Sustainable development and FDI: Balancing Home, Host state and MNEs responsibilities

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Abstract

The European Union (EU) has a long legacy as a proponent of human rights. Over the years its actions in this area have only been elaborated and the EU has taken numerous measures to address human rights issues, internally as well as externally. Starting from negative and positive conditionality, its actions were initially mainly 'state-centred', in line with international law. However, the wide-ranging challenges of globalization, such as increased FDI in developing countries, have broadened the EU's focus to other more diverse areas and actors. One interesting example hereof is the case of multinational enterprises (MNEs) and their responsibilities. Within the broader framework of sustainable development, the EU has attempted to strengthen corporate social responsibility (CSR), first mainly through soft law and slowly through hard law, not in the least by including sustainable development chapters in new agreements and through specific investment-related provisions. But also by enhancing its responsibilities as a home state, e.g. through the new Transparency and Accounting Directive. Such issues are particularly sensitive for developing countries, which might use, in particular, labour standards and environmental norms as means of exchange in the competition for investment. The traditional developing countries, namely the African, Caribbean and Pacific group of states (ACP), are a case in point. Hence, this analysis is mainly concentrated on the relations between the EU and the ACP countries.

It is established that the EU seems to have made progress in this area, but some legal hurdles and lack of political will remain. In this paper, the focus will be on the legal issues and conclusions are drawn if indeed a balance has been found between the responsibilities and obligations regarding sustainable development, in particular in a trade relationship, of the host and home state, and especially the MNEs.

1. Introduction

The EU has evolved from an actor concentrated on internal European integration to a full blown international actor, not in the least in the traditional areas such as trade and as a partner in development cooperation. Globalization has confronted the EU with new challenges and required it to adapt to them and address them. One of these is the increased level of trade all over the world, no longer limited to goods or even services, but characterized by a growing demand and promotion of foreign direct investments (FDI[1]). This is also clearly reflected in the Lisbon Treaty (Article 207 TFEU). Globalization and, in particular, the increase of FDI, especially in developing countries, has not only contributed to raise awareness on human rights issues, but has also increased possible infringements and broadened the scope of attention beyond the traditional human rights. The risk for violations of labour standards and environmental norms is higher in an arena of increased competitive pressure.[2]

[1] Leaving aside the debate on the definition and scope of FDI as included in Article 207 TFEU of the Lisbon Treaty, Directive 361/88 (*OJ* 1988 L 178/5) is the most commonly used point of reference, focusing on the establishment or maintenance of lasting economic links.

[2] Communication from the Commission and the European Parliament, The European Union's role in promoting human rights and democratization in third countries, COM(2001)252, 08.05.2001; European Parliament resolution of 25 November 2010 on corporate social responsibility in international trade agreements, P7_TA(2010)0466, *OJ* 2012 C 99 E/101; K. MANZO, "Africa in the rise of rights-based development", *Geoforum* 34 (2003), (437) 441-442 en 451 (456); J. MACKIE and J. ZINKE, "When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure", *ECDPM* Discussion Paper No. 64A, 2005, 1 (16); J.-M. SIROEN, Final Report: "The Use, Scope and Effectiveness of labour

This is reflected through the enhanced attention for sustainable development.[3] Although there is a growing international activity[4] on sustainable development thinking, there is still no international consensus on the precise content, meaning the specific legal commitments this entails. However, it is clear that labour standards and environmental norms (second and third generation human rights[5]) can be brought into this wider sustainable development framework, entailing the notion of integration of social, economic and environmental issues in the development process.[6] The above-mentioned challenges appear to be of even greater importance in the realm of the EU's relation with developing countries.[7] It is in these countries that a legal and institutional framework is often lacking or not sufficient, but it is also in these countries that the fight for investments will be most fierce.[8] Hence, in absence of a more common approach to the matter, human rights risk being used as means of exchange to attract foreign investors. At the same time, an answer needs to be found to address claims of protectionism under the umbrella of human rights violations. Within this framework lies a huge

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and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements", 18.09.2008, 33-34 (127).

[3] For an overview of the development of sustainable development, see: V. BARRAL, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm", *European Journal of International Law* Vol. 23 no. 2, 2012, 379-383; H. GROSSE RUSE-KHAN, "A Real Partnership for Development? Sustainable Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond", *Journal of International Economic Law* 13 (1), 144-150 (180). The most commonly used definition of sustainable development is the definition included in the Brundtland report (World Commission on Environment and Development (WCED), *Our common future*, Oxford, Oxford University Press, 1987, 43): "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of needs, in particular needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technologies and social organizations on the environment's ability to meet present and future needs." It implies environmental, social and economic well-being for today and tomorrow (http://www.iisd.org/sd).

[4] One may think of the Rio Conference on Environment and Development, the Rio+10 Summit and the Rio +20 Summit. H. GROSSE RUSE-KHAN, "A Real Partnership for Development? Sustainable Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond", *Journal of International Economic Law* 13 (1), 144-150 (180).

[5] This paper does not go into detail on the debate of the division between "generations" of human rights. It follows the most common understanding that "first generation human rights" are in general civil or political by nature, "second generation human rights" (socio-economic rights) relate to some social rights, such as the right to equal working conditions, the right to social security, the right to unemployment benefits, etc. and "third generation human rights" (collective-developmental) include, amongst others, environmental rights, rights to intergenerational equity and sustainability, the right to self-determination, the right to natural resources and collective rights.

[6] L. COTULA, *Foreign investment, law and sustainable development. A handbook on agriculture and extractive industries*, Natural Resource Issues No. 26, IIED, London, 69 (159); F. de ANDRADE CORREA, "The integration of sustainable development in trade agreements of the European Union" in D. KLEIMANN (ed.), *EU Preferential Trade Agreements: Commerce, Foreign Policy and Development Aspects*, European University Institute, Italy, 2013, (141) 142-143 (152).

[7] For developing countries FDI may be a major factor for economic growth, representing a great part of the ODA, and also plays a major role to have access to update technology often necessary for the exploitation of their resources. However, an automatic correlation between FDI, growth and the improvement of labour conditions may not be assumed. O. DE SCHUTTER, "The Accountability of Multinationals for Human Rights Violations in European Law", *Center for Human Rights and Global Justice Working Paper*, Number 1, 2004, 10-11 (74); M. WESCHKA, "Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad", *Max-Planck-Insitut für ausländisches öffentliches Recht und Völkerrecht* (http://www.zaoerv.be) 66, 2006, (625) 626-628 (661); A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edward Elgar Publishing, 2011, 244.

[8] A. GATTO, *op.cit.* footnote 7, 4 and 14-15 and 24-25 and 64 and 94-97. The Ramatex case exemplifies the difficult interrelationship between liberal trade and globalisation and human rights, especially environmental and labour law issues (http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf)

responsibility for the home state, the host state, but also for the multinational enterprises (MNEs[9]) concerned.

The EU has always been a frontrunner in the area of human rights protection. This can be seen in its early pragmatic approach towards human rights violations, in absence of a sound legal basis, and the latter inclusion of essential elements and suspension clauses in its agreements with third countries as well as positive measures to ensure the respect for human rights. The same devotion can be seen in the area of sustainable development. Its inclusion in a firm legal framework at international level has appeared difficult, but this has not stopped the EU to commit and strive to achieve this internally and in its relations with third countries. Moreover, the remaining "state-centred" approach in international law might have made the road bumpier, but eventually is not a stumble block to also address the responsibilities of the MNEs. Being confronted with a growing level of FDI in developing countries and possible infringements of these 'newer' generation human rights, it has however become clear that the traditional framework and mechanism are not fit for this purpose. Hence, the EU has not only enhanced its existing instruments, but developed new means with attention for its own responsibility as a home state, those of the host state and those of the MNEs. It has not only integrated sustainable development as an overall objective in its new agreements with third countries, but included full sustainable development chapters entailing commitments in the area of labour standards and environmental norms and specific provisions on the behaviour of foreign investors. Continuing on the same path, the Union has also developed internal rules to underscore its commitment towards sustainable development and has endeavoured to enhance corporate social responsibility (CSR[10]) through soft law, supporting codes of conduct, and hard law, e.g. adopting transparency rules for the extractive industry.

It is important that, in addressing these new challenges the overall picture is taken into consideration, including the legal responsibilities of all parties involved. In doing so the boundaries of the existing legal framework might be challenged, but to stand still is to fall back. This paper aims to

[9] In the context of this paper when referring to MNEs and their behaviour relating to human rights, in particular labour and environmental norms, this implies Multinational Enterprises domiciled in the Member States of the EU and operating in developing countries by extending their activities in those countries or by the creation of subsidiaries.

[10] "CSR is essentially a concept whereby companies decide *voluntarily* to contribute to a better society and a cleaner environment. At a time when the European Union endeavors to identify its common values by adopting a Charter of Fundamental Rights, an increasing number of European companies recognize their social responsibility more and more clearly and consider it as part of their identity. This responsibility is expressed towards employees and more generally towards all the stakeholders affected by business and which in turn can influence its success": COM(2001)366. Such a general concept was maintained in later policy documents: "CSR is an *opportunity* for enterprises to combine economic, social and environmental objectives. Greater commitment to CSR on the part of European enterprises will enhance Europe's capacity for sustainable development": COM(2009)400, 24.07.2009. It is suggested to adopt following new definition of CRS: "The responsibility of enterprises for their impacts on society. CSR entails that companies respect *legal commitments*, but also go further than their legal obligations towards society. Taking into account the international recognized principles and guidelines, CRS at least covers: human rights, labour and employment practices, environmental issues and combating bribery and corruption": COM(2011)681, 25.10.2011. The EP had pointed out that CSR has never been clearly defined and now fully endorses this definition (Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013, 28.01.2013). For an overview on the EU approach and development of CSR, first mainly domestically later in all its dimensions, see: A. VOICULESCU, "From CSR *for* Trade to CSR *trough* Trade: The Chronicle of European Link Foretold?", *European Foreign Affairs Review* 14, 2009, 743-755 (762).

address the main legal issues and the role they have played in finding a balance between the responsibilities regarding sustainable development of the different actors in the area of trade, in particular FDI. This should allow formulating some thoughts on the remaining legal hurdles and possible suggestions for future action.

2. A committed EU: general framework

The Union is now a fully-fledged international actor, trade and development being one of the first areas of action. It has elaborated and strengthened this role continuously, as it appears from the Court's case law and as is also reflected in the Lisbon treaty (resp. Article 207 TFEU and Article 208 TFEU). Within the EU's external action framework, the commitment towards the respect for human rights, democracy and the rule of law has obtained a firm footing. It has evolved from a case law developed concept of general principles[11] towards a consolidation in the treaties as the very foundations of the EU (*ex* Article 6 TEU, current Article 2 TEU[12]) towards a transversal objective in the EU's relations with third countries[13] and continuously reinforced in the Court's case law.[14] The recognition of human rights and the democratic principles as the legal and political foundations of the Union, implies that they form an integral part of the EU's external policy.[15] Hence, the EU strives to mainstream human rights into its overall external action and promotes and attempts to export these values at the international scene and in its relations with third countries.[16] Thus, although, contrary to development cooperation (*ex* Article 177 TEC), the respect for human rights was not included as an objective in the trade area, it was commonly accepted that the Union was entitled to take measures also in the trade field with that objective in mind.[17] Meanwhile, the Lisbon treaty has not only affirmed

[11] Amongst others: ECJ, *Internationale Handelsgesellschaft*, Case 11/70, ECR [1970] 1125, par. 4; Opinion of the Court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECR [1996] 1759, paragraph 33. P. EECKHOUT, *EU External Relations* Law, Oxford, Oxford University Press, 2011, 95; I. GOVAERE, "The Importance of International Developments in the case-law of the European Courts of Justice: Kadi and the autonomy of the EC legal order", *Research papers in law* 1/2009, 10 (17); I. BOSSE-PLATIERE, *L'article 3 du traité UE: Recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne*, Brussels, Bruylant, 2009, 425.

[12] The current provision states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society which pluralism, non-discrimination, tolerance, solidarity and equality between women and men prevail." Other relevant provisions are e.g. Article 7 and 49 TEU.

[13] Council Conclusions on Human Rights and Democratization in third countries, December 2009; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 173-174.

[14] ECJ, *Kadi*, Case C-402/05 and C-415/05, ECR [2008] I-6351, par. 304. For an overview, see: A. ARNULL, "Left To Its Own Devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union?" in DASHWOOD A. en HILLION C. (eds.), *The General Law of E.C. External Relations*, London, Sweet&Maxwell, 2000, 61-64 (79); N. LAVRANOS, "Protecting European Law from International Law", *European Foreign Affairs Review* 2010, 15, (265) 268-(282).

[15] P.J. KUYPER, "Trade Sanctions, Security and Human Rights and Commercial Policy" in M. MARESCEAU (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, Dordrecht, Martinus Nijhoff Publishers, 1993, 405.

[16] European Consensus, *OJ* C 46/1 ; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 423.

[17] Opinion of the Court of 4 October 1979, International Agreement on Natural Rubber, Opinion 1/78, ECR [1978] 2871; ECJ, *Commission v. Council* (GSP), Case 45/86, ECR [1987] 1493. The dynamic interpretation concerning the EU's trade competence and clear link with development allowed the EU to take measures to promote these principles also in the trade area. A. LUKASCHEK en B. WEIDEL, "Exclusive External Competence of the European Community" in S. GRILLER en B. WEIDEL (eds.), *External Economic Relations and Foreign Policy in the European Union*, Vienna, Springer, 2002, 132-

this approach, but also enhanced it by including it as an overreaching principle guiding the EU's external action and inscribing it as an obligation to do so rather than a possibility (Article 3, paragraph 5 and 21 TEU).[18] All EU external actions, including common commercial policy, need to integrate these broader foreign policy goals. This implies that the agreements with third countries need to integrate this human rights objective.

The changing world has forced us also to look beyond the traditional human rights, and one needs to take in the broader concept of sustainable development. Although the objective of sustainable development has been inscribed into the treaties early on (*ex* Article 2 TEU and Article 6 TEC, current Article 11 TEU), the Union has further endorsed this in subsequent summits and communications establishing and enhancing its external dimension from the Barcelona Summit onwards.[19] Similar, following the Lisbon Treaty its scope has been broadened and the commitments strengthened (current Article 3 and 21 TEU).[20] Although defined in the Brundtland report (*supra* footnote 3), it is not abundantly clear what this precisely means in terms of legal principles. The clear interface between globalization and social development enhanced the support for social standards in economic activities as a specific translation of sustainable development, through the promotion of labour norms and support for the role of the ILO.[21] The same holds for environmental standards, following the increased

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133; K. LENAERTS en P. VAN NUFFEL, *Europees recht in hoofdlijnen*, Antwerpen, Maklu, 2008, 209; I. GOVAERE and A. VAN BOSSUYT, "Le commerce à visage de plus en plus humain? Les droits de l'homme dans la politique commercial commune in M. CANDELA SORIANO (ed.), *Les droits de l'homme dans les politiques de l'Union européenne*, Larcier, 2006, (225) 227-228 and 237-238 (254) ; K. DE GUCHT, "Trade policy and human rights", S&D Conference 'Can trade policy improve human rights', Brussels, 13.10.2010.

[18] Earlier case law of the Court of Justice on development cooperation not only confirmed the respect for human rights as an objective of development cooperation, but even interpreted as an obligation. Advocate General La Pergola took it even further and made the legality of development cooperation depended upon the integration of human rights clauses. ECJ, *Portugal v. Council*, Case C-268/94, ECR [1996] 6177, par. 14-29. Opinion of Mr Advocate General La Pergola of 23 May 1996, *Portugal v. Council*, Case C-268/94, ECR [1996] I-6177, par. 29; P. EECKHOUT, *op. cit.* footnote 11, 133-135. Other relevant provisions proving the EU's strengthened commitment towards human rights are e.g. articles 6 and 2 TEU, artt. 3 and 21 TEU and the adoption of a legally binding Charter of fundamental rights of the European Union.

[19] Communication from the Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM(2001)264, 15.05.2001; Göteborg European Council, Presidency Conclusions, 15/16.07.2001; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and Committee of the Regions, Towards a global partnership for sustainable development, COM(2002)82, 13.02.2002; Barcelona European Council, Presidency Conclusions, 16/16.03.2002; European Commission, Making globalization work for everyone. The European Union and world trade, December 2002; Communication from the Commission to the European Parliament, The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations, COM(2005)37, 09.02.2005; Communication from the Commission to the Council and the European Parliament, On the review of the Sustainable Development Strategy. A platform for Action, COM(2005)658, 13.12.2005; Review of the Sustainable Development Strategy – Renewed Strategy, 10917/06, 26.06.2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and Committee of the Regions, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM(2009)400, 24.07.2009; 2009 Review of the Sustainable Development Strategy – Presidency Report, 16818/2009.

[20] Article 21 TEU entails that the EU's external policies must pursue the objective of "fostering sustainable economic, social and environmental development of developing countries …". The sustainable development aspect can also be found in several other specific provisions, such as *ex* Article 136 TEC (Article 151 TFEU), *ex* Article 151 TEC (Article 167 TFEU), *ex* Article 174 VEG (Article 191 TFEU). Also the inclusion in the Charter of fundamental rights of the European Union of solidarity rights and environmental protection (Article 27-37) further strengthens this sustainable development objective.

[21] Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy, *OJ* 1999 C 98/270, points 42-47; COM(2001)416; J.-M. SIROEN, *op.cit.* footnote 2, 21-23 (127); J. ORBIE and L. TORTELL, "The New GSP+ Beneficiaries: Ticking the Box of Truly Consistent with ILO Findings?", *European Foreign Affairs Review* 14, 2009, (663) 665-668 (681). For an overview on the link between labour standards and trade within the EU, see: B. BURGOON, "The Distinct Politics of the European Union's 'Fair Trade' Linkage to Labour Standards", *European Foreign Affairs Review* 14,

concern for environmental consequences resulting from globalization. This resulted in the mainstreaming of environmental protection as another component of sustainable development.[22] These issues are especially cumbersome in developing countries, taking into account that environmental degradation affects those vulnerable groups the most, as is also clearly reflected in the subsequent Cotonou Conventions (Article 32 Cotonou and Article 32bis Cotonouter).[23] Thus, taking into account sustainable development relates closely to 'newer' rights, it can be assumed that the sustainable development concept manages these second and third generation human rights, such as labour standards and environmental norms, well.[24] This is also confirmed in recital 6 of the preamble of the Cotonou Agreement and Article 9. Moreover, the newfound attention for the responsibilities of MNEs, in particular in their commercial actions abroad, through CSR, fits in perfectly with this sustainable development framework.

The European Parliament (EP) fully endorses such an approach and reiterated that trade is "at the service" of (sustainable) development and poverty eradication, which implies that it needs to contribute to social progress and environmental protection, and – as was the case for traditional human rights – strives for the inclusion of binding social and environmental norms in trade agreements.[25] The (practical) translation of the abovementioned goals and commitments in the relations with third countries, is however not as straightforward as it seems. Therein a difficult balance must be found not only between different interests, such as trade and human rights, but also between the responsibilities of the different actors involved and this must be translated into binding commitments. This is especially cumbersome in the relations with developing countries. Fears of protectionism, on the one hand, and the protection of human rights, on the other hand, need to be addressed. In relation to different actors involved, one must be careful to avoid claims of unlawful interference while at the same time one must address the issue of a poor or even absent legal frameworks and possible abuse of this by the MNEs operating in those countries.[26] A laudable, but difficult, task awaits the Union, the developing countries and the MNEs.

2009, (643) 647-652 (661); F. BOSSUYT, "The Social Dimension of the New Generation of EU FTAs with Asia and Latin America: Ambitious Continuation for the Sake of Policy Coherence", *European Foreign Affairs Review* 14, 2009, (703) 715-716 (722).

[22] SEC(99)777final ; Communication from the Commission to the Council and the European Parliament, Climate Change in the context of Development Cooperation, COM(2003)85, 11.03.2003; Commission Working Document, Integrating Environmental Considerations into other policy areas – A Stocktaking of the Cardiff process, COM(2004)394, 01.06.2004 ; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 521-523.

[23] Other measures concern e.g. the conclusion of Voluntary Partnership Agreements on Forest Law Enforcement Governance and Trade (FLEGT VPA). Voluntary Partnership Agreement between the European Union and the Republic of the Congo on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), *OJ* 2011 L 92/127; Voluntary Partnership Agreement between the European Union and the Central African Republic on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), *OJ* 2012 L 91/103.

[24] I. BOSSE-PLATIERE, *op.cit.* footnote 11, 449.

[25] P6_TA(2006)0242, point 59; European Parliament resolution of 18 May 2010 on the EU Policy Coherence for Development and the 'Official Development Assistance plus' concept (2009/2218(INI)), P7_TA(2010)0174, 18.05.2010, point 48 and 70.

[26] Report on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery, A7-0023/2013, 29.01.2013, 25/51.

In this analysis the focus will be on the traditional developing countries, namely the ACP, with whom the Union is still striving for the conclusion of (full and comprehensive) trade agreements, namely the Economic Partnership Agreements (EPAs). The Cotonou Convention[27] will thus be included in this analysis, as well as the following EPAs: the EPA-CARIFORUM[28], EPA-Pacific (Papua New Guinea and Fiji)[29], EPA-SADC[30], EPA-Ivory Coast[31], EPA-Cameroon[32], EPA-ESA[33], Since the EPA-CARIFORUM is the only full and comprehensive EPA so far, the focus will be centred on the provisions therein.

3. Putting the traditional instruments to new use?

The integration of the objectives of development cooperation in the subsequent agreements with the ACP countries thereby also included the respect for human rights and fundamental freedoms as objectives of the EU-ACP relations, which is confirmed in Article 1 and 9 Cotonou.[34] Taking into account the long standing legacy of the EU towards a human rights based approach to development, one wonders whether the traditional instruments are an option in addressing the new challenges of reuniting sustainable development, in particular respect for labour norms and environmental standards, and trade, especially in regard to FDI. After all, the EU has in the development of these traditional instruments proven to be 'inventive' in the past. The term traditional instruments refers to the

[27] Cotonou I, *OJ* 2003 L 65/27; Cotonoubis, *OJ* 2005 L 209/56; Cotonouter, *OJ* 2010 L 287/3.
[28] Economic Partnership Agreement between the CARIFORUM States, on the one part, and the European Community and its Member States, of the other part, *OJ* 1995 L 289/3. The agreement has been provisionally applied since December 2008 and was approved by the EP.
[29] Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other Part, *OJ* 2009 L 272/2. It concerns Fiji and Papua New Guinea. Papua New Guinea is already applying the agreement, Fiji is not.
[30] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part, *OJ* 2009 L 319/3. It concerns Botswana, Lesotho, Mozambique, Namibia and Swaziland. Namibia has not signed yet and the agreement is not yet ratified. The BLNS and Mozambique have already let it be known that they will not provisionally apply the EPA and focus on a full and comprehensive EPA with the whole SADC group, even including South Africa.
[31] Stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, *OJ* 2009 L 59/3. This agreement has been signed, but has not been ratified yet. Ghana has initialed an agreement with the EU, but it has not been signed yet. Although the EU-West-Africa negotiations have been closed in the meantime, they are still awaiting political endorsement.
[32] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa party, of the other part, *OJ* 2009 L 57/2. The agreement has not been ratified yet.
[33] Council Decision on the signing and provisional application of the Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, 5556/09, 30.04.2009. It concerns Seychelles, Zambia, Zimbabwe, Mauritius, Comoros and Madagascar. So far only the Seychelles, Zimbabwe, Mauritius and Madagascar signed the EPA and it is provisionally applied since 14 May 2012. In January 2013 the EP approved the EPA and it is now awaiting ratification for official entry into force. The EPA-EAC contains similar references (Council Decision on the signature and provisional application of the Agreement establishing a framework for an Economic Partnership Agreement between the European Community and its Member States, on one part, and the East African Community Partner States, on the other part, 17462/08, 03.04.2009). It concerns Burundi, Kenya, Rwanda, Tanzania and Uganda. This agreement has however not been signed yet as they are negotiating a comprehensive regional EPA.
[34] Also in the preamble of the amended Georgetown Agreement, the attachment to the fundamental principles of human dignity, human rights and the rights of people was reaffirmed (ACP/27/028/92). Later on this was altered to "reaffirming their commitment to the respect for human rights and the rights of peoples, democratic principles and the rule of law" and the idea of a human centered, equitable and sustainable development was included (The Georgetown Agreement, as amended by Decision No.1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003, ACP/27/005/00Rev.16).

application of conditionality[35], negative as well as positive, and the broader attribution of positive measures, implying the mainstreaming of a development based on the protection of human rights and stimulating the participation of civil society.

3.a. Sanctions to enhance the responsibilities towards sustainable development?

Negative conditionality is one of the most strongly debated instruments, in particular where contractual relations exists between the Union and the third country concerned.[36] Although an explicit legal basis in the Treaties to take trade measures against third countries violating human rights and a sound legal provision allowing the suspension of agreements with such third countries in case of such an infringement was absent, the EU nevertheless has found its ways to take such measures.[37] Taking into account the precarious legal nature of such action, certainly from an international law point of view[38], a legal consolidation was necessary. Eventually, the Treaty of Maastricht included Article 301 and 60 TEC (current revised Article 75 and 215 TFEU) and from the early nineties on the EU started to develop a standard policy integrating specific human rights provisions in the agreements with third countries.[39] To address legal problems concerning the negative conditionality in a contractual relationship, these clauses were considerably altered over the years. Ultimately, this resulted in the current essential elements and suspension clauses, including human rights and fundamental freedoms as essential elements, providing for a detailed procedure before taking any measures and the requirement to take appropriate measures in case of violation, suspension being a measure of last resort.[40] Although the inclusion of such clauses has not passed without struggle[41], the clauses

[35] Conditionality means a policy where a reward or attribution of advantages is allocated (positive) or withdrawn (negative) based on the fulfillment of certain conditions. N. TOCCI, "Comparing the EU's Role in Neighbourhood Conflicts", in M. CREMONA (ed.), *Developments in EU external relations law*, Oxford, Oxford University Press, 2008, 218; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 430.

[36] It must be noticed that in some doctrine these essential elements clauses are considered as a form of positive conditionality: I. BOSSE-PLATIERE, *op.cit.* footnote 11, 433-439. This is probably based on the statement by the Commission (COM(1995)567; COM(1998)146; COM(2001)252) that the inclusion of an essential elements clause is not intended to signify a negative approach, but to be seen as a shared interest, a joint undertaking and to promote dialogue and positive measures. In sum, the essential elements and suspension clause are perceived by the EU as positive instruments, whilst the ACP countries consider these sanctions as a punishment. Hence, the tension.

[37] ECJ, *Racke*, Case C-162/96, ECR [1998] I-3688. K. ARTS, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention*, Den Haag, Kluwer Law International, 2000, 167, 174-175 and 322-333; L. BARTELS, *Human rights conditionality in the EU's international* agreements, Oxford, Oxford University Press, 2005, 9-13; J. NWOBIKE, "The Application of Human Rights in African Caribbean and Pacific-European Union Development and Trade Partnership", *German Law Journal* Vol. 06 No. 10, 2005, (1381) 1391 (1406); H. HAZELZET, "Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy?", *ECDPM* Discussion Paper No. 64B, 2005, 3-4 (16); F. HOFFMEISTER, "The Contribution of EU Practice to International Law" in *Developments in EU external relations law*, M. CREMONA (ed.), Oxford, Oxford University Press, 2008, 94-95; P. EECKHOUT, *op.cit.* footnote 11, 36 and 503; I. GOVARE, *op.cit.* footnote 11, 7 (17).

[38] P.J. KUYPER, *op.cit.* footnote 15, 416-417; K. ARTS, *op.cit.* footnote 37, 48-49; L. BARTELS, *op. cit.* footnote 37, 100-106.

[39] Council of Ministers of Development Cooperation, Resolution on human rights, democracy and development, *Bull.* EC 11-1991, point 2.3.1.; Communication from the Commission, On the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216, 23.05.1995; COM(2001)252; 'The European Consensus', *OJ* 2006 C 46/1.

[40] V. MILLER, "The Human Rights Clause in the EU's External Agreements", *Research Paper* House of Commons 2004, 14; L. BARTELS, *op.cit.* footnote 37, 23-29.

contained in the Cotonou Convention appear to be the most elaborate so far (Article 9, 97 and 96).[42] *Firstly*, because of their scope, adding good governance as a fundamental element and inscribing a specific procedure in case of serious cases of corruption. *Secondly*, because of the detailed stipulations on the procedure. Not only were specific rules adopted on the decision-making within the Union to take such measures[43], but an elaborate *modus operandi* before taking such measures was included. This was mainly a compromise towards the ACP to counterbalance claims of interference and to guarantee their effectiveness and the use of suspension only as a measure of last resort.[44] Over the years the role of prior consultation and a mandatory political dialogue, as an *ex ante* and *ex post* solution in case of human rights violations, has grown.[45] Nevertheless, and despite perpetuated calls by the ACP to alter this in the Cotonou revision, the final decision to take appropriate measures in case of violation remains an unilateral EU decision.[46] This is logically also the case regarding the possible suspension of trade concessions attributed in the GSP. Despite subsequent alterations and stronger procedures, a thin line between lawful 'interference' and the issue of non-interference, sovereignty and the requirement of equal partnership, remains.[47] Moreover, the absence of a coherent and transparent

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[41] T. PARFITT, "The Decline of Eurafrica? Lomé's Mid-Term Review", *Review of African Political Economy* No. 67, 1996, 56-57; K. ARTS, *op.cit.* footnote 37, 21-31 and 110, 168-189; D. CACCAMISI, "La conditionnalité politique dans les relations de cooperation au développement de la Communauté européenne", *Annales de Droit de Louvain* Vol. 65, 2005, N°.3-4, (285) 296-299 (353); L. BARTELS, *op.cit.* footnote 37, 13; J. NWOBIKE, *op.cit.* footnote 37, (1381) 1384 (1406).

[42] The preamble of Lomé III contained the first signs for a stronger legal footing for human rights in the EU-ACP relations. Lomé IV integrated human rights in the Convention itself (Article 5), which was also followed by a steady increase of human rights actions, and finally Lomé IVbis included an essential elements (Article 5) and suspension clause (Article 336bis). Lomé III, *OJ* 1986 L 86/1; Lomé IV, *OJ* 1991 L 229/1; Lomé IVbis, *OJ* 1998 L 156/1. For a historical overview see: K. ARTS, *op.cit.* footnote 3738, 167-204; P. EECKHOUT, *op.cit.* footnote 11, 475-476; P. VAN ELSUWEGE, "Minority protection in the EU: challenges ahead" in K. INGLIS and A. OTT (eds.), *Constitution for Europe and an enlarging Union: Unity in Diversity?*, Groningen, Europa Law Publishing, 2005, 261.
Article 11ter Cotonoubis also includes the provision on the cooperation in countering the proliferation of weapons of mass destruction as an essential element and the possibility to take appropriate measures (without however mentioning the possibility of suspension). Moreover, the provision refers to a strengthened political dialogue and the use reports by the International Atomic Energy Agency (IAEA), the Organisation for the Prohibition of Chemical Weapons (OPCW) and other relevant multilateral institutions (Article 11ter, paragraph 4).

[43] *OJ* 1999 L 75/32; *OJ* 1999 L 75/30; *OJ* L 2003 L 65/27; *OJ* L 2000 L 317/376; *OJ* L 2008 L 129/44; *OJ* 2006 L 247/46. F. HOFFMEISTER, *op.cit.* footnote 37, 53.

[44] The inscription of procedural guarantees was one of the main concerns of the ACP at the Lomé IV negotiating table, see: K. ARTS, *op.cit.* footnote 37, 188-191. But also after such guarantees were inscribed, concerns of EU unilateralism remained and thus needed to be strengthened, see: K. ARTS, *op.cit.* footnote 37, 234-240.

[45] For an overview on how these consultations take place in practice, see: H. HAZELZET, *op.cit.* footnote 37, 6-7 (16). For an overview of recent consultations, see: L. MBANGU, "Recent Cases if Article 96 Consultations", *ECDPM* Discussion Paper No. 64C, 2005, 17. The revised Cotonou Convention played a significant role in enhancing policy dialogue on this matter and in clarifying the relation between dialogue and the consultation-requirement. Article 8 Cotonoubis and Annex VII Cotonoubis.

[46] ACP-EU Joint Parliamentary Assembly, Draft Report on ACP-EU Political Dialogue (Article 8), PR\529176EN.doc, APP/3689, 06.08.2004; J. MACKIE and J. ZINKE, *op.cit.* footnote 2, 5 (16). Instead, Cotonouter included that such essential and fundamental elements shall apply equally to the ACP and the EU and its Member States (Article 9, paragraph 4).

[47] COM(1998)146; Article 2 Lomé III; Article 2 Lomé IV; Article 2 Cotonou (revised in Article 2 Cotonouter). It is argued by some that the fact that such suspension possibility was included in the framework of a negotiated agreement, makes it harder for the third country to invoke the principles of non-interference and sovereignty, since it was included as an aspect of common interest (S. KEUKELEIRE, *Het buitenlands beleid van de Europese Unie: de diversiteit en praktijk van het buitenlandsbeleid en van de communautaire methode als toetssteen voor het externe beleid van de EG. Het Gemeenschappelijk Buitenlands en Veiligheidsbeleid en het structureel buitenlands beleid van de EU*, Deventer, Kluwer, 1998, 124-125). However, the inclusion of such clauses is very often the result of a compromise and easier to obtain in case of asymmetrical relation, such as between the EU and ACP. The inclusion of this paradox, the combination of conditionality, on the one hand, and the principle of non-interference, on the other, is the result of a power politics and a compromise between the former Community and the ACP. Also the Commission, as well as the EP, seemed to put the principle of non-

approach on the matter further supports this sense of interference.[48] The use of consultation and dialogue to their utmost extent should counterbalance this feeling of unilateralism. In addition, the increased involvement of other third countries, such as China, not requiring the same respect for human rights, might further strain the EU-ACP relation and increase the competition between the ACP.[49]

A second problem surrounding this mechanism, is the situation where the application should result into taking trade measures.[50] The use of trade measures to enforce human rights remains very controversial. There is no legal standing on the matter and doctrine is heavily divided, but this could create problems of WTO-compatibility.[51] It is not readily accepted, and it appears not to, that the human rights clause and its current application as a coercive and extraterritorial measure fits in with the general exception of Article XX GATT or Article XIV GATS.[52] Moreover, this especially so in regard to sustainable development issues such as labour norms and environmental standards, since a link between trade and sustainable development has led to an impasse at WTO level (*infra* section 5).[53] Moreover, GATT jurisprudence does not seem to accept exceptions based on process and production method (such as working conditions), which violates the principle of non-discrimination.[54] The main limitation is that the exceptions cannot be used to promote policy decisions in other countries in such a way that one starts legislating for the other.[55] The fact that such action would be taken in regard to trade relates to concerns of the ACP that unilateral trade restrictions would be invoked for political

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interference into perspective in the framework of respect for human rights, democratic principles and the rule of law (COM(95) 567, point 33). The Council however did not follow this point of view. See: I. BOSSE-PLATIERE, *op.cit.* footnote 11, 479-480.

[48] K. ARTS, *op.cit.* footnote 37, 352-354 and 370-372; L. BARTELS, *op.cit.* footnote 37, 40; T. PARFITT, *op.cit.* footnote 41, 56-57; V. MILLER, *op.cit.* footnote 40, 56-57; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 476-484 and 488; L. BARTELS, Study requested by the EP's Committee on International Trade, "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries, November 2008, 3 (21); H. ZIMMERMANN, "How the EU Negotiates Trade and Democracy: The Cases of China's Accession to the WTO and the Doha Round", *European Foreign Affairs Review* 13, 2008 (255) 271-273 (280).

[49] D. ALLEN en M. SMITH, "Relations with the Rest of the World", *JCMS* 2011, Vol. 49, (209) 212 en 220 (230).

[50] To my knowledge, so far the application of the essential elements and suspension clause has resulted in the suspension of development aid rather than trade relations. S. PEERS, "EC Framework of International Relations: Co-operation, Partnership and Association" in DASHWOOD A. en HILLION C. (eds.), *The General Law of E.C. External Relations*, Londen, Sweet&Maxwell, 2000, 166; K. ARTS, *op.cit.* footnote 37, 349; L. BARTELS, "The Trade and Development Policy of the European Union", *EJIL* 2007, Vol. 18 no. 4, 739 and 747 (756); J. NWOBIKE, *op.cit.* footnote 37, (1381) 1396 (1406); A. BRADLEY, "An ACP Perspective and Overview of Article 96 Cases", *ECDPM* Discussion Paper No. 64D, 2005, 16.

[51] G. M. ZAGEL, "WTO & Human Rights: Examining Linkages and Suggesting Convergence", *IDLO* Vol. 2 No. 2, 2005, 11 (37); B. WARDHAUGH, "GSP+ and Human Rights: Is the EU's Approach the Right One?" *Journal of International Economic Law* 16, 2013, (827) 842-846.

[52] B. FANSEN and M. LUGARD, "Some Considerations on Trade Barriers Erected for Non-Economic reasons and WTO Obligations", *Journal of International Economic Law*, 1999, 530-531 and 532-536; J. L. STAMBERGER, "The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause", *Chi. J. Int'L*. 607, 2003, (607) 609 and 613-614 (618); G. M. ZAGEL, *op.cit.* footnote 51, 11-16 (37); S. ARIEL AARONSON, "Seeping in slowly: how human rights concerns are penetrating the WTO", *World Trade Review* 6:3, 2007, (1) 18-19 (37). For a contrasting view, see: J. M. KAGAN, "Making Free Trade Fair: How the WTO could incorporate labour rights and why it should", *Georgetown Journal of International Law* Vol. 43, No. 1, 2011, (195) 209-210 (224); L. BARTELS, *op.cit.* footnote 48, 14-15 (21).

[53] As a result, the only reflection of sustainable development in the WTO can be found in its preamble and Article XX GATT (similar Article XIV GATS), in particular Article XX (b) and (g) GATT.

[54] G. M. ZAGEL, *op.cit.* footnote 51, 14-15 (37); B. WARDHAUGH, *op.cit.* footnote 51, (827) 842 (846).

[55] B. FANSEN and M. LUGARD, *op.cit.* footnote 52, (530) 532 (536).

violations and for protectionist reasons.[56] Nonetheless, chances that an ACP state, or any other developing country, would actually invoke the non-compatibility of the EU human rights clauses with Article XX GATT or Article XIV GATS, and lead to dispute settlement, are however small.[57] What is even more, the majority (if not all) of the EPAs include a general exception that resembles Article XX GATT.[58] From the wording of this general exception in the EPA-CARIFORUM, taking into consideration the provisions on social aspects, this also seems to apply for social issues thus rendering it possible to take trade restrictions for the violation of social norms. This option, however, seems to be constrained and might apply only for issues concerning child labour[59]. Moreover none of the other EPAs contain such reference (since they do not include specific social and environmental provisions). Taking this, together with the legal constraints at international level, into account it seems doubtful that a broader interpretation, for example allowing restrictions on goods for reasons of unfair labour conditions, would be applied.[60] Although, considering the broader human rights and sustainable development objectives in this agreement, the margin for human rights considerations appears to be broader. Nonetheless, the use of Article 224 EPA-CARIFORUM as a coercive and extraterritorial measure by the EU towards the CARIFORUM for the purpose of human rights protection remains doubtful.

What is even more, to my knowledge, essential elements and suspension clauses have not yet been used to suspend trade cooperation[61] and the Commission has confirmed not to take such action. On the other hand, the stipulations in the EPAs seem to prove otherwise. However, also here more clarity and coherency was required. Even though there are no explicit, separate essential elements or suspension clauses[62], the suggestion to include "for the avoidance of doubt the article 11, 96 and 97 of the Cotonou Agreement will not apply to the EPAs" [63] was turned completely. All EPAs considered here contain, some more explicit than others[64], that Article 11 (b), 96 and 97 of the Cotonou Agreement

[56] The idea that an economic cooperation relationship (such as the Lomé Convention) is not the right forum for political discussions and considerations was also one of the main arguments for the resistance of the ACP to include a human rights clause in the earliest Lomé Conventions, see: K. ARTS, *op.cit.* footnote 37, 168-172. Other arguments were the fact that the EEC may not influence the choice of the social and economic system and the problem of common definitions.
[57] S. ARIEL AARONSON, *op.cit.* footnote 52, 20-21 (37); L. BARTELS, *op.cit.* footnote 48, 15 (21).
[58] Article 224 EPA-CARIFORUM, Article 42 EPA-Pacific, Article 90 EPA-SADC, Article 68 EPA-Ivory Coast, Article 89 EPA-Cameroon, EPA-ESA. The general exception clause applies to trade in goods, services and establishment. It must also be noticed that Article 90 EPA-SADC does not, contrary to the other EPAs, refer to the protection of human, animal or plant life or health.
[59] In a footnote in the agreement it is clarified that the Parties agree that, in accordance with the provisions on the social aspects, measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.
[60] Such an argument within the WTO has been repealed in the Panel Report on the Belgian Family Allowances. S. ARIEL AARONSON, *op.cit.* footnote 52, (1) 18 (37); J. L. STAMBERGER, *op.cit.* footnote 52, (607) 609 (618); B. FANSEN and M. LUGARD, *op.cit.* footnote 52, (530) 532 (536).
[61] J. NWOBIKE, *op.cit.* footnote 37, (1381) 1397 (1406).
[62] This aligns with the new Council policy (EU Council, Reflection Paper on Political Clauses in Agreements with Third Countries, Doc 7008/09, 27.02.2009).
[63] D. LUI and S. BILAL, "Contentious issues in the interim EPAs. Potential flexibility in the negotiations", *ECDPM* Discussion paper No. 89, 2009, 31-32 (54).
[64] Article 73, paragraph 2 EPA-Pacific: "Nothing in this Agreement shall be construed to prevent the application of all provisions of the Cotonou Agreement outside Title II Part 3 and according to the procedures set by the said Agreement."

apply (linkage clause).[65] Some of the EPAs also include a(n) (explicit) reference to Article 2 and 9 of the Cotonou Convention.[66] However, not all EPAs explicitly refer to the possibility of the suspension of trade obligations[67], but I tend to concur with the Commission that the Cotonou Convention is the framework agreement regulating the relations with the ACP and in absence of opposite provisions explicitly excluding this option, the essential elements and suspension clause is also applicable in cases were the trade relations are regulated by an EPA, even in the absence of a linkage clause.[68] A similar provision in all EPA, full or interim, would have been better. It would have diminished the risk of differing interpretation and the inclusion in every clause that this also entails the application of the procedure set out in these articles, in the least, assures the same procedural guarantees as the Cotonou Convention, thus also addressing the fear for unilateralism and protectionism.[69] Moreover, in view of the expiration of the Cotonou Convention in 2020, it might have been better to include a specific binding human rights clause in the separate EPAs instead of a linkage clause.[70] Thus, from a legal point of view the option of trade measures in case of human rights violations, has not fully been excluded. Thought, from a more politic perspective, it is established by some that "trade related human rights measures" are not always effective to establish the goal of changing the policies of the third country concerned and rather harm the human rights situation.[71] Also at UN level and within the ILO there is not much enthusiasm for the use of trade restrictive measures to improve the human rights situation.[72] Hence, in trade relations such measures seem legally and practically not feasible.

Moreover, it is not certain that such essential elements and suspension clauses also offer an option in case of violation of labour norms and environmental standards. Such clauses find their origin in an

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Article 103, paragraph 2 EPA-SADC: "Nothing in this Agreement shall be construed as to prevent the adoption by the EC Party or SADC EPA State of appropriate measures pursuant to the Cotonou Agreement".

[65] Article 241, paragraph 2 EPA-CARIFORUM and Article 106, paragraph 2 EPA-Cameroon: "Nothing in this Agreement shall be construed so as to prevent the adoption by the European Community or by one of the signatory Central African States/a signatory CARIFORUM State of any measures, including trade (related) measures (under this Agreement), deemed appropriate as provided for under Articles 11b, 96 and 97 of the Cotonou Agreement (and according to the procedures set by these articles)." A similar provision can be found in Article 80, paragraph 2 EPA-Ivory Coast.

[66] Article 2, paragraph 1 EPA-CARIFORUM; Art 2, paragraph 1 EPA-Pacific; Article 2, paragraph 1EPA-SADC. Moreover, the EPA and the Cotonou Convention shall be in a complementary and mutually reinforcing manner (Article 2, paragraph 2). The EPA-Ivory Coast includes a more general referral in its preamble to the respect for human rights, democratic principles and the rule of law "which constitute the main elements of the Cotonou Agreement", and to good governance, "which is fundamental to the Cotonou Agreement". The EPA-ESA includes an even more general reference to the Cotonou Agreement.

[67] Article 65, paragraph 1 EPA-ESA: "Nothing in this Agreement shall prejudice the application of measures deemed appropriate as provided for under the article 11 (b), 96 and 97 of the Cotonou Agreement and according to the procedures set by these Article." Article 73, paragraph 2 EPA-Pacific and Article 103, paragraph 2 EPA-SADC.

[68] Recommendation for a Council decision authorizing the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions, SEC(2002) 351 final, 09.04.2002; K. DE GUCHT, "Trade policy and human rights", S&D Conference 'Can trade policy improve human rights', Brussels, 13.10.2010. Only in situations where the free trade agreement has already entered into force and there is no guarantee that the framework agreement will also have entered into force at that time, a separate clause was deemed necessary. But this is not the case for the ACP. Bartels argues that the suspension of other agreements, not containing a linking, is even possible as he considers them to be possible "appropriate measures". L. BARTELS, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements", *Legal Studies Research Paper Series*, Paper No. 24/2012, September 2012, 8 (19).

[69] D. LUI and S. BILAL,*op.cit.* footnote 63, 31-33 (45); J. NWOBIKE, *op.cit.* footnote 37, (1381) 1382 (1406).

[70] The European Parliament's role in relation to human rights in trade and investment agreements, DG for External Policies of the Union, Directorate B, Policy Department, February 2014, 13 (38).

[71] G. M. ZAGEL, *op.cit.* footnote 51, 5 and 24-25 (37); L. BARTELS, *op.cit.* footnote 48, 13-14 (21); A. GATTO, *op.cit.* footnote 7, 243.

[72] G. M. ZAGEL, *op.cit.* footnote 51, 5 and 26-27 (37).

era of a bipolar world where the focus of the West was mainly on civil and political rights.[73] It is nowhere defined in detail to which human rights this essential elements clause refers.[74] Article 9, paragraph 1 and 2 Cotonou does leave the option of Article 96 Cotonou, in case of problems concerning labour norms, open as it clarifies that the respect for *all* human rights and fundamental freedoms also includes the respect for fundamental social rights and refers to all fundamental freedoms and human rights, be they civil and political, or economic social and cultural. Moreover, good governance includes the transparent and accountable management of human and natural resources for the purpose of equitable and sustainable development (Article 9, paragraph 3 Cotonou). Nonetheless, the subsequent separation in several policy documents between human rights, labour standards and environmental rules does not seem to contribute to the idea of applying this instrument also for second and third generation human rights.[75] The absence of a sound international framework, especially concerning environmental norms, further supports this doubt. Regarding labour norms it is common understanding that these refer to the core labour standards of the ILO, namely freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment.[76] However, such a delineated reference is absent in regard to environmental protection. Although increasingly accepted that environmental degradation leads to an impairment of human rights (so-called environmental justice)[77], third generation human rights are less commonly accepted than first and second generations and are often not enshrined in international legal binding documents. Hence, there is no legal certainty whether the application of Article 96 Cotonou is also an option in case of such a violation. Despite the Commissions declaration that the human rights clause also encompasses core labour standards, as set

[73] K. ARTS, *op.cit.* footnote 37, 21-31 and 52-53; D. CACCAMISI, *op.cit.* footnote 41, (285) 336-337 (353).

[74] There is however a general referral in the preamble of Lomé III to the UN Charter, which was complemented in Lomé IV with a reference to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights and by recognizing the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights as positive regional contributions. Finally, the Cotonou Convention added the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees. Moreover, for the first time reference was made to the respect for basic labour rights, taking into account the relevant conventions of the ILO. The international sources in the preamble may serve as a point of reference for interpretation, especially since this does not limit the EU's point of reference to its own instruments. However, it is not clear which principles and rights are considered as essential elements. Moreover, they are only binding for the states that have acceded and ratified them. The 1998 Communication does nothing more than repeat this (COM(1998)146). In addition, there is no reference to 'environmental conventions'. In comparison, over the years core labour standards have been viewed as basic or universal human rights. L. BARTELS, *op.cit.* footnote 37, 84-85; J. M. KAGAN, *op.cit.* footnote 52, (195) 204-205 (224).

[75] E.g. COM(1995)567, point 66. Nonetheless, it has been noticed that occasionally the Commission did propose to tie Lomé benefits to labour standards. B. BURGOON, *op.cit.* footnote 21, (643) 649 (661).

[76] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Promoting core labour standards and improving social governance in the context of globalization, COM(2001)416, 18.07.2001.

[77] O.C. RUPPEL, "Third-generation human rights and the protection of the environment in Namibia" (http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf).

out in the eight core ILO conventions[78], and the general understanding is that the core labour standards are also basic human rights, it appears to be common practice that Article 96 Cotonou is mainly invoked in cases relating to first generation human rights, where one can easily rely on an international consensus.[79] Even more, it is established that in practice the EU chiefly acts in cases of a crisis or in relation to an overall political situation of a third country or in cases of grave breaches.[80] It must however be noticed that in the unilateral GSP-system, which now entails a possible withdrawal of concessions in case of violations of all core human and labour UN/ILO Conventions included in Annex VIII[81], this has already been applied towards Myanmar and Belarus[82]. However, this is more difficult in a contractual relation and such a suspension mechanism is not considered to be the choice of preference in regard to core labour standards.[83] This also appears from Article 213 EPA-CARIFORUM that excludes the suspension of trade concession as an appropriate measure in case of dispute concerning the chapters on environmental and social aspects (*infra* section 3.b.). Although, this does not necessarily contribute to the idea of indivisibility and coherence, such an approach might be more feasible as appears from the actions taken after the Bangladesh factory collapse (*infra*). Also recent suggestion of the EP, in the framework of the second Cotonou revision, to broaden the principles of non-negotiable human rights and sanction mechanism have not led to an alteration.[84] In sum, the vague nature and contested normative content of sustainable development and the strong opposition of the developing countries, might hamper the application of negative conditionality in such cases of infringement.[85] The idea of the EP to include a full comprehensive human rights chapter, next to specific chapters on social and environmental issues (*infra*), might be a good idea to clarify some of the remaining uncertainties concerning differences in implementation and remedies.[86]

Finally, this method does not appear to be adjusted in case of human rights problems in the framework of FDI. Although it might lead to sanctioning the host state for human rights violations directly linked to FDI or work preventative to discourage the host state to lower standards in an effort to attract FDI. As demonstrated above, in its current application the essential elements and suspension

[78] COM(2001)416.
[79] For examples, see: Parliamentary questions, E-3067/2009, 10.07.2009; V. MILLER, *op.cit.* footnote 40, 29-30; J. NWOBIKE, *op.cit.* footnote 37, (1381) 1391-1392 (1406); J. MACKIE and J. ZINKE, *op.cit.* footnote 2, 7 (16); A. BRADLEY, *op.cit.* footnote 50,16; L. BARTELS, *op.cit.* footnote 37, 36-37; L. BARTELS, *op.cit.* footnote 68, 9 (19). Also the ACP noticed this narrow interpretation of the EU, see: V. MILLER, *op.cit.* footnote 40, 40.
[80] L. BARTELS, *op.cit.* footnote 37, 60-61; L. BARTELS, *op.cit.* footnote 48, 12 (21).
[81] Article 19 Regulation 978/2012.
[82] Regulation Vo. 980/2005 (*OJ* 2005 L 169/1); Regulation Vo. 732/2008 (*OJ* 2008 L 211/1); Regulation 978/2012 (*OJ* 2012 L 303/1, recital 25). However, also here the EU is not always consistent in its application, see: J. VANDENBERGHE, "On Carrots and Sticks: The Social Dimension of EU Trade Policy", *European Foreign Affairs Review* 13, 2008, (56) 571-573 (581). Eventually Myanmar was again readmitted: Irish Presidency secures preferable trade terms for Myanmar/Burma to promote economic development, 12.06.2013.
[83] M. GONZALES GARIBAY, "The Trade-Labour Linkage from the Eyes of the Developing Countries: A Euphemism for Protectionist Practices", *European Foreign Affairs Review* 14, 2009, 763-764 (784); F. VAN BOSSUYT, *op.cit.* footnote 21, (703) 709-711 (722).
[84] Development MEPs back new Cotonou deal, but with human rights reservations, 19.03.2013.
[85] D. CACCAMISI, *op.cit.* footnote 41, (285) 337-338 (353); I. BOSSE-PLATIERE, *op.cit.* footnote 11, 428-429 and 451; A. GATTO, *op.cit.* footnote 7, 210-211.
[86] Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, point 31.

clause have not been applied yet for such situations, although this option remains open.[87] Also the argument that it may prevent European investors from violating human rights as they could lose their beneficial position in case of suspension does not hold.[88] It is common practice that human rights violations do not lead to the suspension of trade cooperation. Moreover, Article 213 EPA-CARIFORUM excludes this option in case of disputes concerning the environmental or social chapter. In addition, it leads to sanctioning of the host State rather than the foreign investor responsible.[89] This also appears from the approach taken by the EU following the factory collapse in Bangladesh[90], agreeing on a "Sustainability Compact", but keeping Bangladesh in the EBA. However, keeping the option open if required reforms are too slow.[91]

In sum, considering the current international legal framework on sustainable development, in particular environmental norms, and the existing constraints within the WTO-framework, the instrument of negative conditionality in trade relations, in particular in regard to FDI, does not seem fit to tackle violations of labour norms and environmental standards. Moreover, the EU seems to recognize that suspension of trade concession does not necessarily lead to the intended results. This makes the application of negative conditionality for the matter at least precarious, it is thus wondered if the use of positive measures is better fit.

3.b. A more positive approach to support sustainable development

The EU's support for human rights has not remained limited to negative measures and in absence of a legal basis for the former, the taking of positive measures was actually the only lawful action. Moreover, several policy documents confirm that the EU prefers a positive approach towards human rights.[92] This is also reflected in the Lisbon Treaty, which confirms the choice for a positive approach

[87] First of all, the clauses are mainly used in case of breaches of first and second generation human rights, which are more difficult to be linked directly to foreign direct investment and secondly, it is wondered whether possible violation would be qualified als manifest and gross enough to trigger actual suspension. This was also recognized by the author: A. DIMOPOULOS, "EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement" in P-M. DUPUY, F. FRANCIONI, E.U. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, University Press, 2009, (565) 589 (594).

[88] A. DIMOPOULOS, *op.cit.* footnote 87, (565) 582-583 (594).

[89] A. DIMOPOULOS, "Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy", http://www.asil.org/files/ielconferencepapers/dimopoulos.pdf; A. DIMOPOULOS, *op.cit.* footnote 87, (565) 589 (594).

[90] Joint Statement by HR/VP Catherine Ashton and EU Trade Commissioner Karel De Gucht following the recent building collapse in Bangladesh, 30.04.2013.

[91] Events resulted in question for binding legal instruments allowing for the effective monitoring of working conditions of subcontractors in non-EU countries with which European companies deal. The Commission is of the opinion that this is resolved through the legislation on non-financial reporting and the "Sustainability Compact". This compact is a political compact including commitments in the area of labour rights, structural integrity of buildings and occupational safety and health and responsible business practice. This resulted in a revision of Bangladesh's labour law. X., "EU, Bangladesh Agree on "Sustainability Compact" in Wake of Factory Collapse", *Bridges Weekly* Vol. 17, Issue 25, 11.07.2013 3-5; Press release, Rana Plaza tragedy – one year on: Statement by John Clancy, Spokesperson of EU Trade Commissioner Karel De Gucht, 24.04.2014.

[92] Council of Ministers of Development Cooperation, Resolution on human rights, democracy and development, *Bull.* EC 11-1991, point 2.3.1.; COM(1995) 567; COM(1998) 146; COM(2001) 252; V. MILLER, *op.cit.* footnote 40, 28 and 33-34; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 447; J. NWOBIKE, *op.cit.* footnote 37, (1381) 1389-1390 (1406).

where possible (Article 21, paragraph 2 (b) TEU), by providing technical and financial assistance.[93] This approach was translated in the subsequent agreements with the ACP[94] and the legislation regulating the successive European Development Funds (EDFs) and is easier to align with the idea of equal partnership and ownership as reflected in Article 57 Cotonou.[95] The use of positive measures in a contractual relationship offers less friction with the principle of non-interference since the ACP state concerned needs to consent to the attribution of support.[96] On the other hand, this makes the use of this instrument more difficult were the ACP state is less cooperative and inclined not to leave much room to manoeuvre for non-state actors, such as civil society or NGOs. The inclusion of such groups and the use of dialogue is consonant with the participatory approach of the Cotonou Convention[97] and is also in this scenario of utmost importance. The inclusion of civil society offers room to include issues such as labour norms, environmental standards and CSR.[98] However, actual participation varies considerably over the regions and practice demonstrates that financial and technical assistance was not mainly directed towards economic, social and cultural rights.[99] Nevertheless, things seem to be changing.[100] For example, Article 25 Cotonou aims at social development and the 10th EDF foresaw specific funding for sustainable management of natural resources and finances the combat against HIV, tuberculosis, malaria and work.[101] Nonetheless, the promotion of social and environmental standards is not explicitly mentioned, although the EU committed to assist on legislation for adequate labour standards.[102] The new Multi Financial Framework (MFF) committed to "take greater account of human rights, democracy and the rule of law" in allocating external assistance, and in line with the Agenda for Change identifying this as a priority, this was reflected in the individual instruments, particularly in the new common rules on financing external action[103] and the new DCI[104]. Not only

[93] I. BOSSE-PLATIERE, *op.cit.* footnote 11, 146-147.
[94] E.g. Article 5, paragraph 3 Lomé IV, Article 224 (m) Lomé IVbis and articles 9 and 33 Cotonou.
[95] This is also reflected e.g. in Article 1 Regulation on the implementation of the 10th EDF and Article 4 and 5 Proposal for a Council Regulation on the implementation of the 11th European Development Fund, COM(2013)445, 02.07.2013. J. NWOBIKE, *op.cit.* footnote 37, (1381) 1394 (1406). Council Regulation (EC) No 617/2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, *OJ* 2007 L 152/1.
[96] Only the EIDHR can provide for funding without the consent of the country where it is used.
[97] Article 4; 8, paragraph 7 and 57, paragraph 3 Cotonou; Article 4, paragraph 1 (d) and 2 and 5, paragraph 4 Annex IV and the amendments in Article 58 Cotonoubis.
[98] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The roots of democracy and sustainable development: Europe's engagement with Civil Society in external relations, COM(2012)492, 12.09.2012.
[99] G. CRAWFORD, "Evaluating EU promotion of human rights, democracy and good governance: towards a participatory approach", *Journal of International Development* Vol. 14 Issue 6, 2002, (911) 917 (926).
[100] See for e.g. also: Article 2, paragraph 4 Regulation (EU) No 1338/2011 of the European Parliament and of the Council of 13 December 2011 amending Council Regulation (EC) No 1934/2006 establishing a financing instrument for cooperation with industrialized and other high-income countries and territories, *OJ* 2011 L 347/21.
[101] A. GATTO, *op.cit.* footnote 7, 231 ; E. LE THIEIS, *La dimension développementale des accords de partenariat économique*, Centre d' excellence Jean-Monnet, Université de Rennes, Éditions Apogée, 2012, 101-102. See : Ethiopia and European Community, Country Strategy Paper and National Indicative Programme for the period 2008-2013, 54, 59, 62, 74, 79 (133).
[102] COM(2002)513.
[103] Preamble 9 and Article 1, paragraph 6 Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, *OJ* L 77/95 of 15.03.2014. (Further: common implementation rules, CIR)

does this entail a mainstreaming of human rights, where there is now much more emphasis on implementation and enforcement, there is also much more consideration for environmental protection and social considerations as well as corporate responsibilities.[105] Examples are, the obligation to conduct environmental screenings[106], the thematic program "Global public goods and challenges" of the DCI[107] and, in line with the new public procurement directive, the obligation for natural and legal persons who have been awarded contracts to comply with applicable environmental legislation (including environmental agreements as well as internationally agreed core labour standards)[108]. Although Article 19c Annex IV Cotonou implies the same in the 11the EDF, this could have been more explicit.[109] Even though the 11th EDF[110] falls outside the general EU budget, translating the Agenda for Change in practice, it also aligns with the human rights priority[111]. And in conformity with increased attention for climate change and environmental protection in Cotonouter also includes more environmental considerations[112], but any explicit reference to CSR, environmental norms and labour standards seems to be absent.

This broad framework of positive measures entails the instrument of positive conditionality, making the attribution of development aid and (mid-term) review dependent upon needs and performance criteria.[113] The respect for human rights was however not explicitly enshrined in these needs and performance criteria, but was generally included in the drawing of the Country Strategy Paper and Indicative Program.[114] The broad meaning of needs and performances and the abovementioned provisions clearly allowed for an evaluation taking into account the human rights situation, but it might have been advisable to explicitly include this as a criterion. This was altered in the new MFF, but again only implicitly addressed in the 11th EDF. The MFF called for allocation criteria to be more objective and dependent on the efforts and progress concerning human rights, democracy, the rule of law and good governance[115]. In line with the Agenda for Change, the DCI includes needs, capacities, commitments and performance and potential impact in the respective

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[104] Preamble 5, 6, 7 and 11 and Article 3, 5 and 10, paragraph 5 Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, *OJ* L 77/44 of 15.03.2014. (Further: DCI)
[105] E.g. preamble 20 and Article 3 and 5 DCI.
[106] Article 2, paragraph 6 and Article 14 CIR.
[107] Article 4(b), 6, 7 and Annex II and IV DCI
[108] Article 8, paragraph 8 CIR.
[109] Article 13 Proposal for a Council Regulation on the implementation of the 11th European Development Fund, COM(2011)445, 02.07.2013.
[110] Analysis of the 11th EDF is based on the Commission proposal: Proposal for a Council Regulation on the implementation of the 11th European Development Fund, COM(2011)445, 02.07.2013; Proposal for a Council Regulation on the financial regulation applicable to the 11th European Development Fund, COM(2013)660, 25.09.2013.
[111] Article 1 COM(2013)445.
[112] E.g. preamble 13 and Article 9, paragraph 6 and Article 19 COM(2013)445 (= Article 2, paragraph 6 and Article 14 CIR).
[113] Annex IV Cotonou; Council Regulation (EC) No 617/2007 of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, *OJ* L 152/1 of 13.06.2007. For practical examples on the application of performance-based conditionality, see: C. ADAM, G. CHAMBAS, P. GUILLAUMONT, S. GUILLAUMONT, J.W. GUNNING, "Performance-based conditionality: A European Perspective", *World Development* Vol. 32, No. 6, 2004, (1059) 1062-1064 (1070).
[114] Article 3, 9 and 12 Annex IV. The amendments after Cotonouter did not alter this. L. BARTELS, *op.cit.* footnote 37, 113-114; D. CACCAMISI, *op.cit.* footnote 41, (285) 348-349 (353).
[115] Multiannual Financial Framework (2014-2020) – Negotiating Box, 10063/1/12 Rev 1, 24.05.2012.

country as allocation criteria, explicitly including good governance and human rights to fall under the performance criterion.[116] Although Article 3 Annex IV Cotonouter and the 11th EDF, aligning with the DCI, includes the same allocation criteria there is no specification on the interpretation of these criteria.[117] Taken the Agenda for Change into account this would, logically, also entail human rights, democracy and the rule of law.[118] Unfortunately, neither in the DCI nor in the 11th EDF, is there a clarification whether this also entails environmental standards and labour norms[119], including CSR, but the provision of Article 3, paragraph 7[120] and paragraph 8[121] DCI as well as Article 2, paragraph 4 EDF certainly offer room for such considerations. It remains to be seen what the actual allocation methodology of the 11th EDF will look like, depending also on the weight given to each criterion. Although respect for human rights is of major importance, a political criterion cannot be predominant and following the Agenda for Change, more weight should be attached to the needs criterion and a clarification on their interpretation, also including and monitoring CSR. Nonetheless, as is exemplified by the GSP+[122], it is extremely difficult for developing countries to comply with social and environmental requirements and it places an additional requirement on the ACP countries, hence the importance not only helping those already on track as well as the need for capacity building, which was clearly reflected in the next DCI and proposals for the 11th EDF in line with the Cotonou Convention.

The use of positive incentives in a trade framework is exemplified by the GSP-system, especially the GSP+. On the other hand, the granting of EBA preferences is not made dependent on the respect for human rights. The same holds for the EPAs. Neither the conclusion of such agreements nor the attribution of trade flexibilities within the framework of those agreements have been made dependent upon the respect for human rights, including labour norms and environmental standards.[123] The reluctance to do so also appears from Article 213 EPA-CARIFORUM. Moreover, such a conditionality might create problems of WTO-compatibility[124], has proven to be ineffective in the

[116] Article 3, paragraph 2 (c) and 11 DCI.
[117] It must be notices that Article 3 Annex IV Cotonouter does include governance in its performance criterion.
[118] The only explicit reference to human rights, democracy and the rule of law as criterion can be found in the provisions concerning budget support (Article 39 COM(2013)660, see also Article 4, paragraph 2 CIR).
[119] References to such norms in Article 5 and Annex I are included under the heading "inclusive and sustainable growth for human development" instead of "human rights, democracy and good governance".
[120] Article 3, paragraph 7 alinea 2: "Furthermore, relations with partner countries shall take into account their commitment and track record in implementing international agreements and contractual relations with the Union."
[121] Article 3, paragraph 8 includes a rights-based approach encompassing *all* human rights.
[122] I. BOSSE-PLATIERE, *op.cit.* footnote 11, 454.
[123] In the realm of the Bangladesh factory collapse it has been suggested to make additional trade concessions in agreements dependent on respect also for the fundamental labour rights, this in a gradual manner and combined with technical assistance. It is doubted whether the current intention of the EU to impose sanctions because of unsafe working conditions is effective and there is a real risk for reallocation to countries where there are also no sufficient social conditions. Finally, the approach should be broader than unsafe working conditions tackling issues such as the right to organize and collective bargaining. See: L. VAN DEN PUTTE, "EU should help Bangladesh workers to unionize", *EUobserver*, 21.05.2013.
[124] It was suggested to make WTO membership dependent upon the respect for human rights. For other suggestions on the integration of human rights within the WTO, see: P. DEMARET, "Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community" in *The European Community's Commercial Policy after 1992: The Legal Dimension*, M. MARESCEAU (ed.), Dordrecht, Martinus Nijhoff Publishers, 1993, 351-352 and 376-386; D.-C. HORNG, "The Human Rights Clause in the European

GSP+ framework[125], and adding such a condition to the conclusion of an EPA would make the already cumbersome negotiations even more difficult. Moreover, such an *ex ante* conditionality is also not inscribed into the general Cotonou Convention[126] and would not be consonant with the general policy of the EU preferring to maintain a link with the country concerned rather than isolating it.[127] Also here, the aid incentives seem to be the preferred alternative route (e.g. Article 190 and 196 EPA-CARIFORUM).

In sum, compared to negative conditionality and in absence of a solid legal framework, the use of positive measures trough financial and technical cooperation is especially important to promote a solidarity based community and more fit for situations that require an active involvement of the government where resources are often lacking.[128] The application of positive incentives within a trade relationship are however less straightforward.

Overall, the use of the traditional instruments has evolved and offers some room in the area of trade and for the protection of second and third generation human rights. But, in their current legal format these do not seem the most feasible option from a practical and legal point of view to address the issues of sustainable development in a trade relation. The EU has acknowledged that the sustainable development dimension of globalisation requires a different set of measures and attempted to develop mechanisms that are more fit for purpose also taking into consideration the growing responsibilities of other actors involved.

4. Committing to sustainable development: finding a balance?

International attempts to connect sustainable development and trade in the WTO-framework have failed.[129] Similarly, the attempts to include a reference to labour standards and environmental

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Union's External Trade and Development Agenda", *European Law Journal* Vol. 9 No. 5, 2003, (677) 696-697 (701); J. NWOBIKE, *op.cit.* footnote 37, (1381) 1398-1399 (1406).

[125] B. WARDHAUGH, *op.cit.* footnote 51, 827-846.

[126] In general for the ACP the human rights situation was taken into account for membership to the ACP group and accession to the Conventions, however without prescribing it as a pre-condition for membership. This became clear in regard to the Haitian membership to the Lomé IV Convention, where some member states demanded an explicit commitment concerning human rights. However, this was not a condition inscribed into the treaty nor had it been applied to any other ACP member. K. ARTS, *op.cit.* footnote 37, 197 and 303-304; J. NWOBIKE, *op.cit.* footnote 37, (1381) 1392-1393 (1406). On the other hand the poor human rights record of Cuba is one of the main reasons why the country has been refused to join the Cotonou agreement, which was in clear contradiction with earlier statements "that whether Cuba meets the human rights and democracy criteria should be decided once Cuba became a full member of the Agreement and not at the moment of application". L. BARTELS, *op.cit.* footnote 37, 35 and 61.

[127] *Ex ante* conditionality implies that the EU refuses to negotiate or sign an agreement based on the human rights situation. Not only is the appliance of conditionality within a contractual relationship considered to be more effective, it is also better to establish a framework for cooperation in dialogue rather than isolating the country concerned. Although the EP prefers the respect for human rights as an *ex ante* condition, overall, safe often for stronger economic countries, the EU's practice tend to choose for a relationship rather than isolation. L. BARTELS, *op.cit.* footnote 37, 60-61; L. BARTELS, *op.cit.* footnote 48, 12 (21).

[128] I. BOSSE-PLATIERE, *op.cit.* footnote 11, 431 and 448.

[129] See for example: World Commission on the Social Dimension of Globalization, "Inclusion of Fundamental Labour Rights in GATT Article XX", http://www.ilo.org.dyn/idea/ideasheet.display?p_idea_id=H5 (accessed at 07.05.2013).For an overview on the trade-labour linkage in the WTO, see: S. ARIEL AARONSON, *op.cit.* footnote 52, (1) 28-29 (37); M. GONZALES GARIBAY, *op.cit.* footnote 83, (763) 767-773 (784); I. BOSSE-PLATIERE, *op.cit.* footnote 11, 451; F. de

protection within the Multilateral Agreement on Investment have not succeeded.[130] The main idea is that other international organisations are more fit to address sustainable development issues, including CSR[131]. There is no agreement on the matter whether there is room for considerations based on the violation of non-WTO norms[132] and no legal stance on the extraterritorial application of the general exceptions (*supra* section 3.a.). The resistance of developing countries in fear of protectionist measures under the umbrella of human rights violations, further endorsed this.[133] A suspicion that also finds a reflection in the Cotonou Convention and EPAs (*infra*). Despite the limited inclusion within the WTO framework[134] and reticence in other international for a, taking the Treaty provisions into account (*supra* section 2) the EU should pursue sustainable development in its contractual relations beyond its commercial interests, integrating social, economic and environmental aspects. Maybe exactly because of this impasse, the integration of sustainable development provisions in bilateral and regional trade agreements has increased over the years. The Union continues to strive for a sustainable and fair social-economic development in its relations with third countries[135] and has attempted to enhance the legal value of its commitment on sustainable development through the inclusion in its agreements with third countries.[136] This through the inclusion of sustainable development as an overall objective. In line with this policy, the Cotonou Convention entails such an explicit and broad sustainable development objective in Articles 1 and 9 and reiterated in Article 19 Cotonou.[137] Also the

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ANDRADE CORREA, *op.cit.* footnote 6, (141) 143-145 (152); C. VIDAL-LEÒN, "Corporate Social Responsibility, Human Rights, and the World Trade Organization", *Journal of International Economic Law* 16, 2013, (893) 898–901 (920); J. M. KAGAN, *op.cit.* footnote 52, (195) 197-198 (224).

[130] A. GATTO, *op.cit.* footnote 7, 58.

[131] On the reasons why the WTO does not seem the most feasible framework, but should be more receptive to mainstream human rights, and other alternatives, see: G. M. ZAGEL, *op.cit.* footnote 51, 21-37; C. VIDAL-LEÒN, *op.cit.* footnote 129, (893) 916–919 (920).

[132] G. M. ZAGEL, *op.cit.* footnote 51, 16 and 21 (37); S. ARIEL AARONSON, *op.cit.* footnote 52, (1) 21-22 (37).

[133] The developing countries continue to object to the attempt to link non-trade issues before other development issues in the framework of the WTO are sufficiently addressed. COM(1995)567, point 66; Communication from the Commission to the Council, The Trading System and Internationally recognized Labour Standards, COM(96)402, 24.07.1996; O. DE SCHUTTER, *op.cit.* footnote 7, 11 (74); G. M. ZAGEL, *op.cit.* footnote 51, 5 and 23-26 (37); J.-M. SIROEN, *op.cit.* footnote 2, 34-41 (127); A. GATTO, *op.cit.* footnote 7, 244.

[134] The Singapore Ministerial Declaration only renewed the commitments on core labour standards and the role of the ILO (Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18.12.1996, point 4) and by referring to the non-use for protectionist purposes of labour standards a labour and trade linkage was avoided in Seattle ("…We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question…."). To date, the only reference to sustainable development can be found in the preamble of the WTO and Article XX GATT and Article XIV GATS, with the legal uncertainties mentioned above to apply them in case of human rights violations (*supra*). It seems doubtful that the Doha Development Agenda would be a major turning point on the matter (Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 14.11.2001, points 8 and 31-34). See: H. GROSSE RUSE-KHAN, *op.cit.* footnote 3, 177-178 (180); S. ARIEL AARONSON, *op.cit.* footnote 52, 10-34 (37).

[135] COM(2001)252.

[136] Commission working paper, addressed to the European Council, The Cologne report on environmental integration: mainstreaming environmental policy, SEC(99)777final, 26.05.1999; COM(2005)37; COM(2010)612; K. DE GUCHT, "Trade, Growth and Development: A tailored policy for those most in need", European Economic and Social Committee, 18.09.2012; I. BOSSE-PLATIERE, *op.cit.* footnote 11, 451; F. de ANDRADE CORREA, *op.cit.* footnote 6, (141) 147-152.

[137] From Lomé IV onwards the main objectives of development cooperation as stipulated in the Maastricht Treaty were integrated in the subsequent agreements with the ACP, thereby also including the broader framework of the MDGs and sustainable development. Consideration 10 Preamble (revised in Cotonoubis explicitly mentioning the MDGs) and Article1 revised in Cotonouter mentioning that the objectives and international commitments of the Parties that inform the development strategies include the MDGs. Article 9 states that "respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development."

EPAs include in some way or another the sustainable development concept, but as is the case for the essential elements and suspension clause, more alignment between the different EPAs would have been advisable. The EPA-CARIFORUM is the strongest case in point. Therein sustainable development was not only included as an overall objective[138], it was further clarified that this commitment, hence a legal binding obligation, implied that in the application of the agreement full account shall be taken of human, cultural, economic, social, health and environmental best interests of their respective population and future generations and that the decision-making methods shall embrace the fundamental principles of ownership, participation and dialogue.[139] The EPA-SADC and EPA-Pacific contain more general provisions. And again, the EPA-Cameroon and EPA-ESA are less elaborate and include sustainable development in their general objectives[140], while the EPA with Ivory Coast only contains a general reference to sustainable development in its preamble.[141] For these ACP, the sustainable development issue was left to further negotiations in the perspective to conclude a full and comprehensive EPA.[142] The abovementioned future negotiations on the matter probably refer to the elaboration in specific social and environmental provisions. It is somewhat strange that the EPA-SADC and EPA-Pacific, contain no such reference in their rendez-vous clause.[143] Here again, since the Cotonou Convention 'frames' the EU-ACP relations, the sustainable development objective works as an umbrella and also needs to be applied in the EU-ACP trade relations even in absence of a specific referral in the EPAs concerned. This is supported by the fact that the Commission departs from the assumption that developing countries may only enjoy the benefits of trade if sustainable development is protected and promoted.[144] In absence of an international legal framework, the exact content and more specifically the legal obligations this might entail has not yet been clarified.[145] The overall contention is that, just as policy coherence for development, this objective should be construed as an obligation of conduct rather than results.[146] This has the advantage that it leaves room for policy space, but needless to say that it makes the legal enforceability of this objective very difficult.[147] Nevertheless, it has an important interpretative value and since it is included as an overall objective all

[138] Article 1 (a) EPA-CARIFORUM.
[139] Article 3 EPA-CARIFORUM, Article 3 EPA-SADC
[140] Article 2 (a) EPA-Cameroon refers to the establishment of a trade partnership consistent with the objective of sustainable development, Article 2 (a) EPA-ESA refers to establishment of a strengthened trade and development partnership consistent with the objective of sustainable development. The not yet signed EPA-EAC contains an identical provision (Article 2 (a)).
[141] The preamble contains a general reference to sustainable development as an objective of the EU's development cooperation.
[142] Article 60 EPA-Cameroon, Article 44 (g) EPA-Ivory Coast, and Article 53 (e, iii) EPA-ESA.
[143] Article 67 EPA-SADC. It only includes a commitment to monitor and assess the impact of the Agreement on sustainable development (Article 94 and 96 EPA-SADC). Article 69 EPA-Pacific.
[144] Communication from the Commission to the Council and the European Parliament, Trade and Development. Assisting developing countries benefiting from trade, COM(2002)513, 18.09.2002; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europa: Competing in the world, COM(2006)567, 04.10.2006.
[145] Moreover since the concept of sustainable development may vary *ratione temporis*, *ratione personae* and *ratione materiae*, see: V. BARRAL, *op.cit.* footnote 3, 382-383.
[146] On the issue of sustainable development as a legal concept, see: V. BARRAL, *op.cit.* footnote 3, 383-400; H. GROSSE RUSE-KHAN, *op.cit.* footnote 3, 160 (180).
[147] I. BOSSE-PLATIERE, *op.cit.* footnote 11, 451.

provisions need to be read, implemented and all decisions need to be taken with that objective in mind.[148] This implies, contrary to international investment law, that sustainable development also plays a substantive interpretative role for the FDI provisions.[149] The Union, with the EP as one of the main human rights proponents, attempted to further enhance the level of protection and its obligations by including specific environmental and social chapters as well as specific provisions on the behaviour of foreign investors.

4.a. Translating responsibilities into legal commitments

In line with the general EU's policy and increased leverage of the EP in trade agreements after the Lisbon Treaty rooting for such an inclusion, this has been further fleshed out in a specific social and environmental clauses in the Cotonou Convention and chapters in the EPA-CARIFORUM.[150] These specific social and environmental clauses clearly reflect the difficult balance between the need to protect these norms and fears of protectionism (resp. Article 49 and 50 Cotonou).[151] These provisions appear however very general. The idea was that these provisions would form the basis for further negotiations and would be more elaborate in the EPAs. Taking into account the EPA-CARIFORUM is the only full and comprehensive EPA to date, it is also the only one containing specific social (Article 191-196) and environmental (Article 183-190) chapters.[152] In both cases the provisions contain some general stipulations to promote trade in goods and services beneficial for the environment and fair and ethical trade (Article 183, paragraph 5 and Article 191, paragraph 5), the importance of these issues at regional level (Article 185 and 194) and cooperation (190 and 196). Article 183 and Article 191 could have included a more explicit reference regarding CSR, as was done in the trade agreement with South Korea and Central America.[153] It appears from the following provisions that human rights cannot be sacrificed for the sake of free trade. Although certainly noteworthy, the special environmental and social chapters do not seem to include more than some general commitments, mainly repeating what was already contained under the Cotonou Convention and reiterating obligations to which the parties have already committed themselves to (Article 183 and 191).[154] Hence, establishing a minimum set of obligations. However, of great importance minimizing the competition between countries for FDI, is

[148] A. DIMOPOULOS, *op.cit.* footnote 89; A. SPEARS, "The Quest for Policy Space in a New Generation of International Investment Agreements", *JIEL* 2010, 13(4), (1037) 1064-1069 (1075); H. GROSSE RUSE-KHAN, *op.cit.* footnote 3, 139-180; L. BARTELS, *op.cit.* footnote 68, 11 (19); L. BARTELS, *op.cit.* footnote 37, 81-82.
[149] See: H. GROSSE RUSE-KHAN, *op.cit.* footnote 3, 178-179 (180).
[150] This growing attention for second and third generation rights already became apparent in Article 4 and 5 Lomé IV, Article 33-41 Lomé IV and also appears form Article 9 Cotonou.
[151] Concerning environmental issues, the latter was only included after the second revision of the Cotonou Convention.
[152] The absence of specific social and environmental clauses however does not imply no other measures were taken to integrate the sustainable development objective. E.g. Article 38, 41, 43, 4749 and 50 EPA-ESA; Article 16 and 44 EPA-Ivory Coast generally refers to sustainable development, Article 53 ESA-EPA refers to trade, environment and sustainable development (a similar provision Article 37 can be found in the not yet signed EPA-EAC) and Article 15 and 60 (b) EPA-Cameroon and Article 10 ESA-Pacific.
[153] F. de ANDRADE CORREA, *op.cit.* footnote 6, (141) 148-150 (152).
[154] L. BARTELS, *op.cit.* footnote 68, 14 (19). The underlying thought being that the countries would be more inclined to engage in substantive commitments in a context of dialogue and cooperation, however without connecting them to trade preferences or any formal obligation to ratify ungratified Conventions.

the inclusion that the Parties agreed (shall ensure) not to encourage trade or FDI by lowering their level of protection provided by environmental and social or labour legislation or derogating from or failing to apply legislation (Article 188 and 193).[155] How this will be enforced is another matter and it offers little guarantees if not all EPAs include such a commitment, they risk undermining the overall objective and human rights will be played out in the competition for trade (so called "race to the bottom"[156]). Moreover, it should have included that this also entails that the parties shall not fail to enforce such legislation, as was done in the Colombia/Peru Agreement[157]. In general, one can wonder why no firmer and more detailed commitments were included as was done in that agreement and the GSP+[158]. They do not only reaffirm the commitments already made, but also e.g. commit to an effective implementation in its laws and practice and the GSP+ strongly relies on cooperation with the relevant monitoring bodies, in particular the ILO.[159]

As mentioned before, concerning the labour standards a clear delimitation is made referring to the core labour standards of the ILO (Article 191).[160] Probably for political reasons and due to time constraint, leaving such matters to further negotiations for full and comprehensive EPAs, but there appears to be no legal impediments to include such a reference also in the other EPAs since most of the signing ACP countries are also ILO member.[161] Moreover, compared to what is the case in the social clause, in regard to the environment the reference remains very general (Article 49 and in Article 183, paragraph 3 EPA-CARIFORUM). It is wondered why, since the GSP+ and the agreement

[155] A commitment that was also repeated in the specific FDI-provisions (Article 73 EPA-CARIFORUM). Compared to some investment treaties, if they even provide for such clauses, this is more mandatory (shall ensure instead of should).
[156] J. M. KAGAN, *op.cit.* footnote 52, (195) 201-202 (224).
[157] Article 277, paragraph 2 and 4.
[158] In the GSP+ the granting of the unilateral preferences is dependent upon actual ratification and implementation and ongoing obligations.
[159] Article 269, paragraph 3 and 270, paragraph 3 EU-Colombia/Peru. Also in the provision to uphold the level of protection the effective enforcement of its laws is taken on (Article 277, paragraph 2). However, it must be mentioned that compared to the EPA-CARIFORUM the title on trade and sustainable development is not subject to dispute settlement. While the EPA-CARIFORUM entails detailed specifications. Article 9 Regulation No. 978/2012; Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentives arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences, *OJ* 2013 L 48/5. Orbie and Torell however established that withdrawal of preferences in the GSP scheme is fairly consistent with ILO assessments and condemnations, this seems less to be the case concerning the granting of GSP+ incentives. However, it was noticed that in the event that the Commission's control would remain rather formalistic than substantial also the GSP lacks a monitoring system. J. ORBIE and TORTELL, *op.cit.* footnote 21, (663) 675-681; A. GATTO, *op.cit.* footnote 7, 261.
[160] This is also a compromise towards the developing countries to reassure them that this does not include issues such as wage differences. It must however be notices that, compared to Article 50 Cotonou, the Parties however also reaffirm their commitment to the Decent Work Agenda, which goes further than the core labour standards, and recognize the benefits of fair and ethical trade.
[161] Except for Cook Islands, Micronesia, Nauru, Niue and Tonga (Pacific region) all ACP countries are ILO Members. What is even more, following the 1998 ILO Declaration on Fundamental Principles and Rights at Work, there is an agreement that ILO Members, following their membership, also those that have not ratified the conventions, are "obliged to promote and realize the principles concerning the fundamental rights of the ILO Conventions". These core principles and rights include freedom of association and effective recognition of the right to collective bargaining, elimination of all forms of forced of compulsory labour, effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. However, of course keeping in mind that ratification, implementation and compliance are not one and the same and this is exactly the limitation the ILO entails since there is no legal mechanism to enforce compliance.

with Colombia and Peru[162] do contain a specific list of international environmental agreements, this was not done in the EPA.[163] On the other hand, the referral to multilateral and regional agreements and environmental agreements to which they are parties (Article 184 and 72) should prevent the EU falling back on its own interpretation, which would have enhanced the idea of protectionism.[164]

Conversely, the agreement includes provisions meant to ensure that this would not be used for protectionist purpose also guaranteeing the choice of policy. *Prima facie* the stipulations on guarantees against protectionism appear to be very vague.[165] They entail respect for the parties to determine their own policies and a reference to take to the special needs and requirements and their own social and sustainable development priorities into consideration (Article 184, 185 and 192). It can be wondered why the transparency requirement (Article 187) in the environmental chapter and the specific reference not to use these labour norms for protectionist purposes (Article 191, paragraph 4) were respectively not included in the social chapter and in the environmental chapter. Essentially it is Articles 213 and 224 EPA-CARIFORUM (*infra*) are the guarantees against use for protectionist purposes. A lot will depend on the actual compliance in practise and application of the specific control mechanism and dispute settlement when required.[166] The EPA-CARIFORUM contains a fairly broad monitoring mechanism, namely the Consultative Committee and CARIFORUM-EC Trade and Development Committee with a broad mandate regarding sustainable development issues.[167] Article

[162] Both the trade agreement with Colombia and Peru (Article 270, paragraph 3) as well as Annex VIII of the GSP+ (Regulation 978/2012) refer to following multilateral environmental agreements: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 (hereinafter referred to as 'CITES'), the CBD, the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the United Nations Framework Convention on Climate Change (1992), Kyoto Protocol to the United Nations Framework Convention on Climate Change. The trade agreement additionally also includes: the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998. Moreover, it is added that the list can be extended to other multilateral environmental agreements as recommended by the Trade Committee and proposed by the Subcommittee on Trade and Sustainable Development (Article 270, paragraph 3). For critics relating to the highly inflexible prefixed list in Annex VIII of the GSP+ and lack of actually addressing the development needs of the beneficiary country, see: B. WARDHAUGH, *op.cit.* footnote 51, (827) 835-837 (846).

[163] This is even stranger since national law, for example in Namibia do appear to contain explicit environmental clauses and is party to various international environmental covenants. See: O.C. RUPPEL, *op.cit.* footnote 77.

[164] J. WOUTERS, "The EU Charter of Fundamental Rights. Some reflections on its external dimension", editorial for *Maastricht Journal of European and Comparative Law* 2001/1, 7-8; G. M. ZAGEL, *op.cit.* footnote 51, 17-19 (37); A. DIMOPOULOS, *op.cit.* footnote 87, (565) 583 (594).

[165] These provisions also appear to be vaguer and general compared to those of the Colombia/Peru trade agreement. E.g.: explicit reference is made to "the sovereign right of each Party" (Article 268), Article 269, paragraph 5 EU-Colombia/Peru not only establishes that labour standards may not be used for protectionist purposes, it is even added that " the comparative advantage of any Party should in no way be called into question" and in Article 277, paragraph 4 it is guaranteed that "Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party." However, also these leave room for interpretation and it may be wondered whether this does not contravene in the long term with other rights. The interpretation of what is considered a "comparative advantage" will be crucial here and especially the right to a fair remuneration will be difficult.

[166] Compared to other investment treaties, the EPA-CARIFORUM is innovative since it does include a specific dispute settlement mechanism, while most others limit such issues to consultations. L. COTULA, *op.cit.* footnote 6, 86 and 90 (159).

[167] Under the current state of play (March 2014) both regions still need to finish setting up a joint Consultative Committee representing civil society as well of a list of Arbitrators. Article 232, paragraph 1 EPA-CARIFORUM. L. BARTELS, "Human Rights and Sustainable Development Obligations EU Free Trade Agreements", *Legal Issues of Economic Integration* 40, nr. 4 (2013), (297) 309 (313); The European Parliament's role in relation to human rights in trade and investment agreements, DG for External Policies of the Union, Directorate B, Policy Department, February 2014, 10-11 (38).

184, paragraph 3 provides for possible exceptions for example based on the protection of human, animal and plant life or health, this was not included in the social chapter. Hence, the general exception of Article 224 applies. As noted earlier, it is however not yet clear how or even if this can be applied for social or environmental issues (*supra).* In case of a dispute surrounding these specific chapters additional requirements were installed, next to the general provisions on dispute settlement (Article 204 et seq), providing for a more elaborate system of consultation and advice resulting in a report of a committee of experts (Article 189 and 195). It is only when this fails the general dispute settlement provisions apply and even then specifications are included, namely on the establishment of the arbitration panel in case mediation fails (Article 207, paragraph 4 and 221, paragraph 3) and possible appropriate measures in case of non-compliance (Article 213). As mentioned before, Article 213 EPA-CARIFORM entails that the suspension of trade concessions are not considered being appropriate measures in case of problems on the environmental or social chapter. While this is a step away from the sanctions based approach and seems to avoid claims of protectionism[168], it might undermine the idea of indivisibility of human rights[169] and does not coincidence with the application in the GSP[170]. Yet, recent actions, such as towards Bangladesh (*supra*), seem to root for a different approach. It remains to be clarified in future dispute settlement how article 213 and 224 will be interpreted, taking sustainable development as an overall objective into account[171].

Reflecting the difficulties surrounding the concept of sustainable development and taking the remaining deficits into account, in the realm of the current (international) framework, the provisions in the EPA-CARIFORUM were a good compromise between the inclusion of a separate social and environmental conditionality clause and fear for its use as a protectionist measure.[172]

4.b. Adapting to the new challenge of FDI in developing countries

The EU has taken efforts to address the responsibilities of the MNEs. Considering the new characteristics of international trade, foreign investors can and should have a major role to play in the protection of human rights, in particular labour and environmental norms, especially when operating in developing countries (*infra* section 4).[173] It is in those countries the adoption and enforceability of legislation for that cause is difficult.[174] It is therefore the EU's task to ensure "that trade agreements not only contribute to the establishment of legitimate rights of European enterprises, but also their

[168] COM(2001)416. Although the EP seems to maintain a call for the use of sanctions (P7_TA(2010)0466, *OJ* 2012 C 99 E/101). For a comparison between the EU and the US approach (written before the Lisbon Treaty), see: B. KERREMANS and M. MARTINS GISTELINCK, "Trade Agreements, Labour Standards and Political Parties. Differences between the US and the EU in their Approach Towards the Inclusion of Labour Standards in International Trade Agreements", *UNU-CRIS Working Paper* W-2008/1, 27.
[169] L. BARTELS, *op.cit.* footnote 68, 18 (19). On the other hand, the violation of other human rights have (up until today) not yet resulted in the application of trade measures, nevertheless the possibility is there.
[170] J. VANDENBERGHE, *op.cit.* footnote 82, (561) 569-574 (581).
[171] Article 219 EPA-CARIFORUM.
[172] D. CACCAMISI, *op.cit.* footnote 41, (285) 337-338 (353).
[173] A. GATTO, *op.cit.* footnote 7, 46-63.
[174] M. WESCHKA, *op.cit.* footnote 7, (625) 629 (661).

duties in the field of environment, labour and human rights in general".[175] After acknowledging the limitation the existing CSR framework entailed (*infra*), and in line with the intention for a new common investment policy[176] and the general policy on development cooperation, the EPAs are considered to offer great potential to make the trade, development and CSR link operational.[177] The EPA-CARIFORUM is indeed innovative, establishing for the first time a direct link between human rights and FDI. This was done through the inclusion of specific provision on the behaviour of investors, the maintance of standards and a general exception clause that also applies for FDI.[178] This in an attempt not only to guarantee respect for such rights but also avoiding that investors play off different countries against one another.[179] Unfortunately, Articles 72-73 EPA-CARIFORUM do little more than repeating what Articles 183-196, previously analysed, already included such as the non-lowering of standards to encourage FDI, and contain little additional obligations and are again directed towards the host state.[180] Although certainly noteworthy, the clause on the maintenance of standards (Article 73), entailing a legally binding obligation[181], could have included that this implies that national legislation should be established clarifying that private contracts may not include clauses exempting the foreign investor from the application of new social and environmental laws nor include a requirement for the host country to compensate costs for compliance with such laws.[182] This would at the same time clarify possible discussion in investor-to-state disputes, if this would be included in future EPA (*infra*). Moreover, future EPAs, provided that they include pre- and post-establishment FDI-provisions, might inscribe that investments made will only be protected if the investment is while made respecting national legislation (on environmental protection and labour laws). Combined with an increasing level of national legislation and support trough financial and technical cooperation, this offers great potential to create more binding obligations. The provisions on the behaviour of investors (Article 72) [183] goes beyond an intention to endeavour or merely best efforts by entailing an actual

[175] Committee on Development and Cooperation, Report on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, A4-0508/98, 17.12.1998.
[176] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010)343, 07.07.2010.
[177] COM(2001)416, 18.07.2001, 10 (31); The European Consensus', *OJ* 2006 C 46/1, point 98 and 99.
[178] A. DIMOPOULOS, *op.cit.* footnote 87, (565) 577 and 583 (594).
[179] A. GATTO, *op.cit.* footnote 7, 4 and 14-15 and 24-25 and 64 and 94-97.
[179] European Parliament resolution on mainstreaming sustainability in development cooperation policies, P6_TA(2007)0014, *OJ* C 250 E/77, point N and 43; Council Conclusions on Human Rights and Democratization in third countries, December 2009, point 17. MNEs should not directly violate human rights, not indirectly by supporting violating governments and may even positively influence human rights records (promote). See: A. GATTO, *op.cit.* footnote 7, 9-13.
[180] BARTELS attributes the repetition of the obligations in the sustainable development chapter for FDI to the complicated negotiating dynamic: L. BARTELS, *op.cit.* footnote 68, 13 (19). It must be noticed that the concept of not lowering the standards to encourage FDI, also explicitly mentions health and safety legislation and laws aimed at protecting and promoting cultural diversity. But in general, again the core labour standards are mentioned, but the environmental norms are not specified.
[181] A. DIMOPOULOS, *op.cit.* footnote 87, (565) 585 (594).
[182] This would be in line with recent developments in investment treaties providing clarification on the scope of investment protection standards. L. COTULA, *op.cit.* footnote 6, 25 (159).
[183] This includes the commitment to *ensure* that investors do not do not bribe public officials or related persons, act in accordance with the core labour standards, operate in a manner that does not circumvent environmental or labour obligations arising from agreements to which the EU or the CARIFORUM countries are parties and, in line with the broader CSR idea, establish and maintain local community liaison processes. For most EU countries (except for Cyprus, Malta, Lithuania,

obligation (shall), but is still less stringent than those formulated in relation to the traditional human rights. This clause does not create legally binding obligations for MNEs and although the inscription of direct obligations for investors might be difficult in respect of public international law, the provisions could be stronger and certainly enhanced in the future. A suggested by the EP this could include the idea of Socially Responsible Investment (SRI)[184], referring to the UNCTAD Investment Policy Framework for Sustainable Development (2012) and inserting a stronger CRS clause in future agreements. An obligation could have been included for the home and the host state to encourage enterprises to respect existing international codes. This would no longer make them voluntary for the MNEs and ensure that blatant infringement carry consequences, on the one hand, and, on the other hand, offer sufficient flexibility for the host state.[185] At least the current provisions could have further been specified, for example by clarifying that this includes appropriate access to a tribunal for the enforcement of the States' environmental or labour law and ensuring access to alternative non-judicial remedies for example by recalling the options the International Chamber of Commerce offers or other complaints mechanisms.[186] A stronger CSR clause, in future agreements, should entail more than the core labour standards, including for example also employment conditions, incorporate reporting and monitoring mechanisms and complaints or other kind of accountability mechanism.[187] However, up

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Latvia and Romania) as well as South Africa the first an obligation already flows from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction. It is also one of the few Convention that contains an obligation for the State Parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals (Article 2 and 4 OECD Anti-Bribery Convention). Moreover, this commitment on the part of the EU has been further strengthened by the recent initiative on transparency rules for extractive companies (*supra*).Also the African Union Convention on Preventing and Combating Corruption attempts to address this issue, requiring the state to enact legislation that criminalises the bribing of government officials. But there remain lacuna also in this area, for example not addressing non-cash gifts or actual enforcement. O. DE SCHUTTER, *op.cit.* footnote 7, 7 (74); http://www.oecd.org/corruption/oecdantibriberyconvention.htm, accessed 27 March 2013; L. COTULA, *op.cit.* footnote 6, 110 (159).

[184] This implies combining the investor's financial objectives with their concerns regarding social, environmental, ethical and corporate governance issues (Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013, 28.01.2013, point 20).

[185] E. VAN DER ZEE, "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?", *Legal Issues of Economic Integration* 40, No. 1, 2013, (33) 32, 51 and 52- (72) (and 6). This would imply for example the set up of National Contact Points to promote and implement the OECD Guidelines and the inclusion for investors to conduct human rights impact assessments. It would enhance the possible enforcement of the Guidelines. Other suggestions were the establishment of a Joint Committee or an Ombudsman.

[186] D. AUGENSTEIN, "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union", Submitted by the University of Edinburgh (http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf, accessed 05.04.2013), 46-47 (81); L. COTULA, *op.cit.* footnote 6, 27 (159).

[187] The EP further suggests a system of transnational legal cooperation to bet set up between the EU and third countries signatories of trade agreements to ensure effective access to justice. It however went further and called for an international judicial procedure to ensure that breaches of the law by companies are punished. For suggestions on a future CSR clause, see: P7_TA(2010)0466, *OJ* 2012 C 99 E/101, point 26-27; A7-0023/2013, point 91; Report on promoting development trough responsible business practices, including the role of extractive industries in developing countries, A7-0132/2014, 19.02.2014; Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, point 31; Opinion of the Committee on Foreign Affairs on Corporate Social Responsibility: accountable, transparent and responsible business behavior and sustainable growth, 05.12.2012, points 8 and 21; The European Parliament's role in relation to human rights in trade and investment agreements, DG for External Policies of the Union, Directorate B, Policy Department, February 2014, 17-18 (38).

until now suggestions to include such clauses were not followed up nor were explicit reference to these codes included (*infra*).[188]

In addition, the provisions regulating the access and establishment of FDI (Article 67-70) seem more lenient than the behavioural requirements and limit the policy space of the CARIFORM states. As appears from Annex IV, only some of the CARIFORUM States have considered the ramifications of the undertaken commitments. It will be of utmost importance that other ACP countries do the same in the negotiations of full and comprehensive EPAs. Moreover, compared to traditional bilateral investment treaties, the general exception clause of Article 224 also applies for FDI.[189] This might offer a leeway for the host state, in this case the CARIFORUM countries, to pursue a public policy conducive to sustainable development (ensuring the right balance between the protection of the investor and the need for state intervention), provided such measures are necessary and proportionate.[190] However, it is not entirely clear yet how this exception clause will be applied in relation to sustainable development, in particular labour norms and environmental standards, and in relation to the Article 67-70 EPA-CARIFORUM (*supra*).[191] A more explicit referral in the general exception clause to the human rights obligations, or even sustainable development, might alleviate this.

Compared to more traditional political settlement of disputes, the provisions in the EPA-CARIFORUM provide for a more "judicilized" mechanisms. However, without there being a differentiation between dispute settlement for trade and investment. Consequently providing only for state-to-state dispute settlement and limiting the accessibility for private individuals.[192] Moreover, the composition of an arbitration panel including also persons with specific expertise on environmental and social matters, appears not to be guaranteed here. It would be advisable to clarify this. In general and in compliance with Article 219 EPA-CARIFORUM, there should be a balance in investment and human rights expertise, ensuring room for human rights considerations which is currently lacking in most Bilateral Investment Treaties (BITs). The practical implications for human rights considerations in FDI-rulings remains to be seen.[193] If future EPAs would include provisions on investor-to-state disputes, Article 224 EPA-CARIFORUM should be clarified decreasing the risk of investors suing

[188] However, also suggestions to include more CSR into the GSP, have also not been followed. P7_TA(2010)0466, *OJ* 2012 C 99 E/101, point 20. The intention was to include a binding requirement for states to ensure that cooperations fulfill obligations in the areas of human rights, labour standards and environmental rules. Other suggestions are for example the inclusion of contractual clauses in all "finance for trade and development" offered to the private sector, requiring compliance with the OECD Guidelines and UN Guiding Principles and adding an accountability and complaints mechanism (point 36 and 89, 42/51).

[189] A. DIMOPOULOS, *op.cit.* footnote 89; D. AUGENSTEIN, *op.cit.* footnote 186, 46-47 (81).

[190] For considerations concerning the possible use of exceptions by the ACP to trade liberalizations based on the protection of their rights, the choice of policy and interests, see: See fort his argument: J. NWOBIKE, *op.cit.* footnote 37, (1381) 1401-1404 (1406).

[191] A7-0023/2013, 44/51.

[192] A. DIMOPOULOS, *op.cit.* footnote 87, (565) 572-576 (594).

[193] A. DIMOPOULOS, *op.cit.* footnote 87, (565) 590-594.

governments for reducing their profits in legislating for the protection of the environment or social concerns.[194]

Although innovative and the fact that the provisions creates restrictions for FDI to the advantage of human rights considerations, one need to remain careful that MNEs are not only bestowed with rights. Rights come with responsibilities and this should be further enhanced (in future EPAs). One of the main lacuna, also here, is the question of accountability and enforcement. There is no mechanism to include civil society and the persons who are directly affected do not have a guarantee of an enforcement mechanism, this depends on the legislation of the host state.[195] The only option provided is the application of Article 97 Cotonou, which is again state-centred. Although the initial inception that this provision only relates to corruption situations in regard to development aid has now been broadened, it has rarely been used and it can be wondered if it would actually be invoked and applied in relation to Article 72 EPA-CARIFORUM.[196] Up until now, it can be doubted whether a sufficient balance is indeed struck between the protection of the investor and the need for state intervention.[197] This might partly be alleviated by the EU in the fulfilment of its responsibilities as a home state (*infra* section 4).

5. MNEs rights *and* responsibilities?

The growing level of activity of enterprises in third countries, in particular developing countries, requires to divide the attention between the host state responsibilities and those MNEs more evenly. Although the latter indeed cannot take over public authorities' responsibilities in issuing suitable legislation, including access to remedies, MNEs have acquired a significant role with connection to sustainable development and trade.[198] One can no longer argue that the only social responsibility of business is to increase profits.[199] Although there has been reluctance in the past to address the issue of

[194] Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, points 9 and 37. To ensure a balance between sufficient protection and sustainable development this also requires for example balanced expertise in the arbitral tribunal or panel, see: L. COTULA, *op.cit.* footnote 6, 35 (159).

[195] A. DIMOPOULOS, *op.cit.* footnote 89. It must be noticed however that Article 217 EPA-CARIFORUM explicitly includes the right for private individuals to submit *amicus curiae*. The EPAs could at least install a mechanism ensuring a right for individuals and civil society to request for investigation of alleged human rights violations.

[196] A. DIMOPOULOS, *op.cit.* footnote 89; J. MACKIE and J. ZINKE, *op.cit.* footnote 2, 1-2 (16); A. BRADLEY, *op.cit.* footnote 50, 3 (16).

[197] Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013, 28.01.2013, point 49.

[198] In the framework of this paper, that is human rights – in particular sustainable development and trade – in particular FDI, the issue of the possible role and accountability of natural and legal persons for the crimes of genocide, war crimes, crimes against humanity torture and forced disappearances is not directly discussed (crimes recognized as customary international crimes). In case of this restricted field of crimes the notion of universal jurisdiction and direct responsibility of individuals applies, but however does not apply to legal persons. However, some countries appear to apply such liability also for legal persons. For an extensive analysis on the issue of the exercise of extraterritorial jurisdiction, in the absence of a positive authorization, and whether this may be considered as a violation of the sovereignty of the territorial state or an interference with its international affairs, see: O. DE SCHUTTER, *op.cit.* footnote 7, 4-5 and 53 (74); O. DE SCHUTTER, "Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations", 11-20 and 26-29 (52) (http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf, accesses at 02.04.2013); M. WESCHKA, *op.cit.* footnote 7, (625) 636 (661); A. GATTO, *op.cit.* footnote 7, 91-97.

[199] E. ENGLE, "Extraterritorial corporate criminal liability: a remedy for human rights violations?", *St. John's Journal of legal commentary* 2006 Vol. 20:2, (287) 308-337 (329).

MNEs' behaviour, this is no longer attainable as is demonstrated by public opinion and increased legal writings on the matter.[200] Changed consumer behaviour has resulted in MNEs adopting a more proactive role, taking voluntary initiatives and committing to general or sectorial codes of conduct.[201] These initiatives were followed up at international level.[202] One of the biggest initiatives of MNEs at international level is the UN Global Compact[203] and the UN Norms, meant to complete the UN Global Compact, which were however never adopted by the UN Human Rights Commission.[204] After the set back of the UN Norms, a UN Framework on Business and Human Rights was adopted[205], for which the EU expressed its full support. The adoption of the 'Guiding Principles for Human Rights' serves as an "authorative global reference point for business and human rights"[206]. Also the OECD Guidelines for Multinational Enterprises as revised in 2000[207], which were established exactly as a counterweight to the extensive protection granted to the rights of investor in most investment agreements, are worth mentioning as one of the first guidelines adopted by governments and addressed to MNEs, but are not directly binding on the MNEs.[208] Also the ILO Tripartite Declaration on

[200] See: A. GATTO, *op.cit.* footnote 7, 7-8 and 105-110.

[201] http://ec.europa.eu/environment/industry/retail/event_2010/pdf/code_conduct.pdf (accessed at 05.06.2013); http://www.euroleather.com/ccenglish.htm (accesses at 05.06.2013).

[202] See also: C. VIDAL-LEÒN, *op.cit.* footnote 129, (893) 894–898 (920).

[203] http://www.unglobalcompact.org/AboutTheGC/. However, this lacks specificity and the only requirement to participate is to publicly declare their commitment to the stated principles. However, the lack of efficient operational measures was partially dealt with by declaring and making public a participant that does not provide its annual report as "inactive" and by installing a written complaints mechanism and may also lead to "inactive" qualification or a removal of the list of participants. See: M. WESCHKA, *op.cit.* footnote 7, (625) 651-652 (661).

[204] UN Sub-Commission on the Promotion and Protection of Human Rights (UN Economic and Social Council, Commission on Human Rights (22nd meeting, 13 August 2003), Economic, Social and Cultural Rights – Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2. For an analysis of these norms, see: M. WESCHKA, *op.cit.* footnote 7, (625) 653-656 (661).

[205] Following a series of reports, the Special Representative of the UN Secretary-General on the issue of Human Rights and Transnational Cooperations and Other Business Enterprises has established in 2008 the 'Protect, Respect, and Remedy' Framework for better managing business and human rights challenges (UN Framework).

[206] Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business Enterprises – Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011. New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E. E. VAN DER ZEE, *op.cit.* footnote 185, (33) 40-50 (72). These principles including the duties of states and responsibilities of companies rest on the principles to protect, respect and remedy.

[207] The original Guidelines did not care much for social or environmental concerns nor for the impact of activities of MNEs in developing countries as these only applied in the territories of States adhering to the OECD. Since the 2000 revision the Guidelines apply to the world-wide activities of enterprises operating in countries adhering to the Guidelines (not necessarily OECD members). A. GATTO, *op.cit.* footnote 7, 77.

[208] These Guidelines base the respect for human rights on the international obligations and commitments of the host country. It is for example noticed that since the 2000 revisions there is a monitoring process, based on the establishment of National Contact Points (NCP), but that its efficiency is still limited. For e.g. the confidentiality of the Enterprises is severely protected and conclusions may lead to an abstract recommendation on the implementation of the Guidelines, but not the behavior of a specific MNE. A limitation that was also implicitly recognized by the Committee of Foreign Affairs (Opinion of the Committee on Foreign Affairs on Corporate Social Responsibility: accountable, transparent and responsible business behavior and sustainable growth, 05.12.2012, point 17). See: O. DE SCHUTTER, *op.cit.* footnote 7, 66-67 (74); J. WOUTERS en L. DE SMET, "Het EVRM, International Mensenrechtenstandaarden en 'Multinationale' Ondernemingen", *Instituut voor Internationaal Recht* Working Paper Nr. 37, 2003, 24 and 27-28 (32); M. WESCHKA, *op.cit.* footnote 7, (625) 647-650 (661); D. AUGENSTEIN, *op.cit.* 186, 51-52 and 78 (81). These Guidelines were recently updated in 2011 (http://www.oecd.org/daf/inv/mne/2011update.htm). For the history and recent development of these Guidelines, see: E. VAN DER ZEE, *op.cit.* footnote 185, (33) 37-40 (72). Following the 2011 update the Guidelines are not only applicable to MNEs operating in or from adhering countries, but extended for example the supply chain responsibility provisions so they apply not only in business relations in which investment relations are present.

Multinational Enterprises and Social Policy, creates recommendations but is not legally binding.[209] One of the main stumbling blocks remains the 'state-centred' approach of international law resulting in the absence of a general consensus on direct obligations and legal accountability of legal persons.[210] Other deficiencies of the current framework are the fact that these remain voluntary, prove to be little transparent, lack sufficient implementation following problems of monitoring, reporting, verification and enforcement or accountability mechanism.[211] The fragmented approach through different codes and systems makes effective control on the actual implementation very difficult and too often results in situations where such codes are mainly used for public relations' purposes, but not actually changing behaviour.[212] Recently, the United Nations Forum on Sustainability Standards (UNFSS) was launched.[213] Hopefully, some of these issues are addresses there.

5.a. The EU's first efforts to address MNEs responsibilities

In the face of the current absence of an international recognized direct accountability for MNEs for human rights violations, respect for human rights predominantly induces obligations for the host State, respecting the principles of participation and ownership, as well as for the home State.[214] However, focus has mainly been on the host state, resulting in the Union laying down obligations for developing countries. In relation to FDI, however lies another substantive responsibility for the Union, namely as the home state. The Union has been one of the main proponents to address the issue of the MNEs responsibilities, establishing the idea of CSR and making the business world a partner for development in the long run.[215] However, just as is the case for sustainable development, CSR has never been

[209] A. GATTO, *op.cit.* footnote 7, 79-80.

[210] For further information on these matters, see: P. ALSTON, "A Human Rights Perspective on the Millennium Development Goals", Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, 1-62; A. KING, "The United Nations Human Rights Norms for Business and the UN Global Compact", King Zollinger & Co, February 2004, 4; C.F. HILLEMANNS, "UN Norms on the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", *German Law Journal* Vol. 04 No. 10, 1066-1080; Amnesty International, "The UN Human Rights Norms for Business: Towards Legal Accountability", *Amnesty International Publications* 2004, 35; P. PAVEL MIRETSKI en S-D BACHMANN, "Global Business and Human Rights – The UN "Norms on the Responsibility of Transnational Cooperations and Other Business Enterprises with Regard to Human Rights" – A Requiem", (accepted author's copy) – publication in 17 *Deakin Law Review* 2012, 33. Although there is, up until today, no integration of clauses on corporate governance or CRS in international agreements, these issues are slowly finding their way in through arbitration and national legislation.

[211] J. WOUTERS en L. DE SMET, *op.cit. 208*, 26-29 (32); M. WESCHKA, *op.cit.* footnote 7, (625) 643-656 (661); E. VAN DER ZEE, *op.cit.* footnote 185, (33) 41-51 (72); A. GATTO, *op.cit.* footnote 7, 22; Report on promoting development trough responsible business practices, including the role of extractive industries in developing countries, A7-0132/2014, 19.02.2014.

[212] COM(2001)366; Amnesty International, "The UN Human Rights Norms for Business: Towards Legal Accountability", *Amnesty International Publications* 2004, 12 (35); O. DE SCHUTTER, *op.cit.* footnote 7, 58 (74); M. WESCHKA, *op.cit.* footnote 7, (625) 644 (661); A7-0132/2014, 19.02.2014; Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, points 53 and 55.

[213] This program was established in the recognition that social and other standards might place additional burdens on in particular developing countries.

[214] P7_TA(2010)0466, *OJ* 2012 C 99 E/101, point P. Respect for human rights, democratic principles and the rule of law (Article 9 Cotonou) impose positive obligations on the parties (meaning the Union and the Member States on the one part (at least as jointly liable) and the ACP on the other part (Article 1 Cotonou). L. BARTELS, *op.cit.* footnote 37, 145-164. The EP has even called for common industry-wide international standards on what constitutes responsible business practices (A7-0132/2014, 19.02.2014).

[215] The promotion of and attention for CSR has increased following of 2001 Commission Greenpaper (COM(2001)366) and the Communication from the Commission concerning CSR: a business contribution to Sustainable Development,

clearly defined, hence also here the room for different interpretation and difficulties on the objectives and the agreement on the legal responsibilities this entails. The EP has formulated the responsibilities of the EU as follows: "the Union must ensure that the external policies it implements make a *genuine contribution* to the sustainable development (…) and that the actions of European corporations, wherever they invest and operate, are in accordance with European values and internationally agreed norms".[216] Following suit and finding its origins in the EP's calls for a code of conduct for enterprises operating in Southern Africa during the apartheid[217], the EP has continued to strive for a binding EU Code of Conduct rejecting the argument that such a code would not legally be possible nor called for.[218] However, this has not yet resulted in a binding instrument at EU-level either.[219] Nevertheless, the EU has explored different roads to commit to its responsibilities as a home state and strengthen their obligations.[220] Instead of aiming at a EU-wide code of conduct, the Union chooses to promote CSR in all areas of its competence using the abovementioned international codes as a point of reference[221] and supporting and promoting MNEs to abide by these codes, rather than subscribing to many different sectorial codes.[222] However, the Commission has realized, following the EP's endeavour to move beyond a voluntary CSR-approach[223] and more common standards[224], that soft law has its limits.[225]

COM(2002)347, 02.07.2002; DPS, punt 11; Council Conclusions on Policy Coherence for Development (PCD), Brussels, 17.11.2009; EU Common Position for the Forth High Level Forum on Aid Effectiveness, 14.11.2011; Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013, 28.01.2013. M. VAN REISEN, "Directing EU Policy Towards Poverty Eradication. From Commitments to Targets to Results", 2002, 9 en 14-15 (27).

[216] P7_TA(2010)0466, *OJ* 2012 C 99 E/101.

[217] Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy, *OJ* 1999 C 98/270, points 48-63. GATTO points out the fact that this code was adopted under the European Political Cooperation framework and was rather a policy declaration than a legal instrument, moreover it lacked a sufficient monitoring mechanism. A. GATTO, *op.cit.* footnote 7, 175-176.

[218] Committee on Development and Cooperation, Report on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, A4-0508/98, 17.12.1998 (Howitt Resolution); European Parliament resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility, P5_TA(2002)0278, 07.08.2003.

[219] A. GATTO, *op.cit.* footnote7, 179-182. The EP has established a temporary European Monitoring Platform by organizing public hearings where victims of abuses and representatives of the concerned multinational enterprise are heard. The added value of this mechanism lies in the public accountability of the MNEs and demonstrating possible compliance of the MNEs with their own internal policies. The shortcomings are however that it is, again, only a semi-judicial setting and it is subjected to a great number of lobbying.

[220] A. VOICULESCU, *op.cit.* footnote 10, (743) 748 (762).

[221] COM(2009)400; Green paper, EU development policy in support of inclusive growth and sustainable development - Increasing the impact of EU development policy, COM(2010)629, 10.11.2010; COM(2011)637; COM(2011)681; COM(2012)22.

[222] COM(96)402; COM(2001)366; COM(2001)416; COM(2002)347; COM(2011)681. A. GATTO, *op.cit.* footnote 7, 159-173; A. VOICULESCU, *op.cit.* footnote 10, (743) 751 (762).

[223] A7-0023/2013, point 85.

[224] A7-0132/2014, 19.02.2014.

[225] Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy, *OJ* 1999 C 98/270, points 48-63; European Parliament resolution on mainstreaming sustainability in development cooperation policies, P6_TA(2007)0014, *OJ* C 250 E/77, point 45; A. VOICULESCU, *op.cit.* footnote 10, (743) 749 (762); 12th EU-NGO Forum on Human Rights, Recommendations of the Forum on "EU Human Rights Instruments and the Lisbon Treaty: State of Play and the Way Forward", Brussels, 2010, 6 and 12. A. GATTO also notices the increased conclusion of International Framework Agreements (IFAs), these are agreements concluded between a MNE and a global union federation in order to protect fundamental social rights of the employees of the company concerned in all its operations. However, the legal nature of such agreements is not clear and there is, just as for codes, no global enforcement mechanism. On the other hand they are, compared to codes of conduct, not merely unilateral declarations. The results of such IFAs are mixed, especially as they

The Union has attempted to find answers to enhance and raise awareness on MNEs responsibilities from within, but with extraterritorial implications trough e.g. adjustment of the public procurement rules[226], the fair and ethical trade initiatives, sustainability labelling schemes[227], promotion of other trade-related private sustainability initiatives[228] and the promotion of incentive mechanisms.[229] It is unfortunate that for such incentive mechanisms there remain huge differences between the Member States in the application of such incentive mechanisms remain and only a few take human rights directly into account.[230] Moreover, reflections of such incentive mechanisms to promote CSR in agreements with third countries remain vague.[231] Also fair and ethical initiatives find there reflection in the agreements (e.g. Article 184 and 191 EPA-CARIFORUM), but do not necessarily make them stronger from a legal point of view.

require a well established local union. A. GATTO, *op.cit.* footnote 7, 184-185; A. VOICULESCU, *op.cit.* footnote10, (743) 751-752 (762).

[226] The old Directive 2004/18 provided *a possibility* to include social and environmental clauses in public procurement procedures (as qualification criteria, as award criteria and during the performance of the contract). The provisions could have gone much further and the EU continuously attempted to strengthen an approach for more sustainable public procurement, e.g. through the Green Public Procurement and Social Responsible Public Procurement. In the new directive issues as social standards and environmental protection feature more prominently, e.g. it introduces the 'most economically advantageous tender'. Moreover, it includes to obligation that "*Member states shall take appropriate measures to ensure that in performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by international environmental, social and labour law provisions*" (Article 18, paragraph 2 and Annex X). In the framework of the WTO, the previous Government Procurement Agreement does not contain any reference on environmental protection, but the Commission seems to be of the opinion that considering the preamble of the WTO it *allows to take into account* environmental considerations (SEC(2008)2124, Annex 3). The changes to the Government Procurement Agreement agreed in 2011 however does include standards for the improved prevention of corrupt practices and measures aimed at promoting environmental protections and the conservation of natural resources. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ* L 94/65 of 28.03.2014. Commission interpretative communication, On the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001)274, 04.07.2001; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Public Procurement for a better environment, COM(2008)400, 16.07.2008; European Commission, Buying green! A Handbook on Green Public Procurement, 2011; Interpretative communication of the Commission, On the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001)566, 15.10.2001; European Commission, Buying Social! A Guide to Taking Account of Social Considerations in Public Procurement, 2010. See: O. DE SCHUTTER, *op.cit.* footnote 7, 53 (74); A. GATTO, *op.cit.* footnote 7, 149-158.

[227] E.g.: Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, *OJ* 2010 L 27/1; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ* 2009 L 140/16. Initiatives for a European social mark are currently being considered: EP Committee on Employment and Social Affairs, Report on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery (2012/2097(INI)), A7-0023/2013, 29.01.2013, point 70. A way of sanctioning the relevant company is trough e.g. unfair commercial practice directive (Directive 2005/29, *OJ* 2005 L 149/22). COM(2011)682

[228] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes, COM(2009)215, 05.05.2009.

[229] For an overview of other measures and suggestions, see: D. AUGENSTEIN, *op.cit.* footnote 186, 25-81 p. On suggestions to improve these instruments, see: Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013, 28.01.2013, points 16-38.

[230] See: D. AUGENSTEIN, *op.cit.* footnote 186, 41-43 (81).

[231] The reference in Article 196, paragraph 2 (d) EPA-CARIFORUM only mentions the promotion of CSR trough public information and reporting and does not even mention incentives. This compared to Article 271, paragraph 3 and 4 EU-Colombia/Peru agreement. It would be advisable to include such incentive mechanism also in the EPA, since costs for compliance are often borne by the producer without always being able to enjoy the benefits of it. By providing incentives and a (compulsory) labeling system they will not only be more inclined to comply with these norms, but also profit from a better access to the EU market.

5.b. Legal accountability for MNEs?

Still, to avoid double standards and strengthen the EU's responsibility as a home state, a more mandatory system providing binding uniform standards and rules on accountability for all EU enterprises operating abroad, especially in developing countries, is called for. Taking into account the current boundaries in international law (on extraterritorial application of legislation and jurisdiction), the absence of a general *obligation* for a home state to control their nationals (natural and legal) abroad[232] and the limitations to assimilate such conduct with that of the State itself[233], one can wonder on the basis or feasibility for the Union to adopt such measures. The absence of such an obligation however does not hinder the *possible* adoption of European legislation in that regard. Moreover, there is a responsibility for the EU and its Member State, taking the Treaty into account (Article 3 and 21 TEU and Article 208 TFEU), towards developing countries to ensure that their enterprises do not violate human rights operating in those countries. This was duly recalled by the EP.[234] This would also align with the obligation of international cooperation, which is being revitalized in international human rights law, and the idea of international solidarity. This would not contravene with State sovereignty and to avoid any claims, the EP's idea to include developing countries in the process should be taken on.[235]

One if the first options that comes to mind is the use of the Brussels I(bis)-Regulation[236] for civil liability.[237] Not only does the Regulation appear to offer an option to establish a national jurisdiction on civil liability resulting from human rights violations in third countries inflicted by EU-based[238]

[232] There are however exceptions, e.g. for certain countries in case of bribery of foreign nationals under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction. M. WESCHKA, *op.cit.* footnote 7, (625) 630-631 (661). The establishment of an extraterritorial jurisdiction by a State Party *may* also flow from the UN Convention against Corruption, see: O. DE SCHUTTER, *op.cit.* footnote 198, 5 and 18 (52). On the limitations of these conventions, see: D. AUGENSTEIN, *op.cit.* footnote 186, 57-58 (81).

[233] Only in specific cases, such as where the national has acted on the instruction of, direction of control of the State. Although there is for the State not only a negative obligation to refrain from human rights violations, there is also a positive obligation to protect these rights from violations by others (private parties) *within* its borders. This does however not necessarily mean that the conduct of the individual will also be imputable to the State. O. DE SCHUTTER, *op.cit.* footnote 7, 6-9 and 12-21 (74); J. WOUTERS en L. DE SMET, *op.cit.* footnote 208, 16 (32); D. AUGENSTEIN, *op.cit.* footnote 186, 19-25 (81); A. GATTO, *op.cit.* footnote 7, 66.

[234] Report on promoting development trough responsible business practices, including the role of extractive industries in developing countries, A7-0132/2014, 19.02.2014.

[235] A. GATTO, *op.cit.* footnote 7, 180.

[236] This regulation provides for a partial harmonization of the conditions of judicial competence in the EU. Commission Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001 L 12/1. A new Brussels I regulation was adopted and will enter into force on 10 January 2015. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, *OJ* L 351/1 of 20.12.2012 (further: Brussels Ibis). Ireland and the UK take part in the adoption and application of Brussels I(bis), Denmark has not.

[237] This was also pointed out in the EP Report on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility, A5-0159/2002, 30.04.2002. Since such jurisdiction is based on the active personality principles, one of the classical bases for the exercise of extraterritorial jurisdiction, this is acceptable from an international law point of view. O. DE SCHUTTER, *op.cit.* footnote 198, 23 and 28 (52). On the issue of violations committed by third-country subsidiaries or contractors and the doctrine of separate legal personality, see: D. AUGENSTEIN, *op.cit.* footnote 186.

[238] To apply the Brussels I Regulation the defendant needs to be domiciled in an EU Member States. This requires having their statutory seat, central administration or principal place of business in an EU Member State (Article 63 Brussels Ibis).

companies[239], following the Court's case law[240] it also seems to exclude the option to shift responsibilities to the host country via the *forum non conveniens*. The new *lis pendens* rule risked providing an escape route for some MNEs (Article 33 and 34 Brussels Ibis), with a *forum non conveniens* creeping in silently, but there is no obligation for the court of the Member State to stay its proceedings (it *may*), so offering a way out and guaranteeing an access to justice.[241] It is a shame the proposal to include *a forum necessitates* nor the other proposal to extend possible establishment of jurisdiction in cases where the defendant is domiciled in a third State, were followed.[242] This could have provided options in situations where the non-EU subsidiary is the defendant, where now this is left in the hands of the national private international law rules.[243] Nevertheless, Brussels I(bis) offers many roads to guarantee an access to justice. However, an actual access to remedies needs to be assured as well. To avoid the risk of a legal framework falling short, as is often the case in developing countries, by applying the principal rule of *lex loci damni*, the public policy of the forum can offer a solution.[244] Moreover, for environmental damages the *lex loci acti* might apply if the victim chooses so.[245] In addition, taking into account the Member States obligations as members of the EU and the European Convention of Human Rights as well the fact that the application of the *lex loci delicti* in case of a decision of a parent company based in the EU could also lead to the application of their Member States' legislation, possible hurdles in regard to MNEs accountability (also in terms of access to remedies, fair trail, etc.) can be addressed. Indeed there is room for improvement, for example by enlarging the scope of the exception in cases of environmental damages also for other human rights violations, but in sum, there is a good case for civil accountability of MNE domiciled in the EU, following the violation of human rights in developing countries, without the necessity even for

[239] Article 2 and Article 5 paragraph 3 and 4 Brussels I (Article 4 and 7 paragraph 2 and 3 Brussels Ibis) offer a sufficient legal basis for legal action before a jurisdiction of a EU Member State regarding tort based on the damages, occurring or caused outside its territory, suffered by victims, wherever these are domiciled and whatever their nationality, caused by an activity of a MNE domiciled in a Member State or by any of its branches. O. DE SCHUTTER, *op.cit.* footnote 7, 30-46 (74)

[240] ECJ, 1 March 2005, C-281/02, Owusu, ECR 2007, I-1383, paragraphs 37-46. The option to invoke the *forum non conveniens* doctrine was excluded. Once a jurisdiction can be established in a Member State based on this Regulation, the Member State has to recognize the jurisdiction of their national courts.

[241] V. VAN DEN EECKHOUT, "Corporate Human Rights Violations and Private International Law. The Hinge Function and Conductivity if PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor?", (July 26, 2011). Available at SSRN: http://ssrn.com/abstract=1895690, 6-10 (19).

[242] This would have implied that despite the lack of competence the relevant court may take on jurisdiction if otherwise an effective access to remedies would be absent. A7-0023/2013, point 53; Article 26 COM(2010784. The proposals to enlarge the rules of jurisdiction were not adopted.

[243] The national private international law rules then apply and might include a forum *necessitatis* or rules concerning related actions. Brussels Ibis only includes specific exceptions, namely certain consumer contracts, employment contracts, exclusive jurisdiction and choice-of court agreement (Article 6 Brussels Ibis). These provisions will apply regardless of the defendants' domicile. For a discussion on the new Brussels I regulation, see: P. ARNT NIELSEN, "The New Brussels I Regulation", *Common Market Law Review* 50 (2013), (503) 512-513 (528).

[244] Article 4, paragraph 1 and Article 26 Rome II Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007on the law applicable to non-contractual obligations, *OJ* L 199/40 of 31.07.2007. Ireland and the UK take part, Denmark does not. Article 3 provides for a universal application "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State." It must be noticed however that invoking the plea of international public policy not necessarily leads to the application of the *lex fori.*

[245] Article 7 Rome II. Also the exception of Article 4, paragraph 3 (manifestly more closely connected with a country) might apply, but its interpretation is not straightforward and a strict interpretation might exclude its possible application. VAN DEN EECKHOUT further argues that also Article 16 and 17 might give rise to the application of the law of an EU Member State. V. VAN DEN EECKHOUT, *op.cit.* footnote 241, 14 (19).

legislative changes.[246] It might however even be feasible to harmonize the type and level of civil or administrative sanctions.[247] Nevertheless and despite the recognition of these instruments to better ensure effective access to remedies[248], neither the Commission nor the Council refers to this option and one can question the actual application of the Brussels I(bis) and Rome II Regulations in this area.[249] Up until now, also international calls to clarify on the issue of extraterritoriality for violations by companies, this call has remained without response.[250] The issue of criminal liability for legal persons, at EU level[251], for conduct abroad is even more sensitive.[252] The Belgian example on extraterritorial criminal liability[253], with even amendments – following the disappointments within the WTO on the social dimension – to include violations of core labour standards[254], seems to imply that there is support for such measures.[255] However, the fierce reaction in regard to its actual application and the amendments of the legislation also demonstrate the cautious approach on the matter[256] and there remain huge differences between the Member States. The advantages of an EU initiative thus are manifold, it would lead to a faster adoption on legislation on corporate conduct, would resolve possible problems of distortion of the competition, decrease the impact of business lobby and lessen

[246] For suggestions for possible improvements, see: V. VAN DEN EECKHOUT, *op.cit.* footnote 241, 16-19.
[247] S. ADAM, G. VERMEULEN and W. DE BONDT, "Corporate criminal liability and the EC/EU : bridging sovereignty paradigms for the sake of an area of justice, freedom and security" in *La responsabilité pénale des personnes morales en Europe*, S. ADAM, N. COLETTE-BASECQZ and M. NIHOUL (eds.), Bruxelles, La Charte, 2008, 409.
[248] Opinion of the Committee on Foreign Affairs on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth, 05.12.2012, point 18.
[249] Based on the analyses in O. DE SCHUTTER, *op.cit.* footnote 7, 31-47 (74).
[250] A7-0023/2013.
[251] Analysis on the issue of criminal liability of corporations at international level, see: G.-J. A. KNOOPS, "Transposition of (international) criminal liability modes onto private cooperations", in *La responsabilité pénale des personnes morales en Europe*, S. ADAM, N. COLETTE-BASECQZ and M. NIHOUL (eds.), Bruxelles, La Charte, 2008, 321-342 and G. DE VEL, "La responsabilité pénale des personnes morales dans les instruments juridiques du Conseil de l 'Europe", in S. ADAM, N. COLETTE-BASECQZ and M. NIHOUL (eds.), *La responsabilité pénale des personnes morales en Europe*, Bruxelles, La Charte, 2008, 342-371; S. ADAM, G. VERMEULEN and W. DE BONDT, *op.cit.* footnote 247, 379-383.
[252] See: S. ADAM, G. VERMEULEN and W. DE BONDT, *op.cit.* footnote 247, 384-432; W. DE BONDT, C. RYCKMAN and G. VERMEULEN, "Liability of legal persons for offences in the EU: outstanding policy decisions", in *European Criminal Justice and Policy*, Governance of Security Research Paper Series vol. 7, M. COOLS, B. DE RUYVER, M. EASTON e.a. (eds.), Antwerpen, Maklu, 2012, 177-203.REDRESS and FIDH, "Extraterritorial jurisdiction in the European Union. A Study of the Laws and Practice in the 27 Member States of the European Union", December 2010, (http://www.fidh.org/IMG//pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf, accessed at 04.04.2013).
[253] The so called 'genocide-law' provided for a universal jurisdiction concerning war crimes and genocide, but was eventually watered down requiring a link between the situation in question and the Belgian legal order.
[254] It was proposed to establish a universal jurisdiction on the violation of core labour norms.
[255] Belgische Kamer van Volksvertegenwoordigers, Wetsvoorstel tot invoeging van een artikel 10quinquies in de Voorafgaande Titel van het Wetboek van Strafvordering, met het oog op de universele strafbaarstelling van bepaalde inbreuken op fundamentele sociale rechten, 09.12.1999, Doc. 0315/001. The proposition was subsequently amended in 2008 and repeated in 2011 and is currently pending.
[256] Initially if a person, whichever their nationality infringes these norms they could be prosecuted in Belgium, *if they are found on Belgian territory*, without any requirement of double incrimination.A later amended proposition at the same time broadened, by explicitly including legal persons, and watered down the initial proposal, by adding that the defendant needs to have his *principle residence or be domiciled in Belgium*. Belgische Kamer van Volksvertegenwoordigers, Wetsvoorstel tot wijziging van de Voorafgaande Titel van het Wetboek van Strafvordering, met het oog op de universele strafbaarstelling van bepaalde inbreuken op fundamentele sociale rechten, 29.02.2008, Doc. 0910/001; Belgische Kamer van Volksvertegenwoordigers, Wetsvoorstel tot wijziging van de Voorafgaande Titel van het Wetboek van Strafvordering, met het oog op de universele strafbaarstelling van bepaalde inbreuken op fundamentele sociale rechten, 13.01.2011, Doc. 1025/001. It is further clarified that for legal persons this concerns having their registered office, central administration or principle place of business in Belgium (comparable to Article 54 TFEU). Due to controversy, similar to what was the case for the 'genocide-law', the proposal is still pending.

possible criticism that such legislation is taken for protectionist purposes. Moreover, since the Lisbon Treaty (Article 3 TEU and Article 82 and 83 TFEU) there is a firmer legal basis for EU legislation on jurisdiction and the approximation of substantive criminal law.[257] Nonetheless, history proves this to be very difficult. Up until today legislative measures have been directed towards very specific offences and include no general obligation for the Member States to establish criminal sanctions, which is still the case also after the amendments in the Transparency Directive (*infra*).[258] Although a more common and coherent approach would send an important signal to the international community, reality is that there appears to be no willingness. Thus from within the EU is hampered to take measures to enhance legal accountability of MNEs.[259]

Nonetheless, the loopholes the absence of a fully-fledged *ex post* accountability leaves can be addressed by establishing a sound legal framework on *ex ante* accountability and that is what the Union has attempted to do through the amendment of the Accounting and Transparency Directives.[260] These rules require large undertakings, public-interest entities and issuers who securities are admitted to trading on a regulated market active in the extractive industry, namely oil, gas and mining firms and loggers of primary forests to be transparent on payments made to governments above 100.000 €.[261] The focus on these sectors is prompted by the possible negative consequences of the so-called "recourse curse"[262] and the fact that these activities are most vulnerable to human rights abuses and

[257] For critical reflections on this new competence, see: S. ADAM, G. VERMEULEN and W. DE BONDT, *op.cit.* 247, 429-430. On a note, full harmonization of sanctions is still excluded also after Lisbon.

[258] E.g. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, *OJ* 2011 L 101/1.

[259] See: W. DE BONDT, C. RYCKMAN and G. VERMEULEN, *op.cit.* footnote 252, 177-203. If such legislation would ever see the light of day O. DE SCHUTTER suggests that this should be based on the active personality principle, include norms that benefit almost universal recognition, contain a sufficiently precise incrimination and clarification of the relationship between the criminal liability of the legal person and that of the natural person. O. DE SCHUTTER, *op.cit.* footnote 7, 49 (74); J. WOUTERS en L. DE SMET, *op.cit.* footnote 208, 21 (32).

[260] Proposal for a Directive of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, COM(2011)684, 25.10.2011; Report on the proposal for a Directive of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, A7-0278/2012, 25.09.2012; Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM(2013)207, 16.04.2013; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/384/EEC, *OJ* L 182/19 of 29.06.2013; Directive 2013/50/EU of the European Parliament and the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitting to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 200714/EC laying down detailed rules fir the implementation of certain provisions of Directive 2004/109/EC, *OJ* L 294/14 of 06.11.2013. The Transparency Directive (Article 1 – amending Article 6 Directive 2004/109) refers to chapter 10 of Directive 2003/34, in this analyses the article referred to are those of that directive (unless otherwise indicated).

[261] Large undertakings are defined in Article 3, paragraph 4, public entities in Article 2, paragraph 1 of Directive 2013/34 and issuers in Article 2 Directive 2013/50 (amending Directive 2004/109). Other relevant definitions can be found in Article 41 of the respective Directive. The obligation to draw up a consolidated report only holds if the parent undertaking is under an obligation to prepare consolidated financial statements.. The Accounting Directive applies to all limited liability companies registered in the EEA, whilst the Transparency Directive applies the requirement to all relevant companies listed on EU regulated markets (even if not registered in the EEA and incorporated in other countries). For the exemptions see Article 44.

[262] This entails that a lot of developing countries are not able to enjoy the benefits of their rich natural and mineral resources because of corruption of their administrations by MNEs attempting to gain access. B. FOX, "EU to agree transparency rules

corruption.[263] Attempts to broaden the application also to other sectors, such as the banking, communication and construction sector, were blocked.[264] Disclosure of payments, in money or in kinds, should be done on a government and project base. The application of sanctions, in case of infringement is left to the Member States, but administrative sanctions and penalties should be effective, proportionate and dissuasive (resp. Article 51). Moreover, the Transparency Directive provides for a list of minimum sanctions that can be applied and are clearly also directed towards legal entities (Article 28 et seq.). Additionally, a list of criteria was included to take into account in the exercise of the sanctioning powers. The Transparency Directive, besides including a specific chapter on sanctions and measures, also includes a chapter on the publication of decisions requiring the Member States, in principle, to provide for the publication of every decision on sanctions and measures including at least information on the type and nature of the breach and identification of the legal or natural person. The adoption of such measures is an important preventive measure and leads to a greater preceding accountability of MNEs and may also contribute to good governance.[265] Although the major flaws were altered in the final versions, such as the scrapping of the criminal exemptions[266], the same considerations remain, such as great differences between Member States and no general obligation for criminal sanctions[267]. The inclusion of undertakings also in other sectors operating in third countries was preferred and a lot will depend on its monitoring and enforcement providing for effective, proportional and dissuasive penalties in case of omission.[268] Such legislation is again a step towards illicit financial flows resulting from corruption or bribery, but again sanctions towards the host countries are provided for (Article 97 Cotonou) whilst equally dissuasive sanctions for the MNEs are not guaranteed. Moreover, the idea was to be able to trace the money and ensure its use to fund local and national development and to attain the MDGs, however it will be difficult to actually track the spending of the money.[269] This would align with the obligation of Article 9 Cotonou[270] entailing a revenue management based on sharing for sustainable development.[271]

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for oil and mining firms", *EUobserver*, 09.04.2013; B. FOX, "Campaigners hail 'game-changing' EU deal on oil and mining corruption", *EUobserver*, 10.04.2013.

[263] Report on promoting development trough responsible business practices, including the role of extractive industries in developing countries, A7-0132/2014, 19.02.2014.

[264] Recital 32 and 35, Article 37, paragraph 1 and Article 39, paragraph 1 A7-0278/2012. The EP still calls for an elaboration also to other sectors (Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, point 69).

[265] Proposal for a Directive of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, COM(2011)684, 25.10.2011; Report on the proposal for a Directive of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, A7-0278/2012, 25.09.2012.

[266] Initially Article 38, paragraph 5 COM(2011)684; (deleted) A7-0278/2012.

[267] Article 28c provides that Member States *may* provide for such sanctions as well as take higher administrative pecuniary sanctions.

[268] The EP calls for an independent monitoring mechanism (Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, point 69).

[269] See for example: J. ARELLANO-YANGUAS and A. MEJIA-ACOSTA, "Extractive Industries, Revenue Allocation and Local Politics", *UNRISD*, March 2014, 36 p.

[270] " … sustainable development centered on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights."

Besides the specific rules on payments for governments, the Accounting Directive also inscribes the inclusion of non-financial key performance indicators, being an essential element of CSR, such as information relating to environmental and employee matters (Article 19) and a corporate governance statement in the management report (Article 20). However, these provisions remain fairly general. One needs to be careful that this does not lapse into a general standardized referral to the international codes they subscribe to, without actually altering its conduct, and without sufficient enforcement mechanisms (*supra*). It remains to be seen whether any remaining lacuna on MNEs responsibilities is sufficiently addressed resulting from the approval of the Commission proposal regarding legislation on non-financial reporting[272], but it appears to include similar minimum requirements and a lot of flexibility for the companies. The proposed amendments by the EP seem to strengthen this approach, e.g. by including an explicit referral to CSR, providing attention also to the supply and subcontracting chains, offering detailed guidelines on the information such a non-financial statement should include as well as the requirement that Member States should indeed ensure effective means to enforce compliance.[273]

As the CRS extends to the behaviour of MNEs towards and in third countries it should thus also be a core part of the EU's trade and development policy and included in its contractual relations.[274] Unfortunately, the current mechanisms, voluntary and legislative, can be greatly appreciated. It is a shame that the renewed EU strategy (2011-2014) for CSR seems, despite calls for more emphasis on the external dimension of CSR[275], limited and low in ambition on this front.[276] Similar to traditional human rights, dialogue, consultation and the involvement of the host state, civil society and other relevant organization, is crucial. However, following the 4th EU-Africa Summit, CSR and the need for greater transparency on finance was only mentioned in the side-lines and is nowhere to be found in the

[271] Taking into accounting the general notion that when sources are constrained the use of the maximum available resources requires states to prioritise the progressive realisation of human rights. For examples, see: L. COTULA, *op.cit.* footnote 6, 63-64 (159).
[272] Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM(2013)207, 16.04.2013; Opinion of the Committee on Foreign Affairs on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth, 05.12.2012, point 11; B. FOX, "Corporate governance on the agenda this WEEK", *Euobserver*, 07.04.2014. Large companies (with more than 500 employees and exceeds a balance sheet total of 20 million euro or a net turnover of 40 million euro) would be required to disclose in their management reports material information on policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their boards of directors. These statements include a description of the policies, results and risk-related aspects. They may rely on national, EU-based or international frameworks. When companies do not pursue any policy in one of the given areas, they would be required to provide a reasoned explanation.
[273] European Parliament legislative resolution of 15 April 2014 on the proposal for a directive of the European Parliament and of the Council Directive 78/660/EC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, P7_TA-Prov(2014)0368, 15.04.2014.
[274] A7-0023/2013, point 12 and 17.
[275] Opinion of the Committee on Foreign Affairs on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth, 05.12.2012.
[276] COM(2011)681.

Roadmap.[277] In the current approach (see also *supra* section 4), the EU wanted intention to intensify the commitment to the voluntary international codes of conduct by including them in the agreements with third countries.[278] However, none of the EPAs even include a reference to the OECD Guidelines or UN Global Compact or Guiding Principles and also the explicit inclusion of CSR is very moderate.[279] It is suggested that, if a more binding CSR clause or code of conduct would be included, this might trigger problems relating to Article 2 TBT Agreement and possible trade-restrictive effects will probably need to be addressed. However, this relies on the assumption that a CSR code of conduct is considered as a technical regulation, which is controversial.[280] Secondly, as noted before, one of the most innovative mechanisms is the inclusion of provisions on the behaviour of investors and maintenance of standards in Articles 72-73 EPA-CARIFORUM. Nonetheless, a greater equilibrium between the rights and duties can be reached, by strengthening current commitments and addressing questions of monitoring and enforcement. Laudable as they are, there is thus certainly room for improvement (*supra* section 3.b.).

6. Conclusion

The initial question on how to reunite commitments on sustainable development with the increased number of FDI, in particular in developing countries, and the responsibilities of all parties involved has confronted us with three major issues and numerous points of controversy. There remains a lacuna at international level in the area of legal commitments towards sustainable development. A comprehensive set of environmental norms is not readily accepted, this is less problematic regarding the core labour standards, but for both there is still much controversy on the connection between such norms and trade. Moreover, this appears to be even more difficult in regard to FDI which also entails an important role for MNEs. Also here, an international consensus on possible direct accountability for MNEs remains absent, especially through extraterritorial jurisdiction and the extraterritorial application of legislation. In all areas the Union has been a frontrunner and attempted through internal legislation and in its contractual relationship with the ACP to address these issues aiming not only at the responsibilities of the host state, but also taking its own responsibility and enhancing those of the MNEs. It appears that this path is more capable of reconciling different interests, namely liberalization and human rights, and taking on legal commitments. This is however not to say that it is perfect, but it is a first step in the right direction since it provides more than the current international framework

[277] Fourth EU-Africa Summit, Declaration, 2-3 April 2014, point 35.
[278] COM(2002)347.
[279] The reference to CSR is even more modest in the EPA-CARIFORUM (article 196, paragraph 2 (d)) than in the FTA with Colombia and Peru (article 270) and the one with South Korea (chapter 13).
[280] VIDAL-LEÒN has argued that even if confined to private measures, based on the interpretation of Article 3 TBT, this might lead to problems relating to Article 2 TBT. It is recognized that some CSR schemes, *if* qualified as technical regulations, might induce trade-restrictive effects and trigger problems relating to Article 2 TBT Agreement. It may however be doubted whether the conditions for CSR to be qualified as a technical regulation, namely applying to an identifiable product or group of products, laying down one or more product characteristics or PPM and mandatory, are fulfilled. Besides this, there is indeed a need for active engagement of the WTO in other international organizations in the establishment of CSR disciplines. See: C. VIDAL-LEÒN, *op.cit.* footnote 129, (893) 901–916 (920).

offers on sustainable development as well as most existing investment treaties. As future EPAs might also include post-establishment FDI-provisions, also in that area human rights considerations will assume their role.

The traditional conditionality method was a significant first step for a human rights based approach to development and despite suggestions to widen its scope for example by referring to the UN Norms or CSR, it does not appear to be the most appropriate mechanism in a trade context nor in relation to sustainable development issues.[281] Moreover, there seems to be a lack of coherence in its application in and between the EPAs. The newly developed mechanisms, including sustainable development as a general objective and further elaborated trough specific environmental and labour provisions and investor behaviours' provisions, are in dying need for further clarification on their content, the application of possible exceptions and claims in case of violation. The lack of clarity on the trade – sustainable development connection also seems to have crept into the agreements with the ACP. It remains to be seen whether a balanced outcome can be found, in case of disputes, between economic, social and environmental considerations. Moreover, the current commitments need to be strengthened into stronger legal obligations, with actual implementation commitments, accountability, monitoring and enforcement mechanisms. Without detracting on the merits of such new provisions, the current EPA-provisions are a first stepping stone and can be used to improve future EPAs, in the meantime they are more likely to function as guiding norms rather than actual obligations. In addition, although the Union also as a home state of many MNEs has stepped up its efforts on the issue of accountability of MNEs, offering a better mix of soft law and hard law, questions on actual accountability and enforcement remain, while the options are there.

There is a persisting need for more international unity, which would probably also lessen possible trade disruptive effects, however this does not appear to materialize in the near future.[282] One of the major challenges is thus the inclusion of such provisions in all future EPAs, ensuring a level playing field between the EPAs and the support for the establishment for a more common legal framework binding for all ACP to ensure obligations, implementation, monitoring and enforceability in line with the idea that "the basic principles of unity and solidarity need to be reconciled with the new demands of global cooperation"[283]. This would decrease the risk of human rights being tossed for the sake of FDI. The use of dialogue and the inclusion of civil society could further set off claims of unilateralism and protectionism. Still the majority of responsibilities lies with the host state and whilst the EU has

[281] A. GATTO, *op.cit.* footnote 7, 285.
[282] M. WESCHKA, *op.cit.* footnote 7, (625) 656-661. Such framework could include rules on possible extraterritorial jurisdiction and substantive law.
[283] K. KARL, "From Georgetown to Cotonou: The ACP Group faces up to new challenges", *The Courier*, 2000, (20) 22 (23). The Georgetown Agreement, as amended by Decision No.1/LXXVIII/03 of the 78th Session of the Council of Ministers, Brussels, 27 and 28 November 2003, ACP/27/005/00Rev.16. The agreement integrates the general objectives as incorporated in the Cotonou agreement and also includes e.g. in Article 2 (f): "promote policies especially in the areas of the environment and the rational management of natural resources, in pursuit of sustainable development".

also addressed its responsibilities as a home state, the existing legal possibilities especially in regard to the accountability of MNEs, needs to be used to its utmost extent. The Union has succeeded to move beyond purely economic matters and numerous noteworthy initiatives have been taken, but the EU seems to linger on soft law and hampered by political will. Although there are signs in the right direction[284], still an important task awaits the EU, as well as the ACP as united group, to steer towards more international consensus, cooperation between the relevant international organizations and assurances for a better balance between the rights and duties of states and investors.

[284] Report on Advancing Development Through Trade, A7-0057/2013, 04.04.2013, points 7-8.