time lag) the extension of the EU's internal scope, namely from a customs union to a single market. Whereas until the late 1970s, EU trade policy was about elimination and reduction of tariffs and quota (at-the-border-barriers), since the Tokyo Round (1973-1979) and especially the Uruguay Round (1986-1994) of multilateral trade negotiations it covers a whole spectrum of other issues, such as services, intellectual property rights, government procurement or food safety and technical standards. This extension of the multilateral agenda coincided with the development of the Single Market. Still, the European Court of Justice ruled in its (in)famous Opinion 1/94 that the EU was, at that time, only exclusively competent for the 'old' external trade issue of trade in goods, but not for the new trade topics (services and intellectual property rights). It explicitly linked the external competences to internal practices: 'only when internal legislation has provided for common rules in the sense of a complete harmonisation does an implied exclusive external competence of the Community have to be recognised in order to avoid such common rules being affected if the Member States retained their individual freedom to negotiate with non-member countries'.¹⁷

This division of competences within the EU has repercussion for the objectives the EU can pursue externally. For example, while the EU has been hailed as an effective exporter of environmental, food safety and technical (product) regulations, it is much less effective in promoting other distinctive preferences, such as in the field of social protection. This can be ascribed to the fact that while product standards (with environmental, health or consumer protection purposes) are to a large extent harmonised within the EU, the social protection system is still firmly a competence of the member states. Without a harmonised social protection system, it is difficult to promote such norms externally by way

¹⁷ ECJ, Opinion 1/94, ECR I-117, at 121.

of manipulating access to the EU's single market. For proponents of a more ambitious EU external trade policy, this argument has prescriptive policy implications, as I will further elaborate in the conclusions.

3. THE DOMINANCE OF COMMERCIAL OBJECTIVES

The EU's track record in exporting its environmental protection model is often hailed. Since Vogel's influential 1995 book *Trading Up*¹⁸ the EU has been recognised as an environmental regulatory leader. In different fields such as chemicals or waste management, it has been a first-mover in adopting stringent regulation that has subsequently been emulated by third countries, both through leading by example, as, in contrast to social policy, via its ability to use access to its single market to induce third countries to upgrade their environmental product norms to European standards.

However, I would argue that the zenith of the EU's green leadership¹⁹ is already behind us. The EU's self-confidence that it can 'afford' to be a green leader is gradually waning as competitiveness concerns increasingly dominate the Union's agenda. The objectives of 'competitiveness' and 'protection' (be it social or environmental) can be reconciled in different ways and the choice is based on the discursively mediated dynamic interplay of different factors. A first possibility is to neglect global competition in adopting regulation. A second is to accommodate regulation to the 'inevitable imperative' of global competition. A third alternative is to protect regulatory choices by restricting global competition, through applying these measures also to imported goods and services. I argue that the outcome of this trade-off is dependent on the domestic relative priority that is given to competitiveness *vis-à-vis* protection, or more broadly framed: commercial vs. non-commercial objectives. This, in turn, is influenced by the self-perception of the global leverage the EU has in exporting its regulatory (inter alia social and environmental) model, which is function of current global market shares and expectations about the future. The EU has moved since the turn of the millennium from the first to the second stance,²⁰ *inter alia*, because of continuing resistance from EU trade policy-makers against the third option, in the form of so-called border equalisation mechanisms (e.g., carbon border tax).

Two examples in the environmental realm that illustrate this are REACH and the EU's climate change policy, which are among the two most important EU dossiers of the 2000s in general. The REACH regulation is still revolutionary, but has been significantly diluted throughout the decision-making process. The two most important arguments used to advocate (and eventually justify) the watering-down of the REACH text were: competitiveness and WTO-compati-

¹⁸ D. Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Harvard: Harvard University Press 1995).

¹⁹ J. Vogler, 'The European Contribution to Global Environmental Governance', 81 *International Affairs* 2005, at 835.

²⁰ R.E. Löfstedt, 'The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis', 28 *The Journal of Risk and Uncertainty* 2004, at 237.

bility, thus two trade-related motives. Something similar could be observed with regard to the EU's climate change policies.²¹ While the EU's unilateral climate change and energy package was still welcomed with much respect, there have been (increasing) criticisms about the many exemptions for sectors and the free allocation of emission rights that led to important windfall profits for industry. Also, the EU has not been able to move its ambition towards a 30% CO2 reduction in 2020. Again, the most important reason for the standstill in EU climate leadership has been competitiveness, while the EU has been unwilling to use trade instruments to compel third countries to also adopt ambitious climate commitments.

Thus, we might conclude, throughout the 2000s, the trend of the EU's environmental policy has been to moderate its ambition in order not to be inconsistent with trade objectives (competitiveness) and rules (WTO-compatibility).

4. THE PREVALENCE OF NEGATIVE INTEGRATION

A final feature I want to raise – inevitably briefly – is the external continuation of the prevalence of 'negative integration' that has been generally recognised for the establishment of the internal market. As has been the case within the European Union, also externally the EU is predominantly pursuing negative integration, exporting 'market-making' rules, instead of positive integration, promoting 'market-correcting' rules. Many examples could be given that prop up this argument. A first is the EU's strategy in the run-up to and during the Doha Round. After the Uruguay Round, the EU was quickly in favour of launching a new multilateral trade round that would, *inter alia*, elaborate new rules in the areas of investment, competition, government procurement and trade facilitation (the 'Singapore issues', all market-making issues) as well as on trade-related environmental and social issues (market-correcting issues). However, at the Singapore Ministerial Conference in 1996, while working groups for the Singapore issues as well as on trade-and-environment were created, the social issue was effectively removed from the WTO's table. The International Labour Organization was recognised as the competent international organisation to deal with core labour standards.

Later, in 2001, the four Singapore issues were mentioned (under their own, separate headings) in the Work Programme of the Doha Ministerial Declaration. But the trade-and-environment issue was narrowed down to: clarifying the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements (MEA), cooperation between MEA Secretariats and the WTO and, most significantly, the reduction or elimination of tariff and non-tariff barriers to environmental goods and services. Thus, also the trade-and-environment issue was redefined in a 'negative integration' way. In the end, also three of the four Singapore issues (trade facilitation being the exception) were removed from the Doha agenda in 2003. But it is noteworthy

²¹ F. De Ville, 'European Union Regulatory Politics in the Shadow of the WTO: WTO Rules as Frame of References and Rhetorical device', 19 *Journal of European Public Policy* 2012, at 700.

that the EU, the erstwhile staunchest supporter of new rules on these trade-and-issues, was first willing to drop the market-correcting issues (first labour and then environment) before the market-making ones (the Singapore issues).

Another example is the contrast between the EU's spirited anti-dumping and anti-subsidies policies and weak to non-existent response to the lack of climate change and social protection policies in third states. A series of recent anti-dumping cases against China (most importantly on wireless modems and solar panels) have received much attention. In both types, and for anti-subsidy measures in particular, the rationale is to restore a 'level-playing field' so that artificial market-distortions are elevated and comparative advantages can again play to the full. However, also the lack of environmental and social policies (to address market failures, or negative externalities) could be considered as subsidies, as unfair trading practices that unlevel the playing field. However, the EU is much less willing to take a strong stance against such practices in, for example, China. Instead of levying a tax on imports from countries that do not assume their responsibilities in the fight against climate change, the Union compensates EU sectors that are for that reason negatively affected competitively by handing out free emission permits.

5. DISCUSSION AND NORMATIVE IMPLICATIONS

This essay has proposed to define EU trade policy as 'the continuation of internal market policies by other means'. This conceptualisation is meaningful both as a *positive* and *normative* perspective for the policy domain. Analytically, it has been (admittedly, briefly) shown in this essay that EU trade policy is very much influenced by internal market competences, objectives and instruments. The lack of internal social competences and policies is to a significant extent an explanation for the EU's meagre performance in its external promotion of social protection. The EU's track record is better in environmental policies, again because of the correlation between internal and external affairs. But in the last decade, the EU has also in its internal environmental policy been increasingly sensitive to external constraints and competitiveness effects, as illustrated by the quote of former Trade Commissioner Lamy at the beginning of this paper. In general, to its own image, the EU much more supports the external promotion of 'market-making' instead of 'market-correcting' rules.

Normatively, it can be deplored that 'competitiveness' has become so dominant in the internal market-external trade relationship. This may be partly because trade policy is insufficiently seen in contemporary political practice as being an external instrument of internal market policies. With this I mean two things. First, the trade policy-system has managed to guard its relative autonomy in the European Union's policy-making structure. It owes this to the fact that it was the first exclusive supranational policy-domain, and today it only shares this stage with competition policy. Hierarchically, it is as such privileged both within the European Commission as in the multi-level governance system that the EU itself is. Also, trade policy-makers, when negotiating trade agree-

ments playing two- (or in the EU even three-) level games,²² are able to exercise first-mover advantages.²³ It can indeed be argued that by concluding in the Uruguay Round the Technical Barriers to Trade and Sanitary and Phytosanitary Measures Agreements, EU trade negotiators have circumscribed the manoeuvring room for their regulatory policy-making colleagues. When officials in DG SANCO want to propose a change to EU legislation on food additives, they have to take the substantive and procedural requirements of the SPS agreement into account. While the extent to which this is an obligation can be discussed,²⁴ it has become an administrative obligation for Commission officials to check the WTO compatibility of new regulatory proposals against rules negotiated by their DG Trade colleagues.

Second, while the WTO disciplines on internal market regulation have thus been institutionalised, maybe more importantly, they have been to a large extent *internalised* by regulatory policy-makers in the EU. More than the detailed obligations from the TBT and SPS agreements, the idea that, *inter alia*, environmental, health and consumer protection standards should be the least restrictive possible has nestled in the minds of politicians and officials. This could be observed in the decision-making process on REACH, but also when the EU was setting up its ambitious climate change and energy framework. When the EU contemplated its climate change and energy package, and more specifically when reviewing its Emissions Trading Scheme I and preparing its successor, a difficult issue was how to deal with carbon leakage (undermining the primary aim of the climate change programme) and competitiveness losses (undermining the economic objectives of the EU). Two options stood out: a) applying a border equalisation mechanism (better known as a 'carbon border tax') and b) excluding competition-sensitive sectors from the scheme or handing them emission allowances for free. The European Union eventually decided to go for the second option, under pressure from trade policy-makers, third countries and the involved industries themselves. The threat of a trade war following an EU unilateral carbon border tax was an important argument, and determinant of this outcome.²⁵ Two recent EU decisions, however, go against this pattern: the EU's trade in seal products ban and the inclusion of aviation in the Emissions Trading Scheme. While the first has already led to a case that is currently pending before the WTO's dispute settlement body, the

²² R.D. Putnam 'Diplomacy and Domestic Politics: The Logic of Two-level Games', 42 *International Organization* 1988, at 427.

²³ E. Neumayer 'The WTO and the Environment: Its Past Record Is Better than Critics Believe, but the Future Outlook Is Bleak', 4 *Global Environmental Politics* 2004, at 1; S. Oberthür and T. Gehring, 'Institutional Interaction in Global Environmental Governance: The Case of the Cartagena Protocol and the World Trade Organization', 6 *Global Environmental Politics* 2006, at 1.

²⁴ See *supra* note 20.

²⁵ It is indeed striking, in the light of the analysis above, that when it is proposed that a country (or, *in casu*, the EU) protects its domestic non-commercial preferences through social or environmental tariffs or barriers, this is immediately condemned as protectionist and the threat of retaliation and a trade war is used. Thus, simultaneously, the war analogy is used for commercial competition as such, as for the consequences should a country decide to protect its domestic preferences against global competition.

second has led to a very fierce conflict between the EU and major trading partners such as the US, China, India and Russia.

6. CONCLUSIONS AND RECOMMENDATIONS

Now let us look forward, and think about what a trade policy would imply that would really be the continuation of internal market policies by other means, without constraints of division of competences, the prevalence of commercial objectives and the dominance of negative integration. In other words, that would externally defend and promote choices made within the European community. Let us again take the domains discussed above as examples.

First, we argued that the lack of success of the EU in exporting its social standards and model in general is, *inter alia*, due to the lack of harmonised rules and arrangements at the supranational level. However, calls for harmonisation in fiscal and social matters within the EU (or the euro zone, as we might be heading towards a two-speed Europe) have received a new boost with the crisis, as for example the lack of minimum wages in Germany has been identified as a contributing factor in the euro crisis. A concrete idea could be to relatively harmonise minimum wages (and unemployment benefits) within the EU. For example, at a level of 50% of the median wage. This would then give the EU a yardstick to assess the social protection policies of third countries. Countries without a minimum wage (if necessary at a lower level of, for example, 40% of the median wage), could then be treated less preferentially *vis-à-vis* countries with such a measure. The EU would be able to escape accusations of protectionism, as a relative standard for minimum wages does not eliminate comparative (price) advantages of third countries, but asks them to share the growth and income so generated also with low wage workers. It would not stop international trade between high and low wage countries, and would not eradicate delocalisation completely, but it would at least provide a minimum protection for low-skilled workers and would make globalisation less threatening for them.

Also in environmental policy, the EU could be more voluntaristic, by deciding on ambitious climate change, and other environmental, objectives, and then differentiating its trade policies in the light of the environmental policies of third states. For example, the EU could apply its emissions trading scheme also to imported products. It is possible to adopt an approach that dispels third countries' fears of hidden protectionism. For example, when calculating the carbon emission costs for imported products, the EU could use the average emissions for the production within the EU, or even use the best-practice as a standard. Also, and this goes for social as well as for environmental border equalisation measures, it could decide to dedicate the earnings from such measures to a fund that helps third (developing) countries to build up social security and climate change mitigation systems.

Coming back to the issue of this volume, we would thus advocate a more assertive EU stance in the nexus between trade and non-commercial interests. There is nothing wrong or egoistic with putting trade policy at the service of

non-commercial, domestic preferences, as long as this is done in a non-discriminatory way. This essay has identified a crucial precondition for such a shift in EU trade policy, namely the harmonisation of policies within the EU that the Union would like to promote through its trade policy, such as social standards. If the EU would succeed – and the current evolution in the crisis era goes in the opposite direction – of balancing commercial (negative integration) and non-commercial (positive integration) interests better internally and extending them consistently externally, it could become a true global role model.

