

Austrian Review of International and European Law

VOLUME 20 (2015)

Edited by

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BRILL
NIJHOFF

LEIDEN | BOSTON

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EU Development Cooperation: A Stock-Taking and a Vision for the Future

*Peter Hilpold**

I. Introduction

The dynamic evolution of EU law finds one of its foremost expressions in the area of development cooperation. Here, the most ambitious goals and disinterested ideals intersect with pronounced economic and political interests both of the EU as a whole as well as of the single member states. Therefore, difficult compromises have to be made. The provisions on development cooperation now explicitly form part of the norms on ‘External Action’ (Part V of the TFEU). This policy is, however, not only directed to the outside but it has considerable internal repercussions.

The meaning of development cooperation is subject to continuous change. As will be shown in the following, the EU has been re-orienting itself in this field continuously anew and an important refocusing is under way right now. Over the last decades, there has been, first of all, considerable uncertainty as to what development aid should mean in economic terms. The EU has not been the only international actor being confronted with this question. This has rather been a challenge for any subject active in this field: for states, the competent UN institutions and for non-governmental organizations. For the last half a century an enormous development has taken place in this field. The respective approaches have moved from a rather primitive stage based on simple resource transfers to highly sophisticated concepts attempting to implement forms of all-encompassing, sustainable and lasting development. As a consequence, in its endeavours to operationalize the concept of development cooperation and to conceive a set of tools to effectively implement this policy the Union has not been alone. In fact, the respective ideas and notions

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have been further developed in an intense dialogue with other international institutions and in the ambit of international bodies. The Union has been nothing more than an active discussant in this process, albeit a very important one. The field where the contributions by the Union were ground-breaking was that of political conditionality. As will be shown, in this area the Union led the way and introduced a policy that was copied on a world-wide scale. In the beginning, heavy criticism was levelled against this policy and the EU was accused of intervening in other states' domestic affairs and of imposing its own values on others. In the meantime, however, criticism of this kind has become rare and it has become broadly recognized that such a policy can give a decisive contribution for the diffusion of values broadly shared on the universal level. The fear that the EU would thereby pursue egoistic goals has proved to be unfounded. This policy has perhaps been egoistic in that sense that the EU and its member states had recognized that the propagation and the defence of these core values on a universal level was in the immediate internal interest of the EU and its member states. Such self-interest in the realization of broadly shared values is, however, tolerated.

On a whole it can be said that the EU development policy is becoming ever more part of a holistic universal design to which the Union is giving an important contribution but which is to be seen, at the same time, as a universal project. In the following it will be shown how the EU development policy has evolved from a limited endeavour with a strong egoistic foundation to an instrument designed to actively influence world politics in order to bring about a more peaceful, solidary and rights-based international society.

II. The Beginnings

Formally, the development policy has been part of EC law only since the entering into force of the Treaty of Maastricht. On a factual basis, however, this policy has been evolving over a very long period and the Treaty of Maastricht only rendered official what had become *acquis communautaire* long time before.

The first basis for this later policy can already be found in the EEC Treaty of 1957.¹ It included provisions on association of the overseas countries

¹ For an excellent overview of the historical roots of the EU development policy see Dieter Frisch, 'Entwicklungszusammenarbeit, Vorbemerkung zu den Artikeln 130u bis 130y' in Hans von der Groeben, Jochen Thiesing and Claus-Dieter Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag*, vol. 3 (1999) 2014. See also

and territories in Article 198ss [ex-182ss, ex-131ss], introduced upon the insistence of France (assisted by other colonial powers such as Belgium, Italy and the Netherlands), who wanted to maintain its special relationship with its colonies also in the newly founded EEC, that prepared the ground for such later developments.² This special relationship was mostly about financial aid and privileged trade – two cornerstones of development policy as it was understood in the 50s and the 60s of the last century.

More rapidly than originally thought, the colonial empires kept by some EC member states crumbled and the former special relationship with their dependent territories had to be substituted by a different institute. In fact, the gaining of independence did not solve the development problem but sometimes even accentuated it, as it had not been anticipated or assisted by a sound nation-building process. In any case, the newly independent states kept entertaining most of their economic relations primarily with their former colonial masters and the preservation of these relations – albeit possibly in a more equal form – remained vital for the development process to succeed. On the side of the former colonial powers there was, on the other hand, a strong interest to maintain these spheres of influence that should guarantee, amongst others, preferred access to raw materials.

As is well known, the association regime was enlarged step-by-step paralleling to a large extent the accession process to the EC. In particular, it was the accession of the United Kingdom to the EC that radically changed the face of this institute with dozens of former British colonies now seeking to be integrated into the association regime. While with the Yaoundé I Agreement (from 1965 to 1970)³ and the Yaoundé II Agreement (from 1970 to 1975) mainly developing countries from the francophone world were associated to the EC, already in 1969 a specific agreement, the so-called ‘Arusha Agreement’ was concluded with Kenya, Tanzania and Uganda, thereby associating three former British colonies to the EC.

At the beginning of the 1970s the time was ripe for a first thorough rethinking of international development policy. Not only had the subjective situation for the EC changed with the accession of the United Kingdom, Denmark and Ireland in 1973, but totally new challenges also arose outside the EC with developing countries grouping together and speaking with one voice. This

Lorand Bartels, ‘The Trade and Development Policy of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (2008) 128.

² On this subject see Peter Hilpold, ‘Commentaries to the Articles 198ss TFEU’ in Heinz Mayer (ed), *EUV und AEUV, Kommentar* (2010).

³ The agreement was concluded in Yaoundé, the capital of Cameroon.

was the time when the foundations for an International Law of Development were laid and there was a widely felt perception that this branch of law would finally revolutionize traditional international law.⁴ Although these hopes (or, respectively, woes) proved to be wrong and since long this area of law has all but fallen in oblivion,⁵ at the time of its first forming – which proceeded with an enormous dynamic – it still exerted an enormous attractiveness and had a visible impact on law-making, both on an international level as well as on the level of the Community. With regard to the former, first of all the activities of the United Nations Conference on Trade and Development (UNCTAD) have to be mentioned. It is within this international institution, created in 1964 as a discussion forum for developing countries (the ‘GATT of the poor’), that the demands for a more equal and a more participative international order were advanced in ever more pronounced form. On occasion of the UNCTAD II Conference in New Delhi in 1968 agreement was found on a General Preference System which had to be transposed afterwards in other international normative systems and finally also in national and Community law.⁶ In the 1970s, a radical redistribution of international wealth was demanded and large catalogues of demands, drafted in a normative language, were issued and adopted by the UN General Assembly, partly with the opposition of the developed world. The best examples in kind were the Declaration on the Establishment of a New International Economic Order⁷ and the Charter of

⁴ See, in this regard, Subrata R Chowdury *et al*, *The Right to Development in International Law* (1992); Milan Bulajic, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order* (1993); Christian Tomuschat, ‘New International Economic Order’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol. III (1997) 578.

⁵ See, *e.g.*, Peter Slinn, ‘The International Law of Development: A Millennium Subject or a Relic of the Twentieth Century?’ in Wolfgang Benedek *et al* (eds), *Development and Developing International and European Law* (1999) 299; and Thomas W Waelde, ‘A Requiem for the “New International Economic Order” – The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance’ in Gerhard Hafner *et al* (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (1998) 771.

⁶ On this subject see Peter Hilpold, ‘Das neue Allgemeine Präferenzschema der EU’ [1/1996] *Europarecht* 98.

⁷ UNGA Res 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (1 May 1974) UN Doc A/9559.

Economic Rights and Duties of States.⁸ It is against this international background that the main activities of the EC in the field of development policy have to be seen.⁹ As unilateral measures the EEC in 1971 set into force its own General Preference System.¹⁰

III. The Lomé Agreements

Over time, the Lomé Agreement of 1975¹¹ with 46 African, Caribbean and Pacific (ACP) countries as the treaty-based cooperation framework designed to replace the Yaoundé and the Arusha regime and to overcome the many deficiencies of these agreements, became far more important. The Yaoundé and the Arusha treaties were widely criticized not only for their selective nature but more fundamentally because the association concept was perceived by many developing countries as a neo-colonialist plot¹² and as harmful to their interests in the worst case or as ineffectual in the best. Much criticism also came from several member states as they objected to the strong francophone bias of this system having consequences also on the economic level as the commercial advantages from this cooperation were mainly reaped by firms in French speaking member states.¹³

As a whole, there was a broad consensus that the development promotion aspects had to be stronger emphasized. This was true, even though an explicit competence by the EEC was still lacking in this field. As the time was not yet ripe for a reform of the treaties in this sense, a bottom-up or soft law approach¹⁴ was adopted according to which the Commission prepared a

⁸ UNGA Res 3281 (XXIX), Charter of Economic Rights and Duties of States (12 December 1974) UN Doc A/9631. While the former document was adopted by consensus the latter one met with harsh resistance by important industrialized countries.

⁹ See Anna K Dickson, 'The Demise of the Lomé Protocols: Revising European Development Policy' (2000) 5 *European Foreign Affairs Review* 197.

¹⁰ See Hilpold, *supra* note 6.

¹¹ ACP-EEC Convention of Lomé [1976] OJ L25/2.

¹² Frisch, *supra* note 1, at paras 3, 14.

¹³ Frisch, *supra* note 1, at para 4.

¹⁴ Peter Hilpold, 'Konditionalität in den Beziehungen zwischen der EU und den AKP-Staaten: Menschenrechte, Demokratie, Rechtsstaatlichkeit und verantwortungsvolle Regierungsführung' [2002/2] *Zeitschrift für europarechtliche Studien* 239, at 241.

‘Memorandum concerning a Community development cooperation policy’¹⁵ followed by a ‘First programme of action’¹⁶. The Commission asked not only for a deepening of the development policy and a widening of its scope but also for the adoption of a comprehensive approach that would touch all areas of Community activities and for a better coordination of the relevant activities by the Community and the member states. Considering the fact that at that time no hard law basis for such a policy was given, this was a bold move that should soon bring concrete results. In fact, compared to the previous situation, the Lomé Agreement of 1975 created a totally new framework. As it seemed to fulfil large part of the demands advanced by the developing countries it was widely hailed as an innovative instrument which should be best suited to meet the challenges for the development policy of the future. The following elements were of particular relevance:¹⁷

- It contained a renouncement on reciprocity in international trade relations in line with demands brought forward by developing countries within the GATT;
- In line with the prevailing political and economic thinking in the field of development economics of that time, the economic relations between industrialized and developing countries should be stabilized and protected against short-term market fluctuations of a speculative nature. As the goods mainly traded by developing countries (agricultural products and raw materials) are characterized by extreme price elasticity, earnings of these countries are subject to enormous fluctuations with, in some cases, disastrous consequences for the budgetary situation. On the other side, also the industrialized countries are interested in principle in stable raw material markets and prices. As it turned out, however, the attempt to manipulate the market in this field was doomed to fail; and
- Finally, the Lomé Agreement provided for privileged market access for agricultural products. It was probably this aspect of the Agreement that had – in the long run – the most significant impact

¹⁵ European Commission, ‘Memorandum Concerning a Community Development Cooperation Policy’ (27 July 1971) (1971) 4 EC Bull. suppl. 5.

¹⁶ European Commission, ‘First Programme of Action’ (2 February 1972) (1972) 5 EC Bull. suppl. 2.

¹⁷ See Andreas Zimmermann, ‘Commentary to Article 177 TEC’ in Hans von der Groeben and Claus-Dieter Ehlermann (eds), *Kommentar zum Vertrag über die Europäische Union*, vol. 3 (2003) 1470, para 5.

on trade relations between the EEC and the ACP countries. As will be seen later on, the success of these provisions has been in the end, however, also the reason for intense criticism against the Lomé framework as a whole, as thereby discrimination was introduced among developing countries (between those making part of the EEC-ACP framework and those staying outside). Ultimately, this criticism was of decisive importance for the complete overhaul of the whole cooperation framework.

- The export earnings of the developing countries, especially with agricultural products, should be stabilized according to the so-called ‘STABEX system’.¹⁸

The Lomé Agreement was renewed every five years. On each of these occasions, this Agreement was partly reformulated and the development aims were refocused. The single steps of this process were the following:

- Lomé I (1975-1980);
- Lomé II (1980-1985);
- Lomé III (1986-1990); and
- Lomé IV (1990-2000).

In 1995, a mid-term review process was undertaken which brought about substantial revisions of the text. The revised Lomé IV Agreement is also known as ‘Lomé IV-bis Agreement’.

On 2 August 2000, the partnership agreement between the EC and the ACP countries entered into force. This agreement shall last 20 years. While Lomé I was concluded with 46 ACP countries, this number rose to 50 with Lomé II, to 64 with Lomé III and to 66 with Lomé IV. The subsequent agreement of Cotonou tied 77 ACP states to the EC. In the meantime, this number has risen to 79. According to Article 94 of the Cotonou Agreement, any independent state whose structural characteristics and economic and social situation are comparable to those of the ACP states may become party of this agreement.

The various agreements from Lomé I to Cotonou mirror profound changes in development politics over a period of 25 years (1975 to 2000). In the economic sphere, the leading elements were more and more softened and in

¹⁸ A system of export earnings stabilization set up by the European Community in accordance with the African, Caribbean, and Pacific (ACP) states. Under the system, the EC helps developing countries withstand fluctuations in the price of their agricultural products by paying compensation for lost export earnings.

part even disappeared. Preferential market access, basically for agricultural products in the EC, was the keystone of cooperation. The preferential regime brought this order into conflict with GATT/WTO law and the long lasting ‘Banana conflict’ is the best known expression of such a contention.¹⁹ Interestingly enough, it is now more and more doubted whether this preferential regime was – in the end – really beneficial to the ACP states, as they do not seem to have gained a lasting development advantage over other developing countries outside the regime.²⁰ Openly distractive and damaging policies such as the dumping of the EC’s excess food production on the developing countries’ markets, carried out regularly in the name of food aid, were, however, abandoned.

Formally, the opening of the market took place under the non-reciprocal conditions. In practice, however, trade concessions by the EC had to be traded in by concessions in other fields (especially human rights, good governance as well as social and environmental standards)²¹ by the ACP countries. On

¹⁹ The Banana conflict was finally solved by two agreements (Geneva Agreement on Trade in Bananas between the European Union and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela of 31 May 2010 and the Agreement on Trade in Bananas between the European Union and the United States of America of 8 June 2010). See Council Decision 2011/194/EU of 7 March 2011, OJ L88/66.

Thereby the transition from a quota system for banana imports in the EU (which strongly privileged bananas from ACP countries) to a tariff-only systems was agreed. The WTO-inconsistent import restrictions applied before by the EU had to be abolished. On the evolution of this dispute see Peter Hilpold, *Die EU im GATT/WTO-System* (3rd edn 2009) 355 *et seq.* On the final agreement see Eckart Guth, ‘The End of the Bananas Saga’ (2012) 46 *Journal of World Trade* 1.

²⁰ See, e.g., ‘Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership’, COM (96) 570; Christopher Stevens, ‘The EU-ACP relationship after Lomé’ in Pitou van Dijck and Gerrit Faber (eds), *The External Economic Dimension of the European Union* (2000) 223, at 228 *et seq.*; Joseph A McMahon, ‘Negotiating in a Time of Turbulent Transition: The Future of Lomé’ (1999) 36 *Common Market Law Review* 599; Dickson, *supra* note 9. Recently, in a thorough analysis of the principle of non-discrimination, it has been argued that exceptions to this principle are often not only detrimental to the international trading system as a whole but also to the interests of the countries that should be the very beneficiaries of these exceptions. See also the so-called ‘Sutherland-Report, The Future of the WTO’ (2004) 19–27.

²¹ The issue of such standards became particularly prominent on a general level, with the introduction of the new Generalised System of Preferences for the 10-year period starting with 1995. These standards had the function to condition the behaviour of the developing countries both in a negative and in a positive

a whole, the cooperation between the EC and the ACP countries over time became more and more variegated. From the beginning, the Lomé agreements were officially not characterized as association agreements any longer but as partnership agreements to avoid any implication of inferiority for any of the parties. Although technically they were clearly association agreements along the way from Lomé I to Cotonou, the idea of a partnership between the EC and the former colonies of its member states was further approached under different aspects. Each agreement addressed the issues considered by the ACP countries to be pivotal for effective development. Thus, for example, in the Lomé II Agreement the issue of investment was added; in Lomé III new titles followed, among others, on transport and communication and on cultural and social cooperation.²² Particularly innovative were, however, the provisions in the Lomé IV Agreement; they addressed the problem of debt reduction, the environmental issue and the human rights problem.

Debt reduction is still an important issue in the relations between industrialized and developing countries. The most important question arising in this context is whether this instrument is useful at all in the end.²³ The international finance crisis has presented this problem in a new light and with new emphasis. In any case, it can never apply on a general scale but only selectively, under extreme circumstances and for the least-developed countries because any other policy would lead to moral hazard in borrowing and endanger the functionality of the financial markets.²⁴

Also the environmental issue has gained importance ever since. With the environment more and more being perceived to be a common good of all nations and the affirming of the conviction that only through a global approach the most urgent environmental problems can be solved, developing countries become important interlocutors in this international discussion. This

way in the sense that deviations from internationally agreed standards could be punished by a withdrawal of concessions while particular achievements in these fields could be awarded with extra bonuses. See Paul Waer and Bart Driessen, 'The New European Union Generalised System of Preferences' (1995) 29 *Journal of World Trade* 97; Hilpold, *supra* note 6.

²² Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (2000) 128 *et seq.*

²³ For a differentiating approach, see Raghuram Rajan, 'Debt Relief and Growth', [2005] *Finance & Development* 56-57. Even the recent debt relief plan by the G8 for Africa has met with harsh criticism, see George Monbiot, 'A Truckload of Nonsense' *The Guardian* (14 June 2005).

²⁴ Kenneth S Rogoff, 'Moral Hazard in IMF Loans – How Big a Concern?' [2002] *Finance & Development* 56-57.

is especially true as central environmental resources are located in developing countries. Besides being of global relevance these resources constitute also an important asset in the process of development planning, both in a short-term and in a long-term perspective (thereby leading to partly conflicting goals). In the last years innovative instruments have been devised to make these goods tradable, thereby letting developing countries gain property rights on at least part of the international welfare created by environment conservationist policies.²⁵

The most radical changes Lomé IV brought about regarded, however, the field of human rights. The human rights issue was addressed already in the Lomé III Agreement, although in a prudent and timid way.²⁶ Article 4 of the Agreement made an indirect reference to human rights by emphasizing the necessity of respecting people's dignity. Only in Annex I human rights were explicitly mentioned, even though the connection of human rights with development was somewhat contorted and confusing.²⁷

In contrast, with Article 5 of the Lomé IV Agreement the human rights issue was at the center of the discussion. The achievement of high human rights standards was no longer a secondary element of the development process but became an autonomous goal and a constitutive element of development itself.

Article 5 of the Lomé IV Agreement read as follows:

1. Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with this positive approach, where respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights.

In this context development policy and cooperation shall be closely linked to respect for and enjoyment of fundamental human rights and to the

²⁵ In particular, the so-called 'debt for equity swaps' have to be mentioned here. On the basis of such instruments developing country debt is cancelled if the debtor country agrees to implement an environmental protection or conservation project. Parties to such an agreement can be governments but also NGOs and private banks can operate as intermediaries. This instrument has been successfully tested in several countries (for example, in Bolivia, Costa Rica, Ecuador, the Philippines and Madagascar) but has potential for still broader application.

²⁶ See Peter Hilpold, 'EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance' (2000) 7 *European Foreign Affairs Review* 53, at 59.

²⁷ *Ibid.*

recognition and application of democratic principles, the consolidation of the rule of law and good governance. The role and potential of initiatives taken by individuals and groups shall be recognized in order to achieve in practice real participation of the population in the development process in accordance with Article 13.

In this context good governance shall be a particular aim of cooperation operations.

Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this convention.

2. The contracting parties therefore reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

Every individual shall have the right, in his own country or in a host country, to respect for his dignity and to protection by the law.

ACP-EC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social, political and cultural rights and this must be achieved through development which is essential to their dignity, their well-being and their self-fulfilment.

The Contracting Parties hereby reaffirm their existing obligations and commitment in international law to strive to eliminate all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. This commitment applies more particularly to any situation in the ACP States or in the Community that may adversely affect the pursuit of the objectives of the Convention. The Member States (and/or, where appropriate, the Community itself) and the ACP States will continue to ensure, through the legal or administrative measures which they have or will have adopted, that migrant workers, students and other foreign nationals legally within their territory are not subjected to discrimination on the basis of racial, religious, cultural or social differences, notably in respect of housing, education, health care, other social services and employment.

3. At the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation,

to the promotion of human rights in the ACP States and to measures aimed at democratisation, a strengthening of the rule of law and good governance. Practical steps, whether public or private, to promote human rights and democracy, especially in the legal domain, may be carried out with organisations having internationally recognised expertise in this sphere.

In addition, with a view to supporting institutional and administrative reform, the resources provided for in the Financial Protocol for this purpose can be used to complement the measures taken by the ACP States concerned, within the framework of its indicative programme, in particular at the preparatory and start-up stage of the relevant projects and programmes.

The respect for human rights was characterized as a ‘basic factor of real development’ and this meant that from this point on, efforts to promote human rights obedience should be a necessary element of any development initiative.

On 21 July 1986, the Community’s Foreign Ministers meeting in the Council on human rights, democracy and development declared that respecting, promoting, and guaranteeing human rights was a key factor in international relations and a cornerstone of European cooperation as well as of relations between the Community and its member states and other countries. These ideas were further developed in a Communication to the Council adopted by the Commission on 13 March 1991²⁸ where general lines of conduct concerning the relationship between development cooperation policies, respect for and promotion of human rights, and support for democratic processes in developing countries were conceived. These concepts were again taken up in a Declaration on Human Rights adopted by the Luxembourg European Council of 29 June 1991²⁹ and by a resolution of the Council of 28 November 1991 on human rights, democracy, and development.³⁰ Human rights were linked to democracy and development and qualified as an explicit aim of EC development policy. The Council took a clear position towards a positive approach in favouring the respect of human rights. While sanctions should

²⁸ (1991) 3 EC Bull. 69.

²⁹ (1991) 6 EC Bull. I, at 45.

³⁰ (1991) 11 EC Bull. point 2.3.1. See Der-Chin Horng, ‘The Human Rights Clause in the European Union’s External Trade and Development Agreements’ (2003) 9 *European Law Journal* 677, at 682; and Mercedes Candela Soriano, ‘L’Union Européenne et la Protection des Droits de l’Homme dans la Coopération au Développement: Le Role de la Conditionnalité Politique’ (2002) 13 *Revue trimestrielle des droits de l’homme* 875, at 880.

not be ruled out as a measure of last resort, a clear preference was given to political dialogue.³¹

Beginning with the early 90s, the EC has inserted human rights clauses in all its agreements with third countries (and not only with developing countries). With the Treaty of Nice a corresponding clause was introduced for agreements with third countries not constituting developing countries (Article 181a para 1, subpara 2, now Article 212 para 1, referring to the ‘principles and objectives of EU external action’).

The human rights clauses consist mainly of two elements: the ‘essential element clause’ and the ‘additional clause’ or ‘non-execution’ clause. The first clause goes as follows:

Respect for democratic principles and fundamental human rights [established by the Universal Declaration of Human Rights] inspires the internal and international policies of the Parties and constitutes an essential element of this agreement.³²

The ‘additional clause’ was usually a mere suspension clause. It was used in the first agreements with Estonia, Latvia, Lithuania³³ and Slovenia³⁴ and was called the ‘Baltic clause’. These clauses did not operate in a totally satisfactory way as they provided only for the most extreme cases that should lead to the immediate suspension of the agreement without consultation with the other treaty partner.³⁵

The ‘Bulgarian clause’ which is now usually applied provides on the other hand for a far more flexible and diplomatic mechanism which pays also more respect to the sovereignty of the treaty parties. Should the parties fail to meet their treaty obligations a consultation procedure is started and

³¹ Vaughne Miller, ‘The Human Rights Clause in the EU’s External Agreements’, House of Commons Library Research Paper 04/33, 16 April 2004.

³² Elena Fierro, ‘Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?’ (2001) 7 *European Law Journal* 41, citing page 273-13 (Rel. 4) of the Cooperation agreement between the European Community and the Lao People’s Democratic Republic, OJ 1997 L 334/15.

³³ Agreement between the European Economic Community and the Republic of Estonia on Trade and Commercial and Economic Co-Operation, OJ 1992 L 403/2 (Latvia 403/11, Lithuania 403/20).

³⁴ Cooperation Agreement between the European Economic Community and the Republic of Slovenia, OJ 1993 L 189/2.

³⁵ Der-Chin Horng, *supra* note 30.

afterwards appropriate measures can be taken. Special care is taken for the need of urgency measures. On a whole, a clear *favor contractus* is perceptible in this clause. The ‘Bulgarian clause’ declares as follows:

If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take the appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution between the Parties. In the selection of measures, priority must be given to those which least disturb the agreement. These measures shall be notified immediately to the Joint Committee if the other Party so requests.

With regard to the specific way these human rights clauses operated, a decision was taken to adopt primarily a ‘positive’ approach according to which priority should be given to incentives for greater adherence to internationally agreed standards and for closer cooperation in this field.³⁶ Initially, however, it was not clear how this approach should be implemented. Furthermore, the question remained open what should be the consequence of a violation of these principles. Only with the Lomé IV-bis Agreement this situation has changed and human rights conditionality became fully applicable. The relevant provision, subpara 3 of Article 5(1) of the Agreement, reads as follows:

Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of the Convention.

This provision was to be read together with Article 366a(2) and (3) of Lomé IV-bis Agreement, the so-called ‘non-compliance clause’:

If one Party considers that another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.

³⁶ On the advantages of ‘positive’ measures over sanctions see Bruno Simma, Jo B Aschenbrenner and Constance Schulte, ‘Human Rights Considerations in the Development Cooperation Activities of the EC’ in Philip Alston, Mara R Bustelo and James Heenan (eds), *The EU and Human Rights* (1999) 571, at 578 with further references.

For the purposes of such consultations, and with a view to finding a solution:

- the Community side shall be represented by its Presidency, assisted by the previous and next member states to hold the Presidency, together with the Commission;
- the ACP side shall be represented by the ACP state holding the Co-Presidency, assisted by the previous and next ACP states to hold the Co-Presidency. Two additional members of the ACP Council of Ministers chosen by the party concerned shall also take part in the consultations.

The consultations shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.

At the end of the period referred to in the third subpara of para 2 if in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultation, the party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension of application of this Convention to the party concerned. It is understood that suspension would be a measure of last resort.

The party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared. There can be no doubt that this whole system was primarily based on principles of negative conditionality. The violation of essential elements of this agreement should allow for the application of sanctions according to the procedure described above. The intent proclaimed in the past to move closer to positive conditionality was only partly set into practice. Furthermore, it was not clear in which way the various ‘essential elements’ mentioned in subpara 3 of Article 5(1) were interrelated. The need was felt for a clear framework on the basis of which priorities could be set in order to employ scarce resources in the most effective way. In fact, once it became clear in which way the single essential elements determined each other it should also be possible to identify the areas where – depending on specific characteristics of each individual situation – concrete action was most needed.

IV. The Agreement of Cotonou of 23 September 2000

A. The Relevance of the Principle of ‘Good Governance’

One could get the impression that in the Agreement of Cotonou of 23 September 2000 the relevant framework was identified in the principle of ‘good governance’. This concept, which was first used in the 1989 World Bank Report,³⁷ should provide a workable concept to effectively apply conditionality in international development cooperation. It is, however, not yet really clear what specific role this principle shall play in the context of the EC-ACP relationship in the future. This results from a brief overview of the relevant provisions, Articles 9 and 96 of Cotonou Agreement. Article 9 para 2 subpara 4 reads as follows:

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

The consequences of a violation of essential elements are set out in Article 96 of the Agreement:

Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law.

1. Within the meaning of this Article, the term „Party” refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

1a. Both Parties agree to exhaust all possible options for dialogue under Article 8, except in cases of special urgency, prior to commencement of the consultations referred to in paragraph 2(a) of this Article.

a) If despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it

³⁷ See Simma, Aschenbrenner and Schulte, *supra* note 36.

shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than 15 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than 60 days.

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.

b) The term „cases of special urgency” shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.

The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have to do so.

c) The ‘appropriate measures’ referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement.

...

With regard to the principle of good governance, Article 9 para 3 of the Cotonou Agreement contains the following provision:

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

From the wording of this provision the impression may be gained that the principle of good governance is the overarching concept that should lend itself to give structure to the whole conditionality debate.

As already set out,³⁸ the concept of good governance is, however, still a rather vague one and the integration of this notion in the Cotonou Agreement may be seen as an experiment to ‘harden’ it. For the moment, however, there is an apparent conflict between the binding nature of the Cotonou Agreement and the lack of precision of the concept of good governance. As it is not considered as an ‘essential element’ in the Articles 9 and 96 of the Agreement the consultation process and the sanction mechanism set out in Article 96 do not find application. According to Article 97, only in case of corruption a consultation procedure and appropriate measures may find application.³⁹ For the rest the provisions on ‘good governance’ remain a *lex imperfecta*. It is obvious that this situation is the result of a compromise. To create at this stage a fully implementable concept of ‘good governance’ would probably have been too hard an infringement with the prevailing view of state sovereignty. Nevertheless, the concept of ‘good governance’ is here to stay. Whether this principle will live up to the expectations associated with it is not yet clear. It can however be said without doubt that the prominent place given to this principle is expression of the intent by the European Community to thoroughly reconsider important elements of its development policy. It is no coincidence that it should have been the Agreement of Cotonou where the principle of good governance – and together with it also respect for human rights and democracy – obtained such a strong position. First of all, it was the changed international environment that allowed for the imposition of values during the negotiation process which only slightly more than a decade earlier would have been considered to be mainly the expression of western ideological values. Secondly, it was also the first time that the new provisions on development cooperation introduced by the Maastricht Treaty manifested their full impact.⁴⁰ As the EC/EU and its member states are committing themselves ever stronger in the field of development cooperation also the call for more effectiveness

³⁸ Hilpold, *supra* note 26, at 68.

³⁹ Hilpold, *supra* note 14, at 252.

⁴⁰ Although being in force already at the time when the Lomé IV-bis Agreement was concluded, the philosophy behind these provisions had trickled down fully only at a later moment.

of these measures grows. Good governance is considered to be a key to the effectiveness of development assistance.⁴¹

Of course, the Agreement of Cotonou brought about not only a new philosophy on the role of human rights and governance but also – and probably even more visibly – a new perception on what this model of cooperation should achieve on the economic level and what instruments should be applied to reach this end.

As a result of the negotiations on a revision of the Cotonou Agreement concluded on 23 February 2005, the provisions on the political dialogue were further strengthened. This dialogue was intended to be of a more systematic nature in the future. It shall prevent situations requiring recourse to the consultation procedures envisaged in Articles 96 and 97. For this purpose more details on the political dialogue have been set out in a new Annex VII to the Cotonou Agreement.

B. The Cotonou Agreement as the Pivotal Document for EU Development Cooperation with ACP Countries

The Cotonou Agreement has undergone a second revision in 2010. As will also be shown below both the revision of 2005 and that of 2010 were directed at rendering this agreement more efficient and at strengthening the political component. In 2010, regard was taken of new challenges for the state community as a whole and for the parties involved in the EU-ACP development cooperation process in particular. Thus, specific provisions on climate change, food security, regional integration, state fragility and aid effectiveness were inserted.

On a whole, it can be said that this Agreement came about when a fundamental re-focusing of EU development cooperation was under way according to which it was tried to abandon the concentration on the ACP area in favour of those developing countries most in need. The Cotonou Agreement was, at the same time, expression of an attempt to uphold, as far as possible, the original focus. This difficult balancing act is still ongoing.

The overall political and economic context in which the EC-ACP relationship was designed to operate had changed dramatically. From a political viewpoint, the end of the East-West conflict had immediate repercussions on the Third World. The development discussion was freed from ideological

⁴¹ European Commission, 'Governance and development. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee' COM (2003) 615 final, at 4.

burdens of the past and developing countries came to be seen as a group of nations deserving equal attention. This change of perspective was partly reflected also in the law of the European Union where the insertion of Articles 177-181 in the EC Treaty in 1991 can be regarded as a decisive step towards the creation of a truly general development policy.⁴²

With regard to the economic context, the entry into force of the Uruguay Agreement has brought about a gradual erosion of preferences the ACP countries had previously enjoyed as tariff and non-tariff barriers were further lowered on a general plane.⁴³ In the negotiating process the great challenge was, therefore, on the one hand, to overcome the elements of conflict with WTO law and, on the other, to offer new perspectives of development to this group of nations.

The development challenge now has to be tackled at the backdrop of an international environment that has profoundly changed in respect to the situation when this policy was first officially introduced by the Treaty of Maastricht. One of the greatest perils for further development – and actually for the preservation of the development stage already achieved – are fragile and failing states. The 2010 revision of the Cotonou Agreement has dedicated particular attention to this new threat.⁴⁴ Furthermore, by this revision agreement, the following threats have been newly addressed: organized crime, piracy and trafficking of, notably, people, drugs and weapons. Moreover, as stated in Article 11 para 1: ‘The impacts of global challenges like international financial market shocks, climate change and pandemics also need to be taken into account.’⁴⁵

C. Economic Cooperation Within the Cotonou Framework

The most immediate impulse to abandon the Lomé regime came from GATT/WTO law.⁴⁶ In the early 90s of the last century serious doubts were voiced

⁴² See, in this sense, McMahon, *supra* note 20.

⁴³ *Ibid.*

⁴⁴ Art 11, para 1 of the revised Cotonou Agreement, 25 June 2005. On this challenge see also Peter Hilpold, ‘*Jus Post Bellum* and the Responsibility to Rebuild – Identifying the Contours of an Ever More Importance Aspect of R2P’ (2015) 6 *Journal of International Humanitarian Legal Studies* 284. See also among SDGs of 2015 Goal 16.

⁴⁵ Art 11, para 1, subpara 2 of the revised Cotonou Agreement, 25 June 2005.

⁴⁶ Jürgen Huber, ‘The Past, Present and Future ACP-EC Trade Regime and the WTO’ (2000) 11 *EJIL* 427.

whether the association of the ACP countries to the EC was compatible with GATT law as the non-reciprocal trade preferences were alleged to be in violation of the most-favoured-nation (MFN) principle. Although Part IV of GATT allowed for non-reciprocal trade preferences for developing countries these were to apply on a generalized and not on a selective basis. On 9 December 1994 temporary relief was provided by the contracting parties through a waiver which was to last until the expiry of the Lomé IV-bis Agreement scheduled for 29 February 2000. In view of the fact that waivers did not have the objective to grant permanent exemptions from GATT/WTO rules and considering also that with the entry into force of the new WTO law on 1 January 1995 waivers had come under closer scrutiny, a successor regime had to be found that was compatible with WTO law. As this implied the withdrawal of far-reaching concessions negotiations with ACP countries proved to be tough. Soon it became clear that no radical change after the expiry of the Lomé IV-bis Agreement would be possible. Care had rather to be taken for the introduction of a provisional regime that would also provide further time for the negotiation of the definite successor regulation. In the end, this aim was actually achieved and the necessary consent by the WTO obtained. From 2000 to the end of 2007 the non-reciprocal trade preferences were kept in force. The waiver necessary for this derogation from WTO law was granted on 14 November 2001.⁴⁷ Transition from a non-reciprocal to a reciprocal system proved, however, not to be as smooth as originally thought. In many senses, this process is still ongoing.

The Lomé Agreements were not suited to bring about the economic progress within the ACP countries the parties had initially aimed at. It appeared that economic and social progress in the ACP group was slow or even non-existent.⁴⁸ A further spread of poverty was noticed. The main reason

⁴⁷ World Trade Organization, 'European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001', WT/MIN(01)/15, <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm> accessed 12 July 2017. See also Federico Lenzerini, 'Le relazioni tra Organizzazione Mondiale del Commercio e Comunità Europea nel settore della Cooperazione allo Sviluppo' in Francesco Francioni *et al* (eds), *Organizzazione Mondiale del Commercio e diritto della Comunità à Europea nella prospettiva della risoluzione delle controversie* (2005) 189.

⁴⁸ Olufemi Babarinde and Gerrit Faber, 'From Lomé to Cotonou: ACP-EU Partnership in Transition' in Olufemi Babarinde and Gerrit Faber (eds), *The European Union and the Developing Countries – The Cotonou Agreement* (2005) 1, at 5 *et seq.* See also Nsongurua J Udombana, 'Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union' (2004) 40 *Texas International Law Journal* 59 and Heribert Weiland, 'Globalisierung auf Raten. Zum

for this situation could be found in the fact that the initiatives set within this framework were not capable of giving an incentive for the creation of a strong private sector which should become the decisive force of self-sustaining development.⁴⁹

In a certain sense, the philosophy behind this cooperation regime was one of a traditional international law viewpoint. Interlocutors of the EC and its member states were primarily governments and it was by no means guaranteed that the aid provided would trickle down to reach broader masses. In view of the amounts of resources at play the serious question had to be posed whether they were well spent. In a Commission green paper of 1996⁵⁰ it was pointed out that

beyond political stability, which is a fundamental precondition for growth, and initial endowments, sound policies play a major role in influencing exports and growth. Macroeconomic stability, realistic and stable exchange rates, good institutions and good governance, and efficient resource allocation policies, in particular stable and credible import and taxation regimes, as well as reduced trade protection ... are significant determinants of competitiveness and hence export performance.⁵¹

The concession of unilateral preferences by the EU to the ACP countries has proved to be irreconcilable with WTO law, which was one of the main reasons for the total overhaul of the EC-ACP cooperation regime. The Cotonou Agreement purports to ‘foster the smooth and gradual integration of the ACP States into the world economy’⁵² and aims at ‘full conformity with the provisions of the WTO’.⁵³

neuen Cotonou-Abkommen zwischen der EU und den AKP-Staaten’ in Heinrich Oberreuter, Armin A Steinkamm and Hanns-Frank Seller (eds), *Weltpolitik im 21. Jahrhundert, Festschrift Jürgen Schwarze* (2004) 418.

⁴⁹ Udombana, *supra* note 48, at 66 *et seq.* and Weiland, *supra* note 48, at 423 *et seq.*

⁵⁰ European Commission, ‘Green Paper on Relations between the European Union and the ACP countries on the Eve of the 21st Century – Challenges and Options for a New Partnership’, COM (96) 570 final of 20 November 1996.

⁵¹ *Ibid.*, at para 17. The Green Paper stated further: ‘The Union must redesign its aid policy towards the ACP countries from the scratch [...] the colonial and post-colonial era is over.’

⁵² Art 34, para 1 ACP-EU Partnership Agreement, 23 June 2000 (Cotonou Agreement).

⁵³ Art 34, para 4 Cotonou Agreement.

The so-called Economic Partnership Agreements (EPAs), which are essentially Free Trade Areas concluded by the EU with groups of ACP countries, shall be at the center of economic cooperation. As GATT/WTO law is rather demanding in this regard,⁵⁴ a transitional period had to be allowed for the necessary adaptations to be made.

The transitional period lasted until 31 December 2007 during which the non-reciprocal trade preferences applied under the Fourth ACP-EC Convention were to be maintained. As mentioned, due to a waiver,⁵⁵ the WTO conformity of this transitional measure was guaranteed. The details of this regime were regulated in Annex V to the Cotonou Agreement (deleted by the 2010 reform).

Originally, a clear time-frame was given according to which the transition from non-reciprocal trade to reciprocal trade should be completed. This goal proved to be unachievable and over the years the parties became aware of the complexities of this process. The 2010 revision of the Cotonou agreement ushered in a complete revision of Article 36 of the agreement. This provision now goes as follows:

Article 36
Modalities

1. In view of the objectives and principles set out above, the Parties agree to take all the necessary measures to ensure the conclusion of new WTO-compatible Economic Partnership Agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.
2. The Economic Partnership Agreements, as development instruments, aim to foster smooth and gradual integration of the ACP States into the world economy, especially by making full use of the potential of regional integration and South-South trade.
3. The Parties agree that these new trading arrangements shall be introduced gradually.

⁵⁴ See Peter Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics' (2003) 7 Max Planck Yearbook of United Nations Law (2003) 219.

⁵⁵ WTO, *supra* note 47. This waiver was granted during the Doha WTO Ministerial 2001 and expired on 31 December 2007.

A specific time-frame, formerly mentioned in Article 37 of the Cotonou Agreement, is now missing.

It is not yet clear whether EPAs will successfully take the place of the existing preference regime. In principle, these agreements could have a very far-reaching coverage comprising goods, services, direct foreign investment, technical assistance and harmonization of regulation.⁵⁶

The newly drafted para 2 of Article 35 of the Cotonou Agreement gives proof to the new understanding of the intricacies of development acquired in the meantime by the EU:

Economic and trade cooperation shall build on regional integration initiatives of ACP States.

Cooperation in support of regional cooperation and integration as defined in Title I and economic and trade cooperation shall be mutually reinforcing. Economic and trade cooperation shall address, in particular, supply and demand side constraints, notably interconnectivity of infrastructure, economic diversification and trade development measures as a means of enhancing ACP States' competitiveness. Appropriate weight shall therefore be given to the corresponding measures in the ACP States' and regions' development strategies, which the Community shall support, in particular through the provision of aid for trade.

Ideally, there should be, therefore, a sequence in the sense that first groups of ACP countries integrate among each other and afterwards they conclude a FTA with the EU. As regional integration among developing countries has been – on average – not very successful it is doubtful whether this is a workable approach.⁵⁷ It is argued in literature that integration between the ACP countries and between the EU and the relevant ACP groups should proceed simultaneously.⁵⁸

The newly drafted Article 37A addresses the problem of preference-erosion for ACP states as a consequence of further multilateral and bilateral trade liberalization. The solution offered to overcome this problem is a rather timid one: The parties shall endeavour to overcome the negative impact of

⁵⁶ Gerrit Faber, 'Economic Partnership Agreements and Regional Integration among ACP Countries' in Olufemi Babarinde and Gerrit Faber (eds), *The European Union and the Developing Countries* (2005) 85, at 87.

⁵⁷ *Ibid.*, at 92 *et seq.*

⁵⁸ *Ibid.*, at 96 *et seq.*

this development, for as long as it is feasible. Thereby, the parties admit that preference erosion is a fact that is unavoidable in the long run.

In the past, within the Cotonou agreement, also in the context of economic integration specific regard has been taken of the so-called Least Developed Countries (LDC). As a consequence of the 2010 reform, this category no longer enjoys specific consideration within this field. Still, some specific provisions on LDCs can be found in the Articles 84ss. of the Cotonou Agreement. According to Article 84 LDCs shall be accorded special treatment ‘in order to enable them to overcome the serious economic and social difficulties hindering their development so as to step up their respective rates of development.’

It was hoped that the essence of ‘special treatment’ should be clarified in the ambit of the Doha Round. Up to this moment, these hopes have been disappointed as the Doha Round negotiations have stalled. These countries continue, however, to profit from specific preferences in the ambit of the EU’s Generalised Scheme of Preferences (GSP).

The European Union has granted free access to essentially all products from 49 LDCs as of 1 January 2015.⁵⁹ The intention was to apply the GSP to fewer beneficiaries while rendering it at the same time more effective. To this end the GSP scheme was divided into three arrangements.⁶⁰

- There is, first of all, a general arrangement to be granted to all those developing countries which share a common developing need and are in a similar stage of development. These countries are granted duty arrangements for about 66% of all EU tariff lines. Not all developing countries are, however, eligible for these benefits. In fact, countries which are classified by the World Bank as high-income or upper-middle income countries were retained not

⁵⁹ This step was taken with the so-called ‘Everything But Arms Regulation’ (introduced by Council Regulation (EC) 416/2001 amending Regulation (EC) No 2820/98 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, OJ L060/43). On the basis of Regulation (EU) 978/2012 (applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L303/1) containing the EU GSP presently in force no duties and quantitative restrictions find application on imports of products from LDCs. As of 1 January 2015 the GSP+ regime applies to 13 countries.

⁶⁰ See for this classification and the relating explanations the preambular provisions in Regulation 978/2012, *supra* note 59.

to be in need of such grants as they have successfully completed their transition to competitive market economies. Furthermore, the concession of privileges to such countries would increase the competitive pressure to lower-income countries.⁶¹ Furthermore, for the sake of consistency, also those countries that benefitted from a different preferential market access arrangement with the Union were excluded from the general GSP scheme.⁶² As a consequence, at the moment the group benefitting from the general regime comprises 34 countries and territories.

- Furthermore, there is a Special Incentive Arrangement for Sustainable Development and Good Governance, or ‘GSP+’ initiative. This initiative applies to developing countries if⁶³
 - they are considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system;
 - they have ratified all the conventions listed in Annex VIII of Reg. 978/2012 and provided the monitoring process to these conventions did not reveal any serious failure in the implementation of these conventions and no reservation has been formulated to any of these conventions that would have been prohibited by the relevant instrument or be incompatible with its object and purpose.⁶⁴

⁶¹ *Ibid.*, at para 9 of the preambular provisions.

⁶² *Ibid.*

⁶³ *Ibid.*, at Art 9.

⁶⁴ This appears to be a very ingenious way to further enhance human rights compliance in third countries. As it has been shown, the European Union has conducted a human rights promotion policy towards third countries for quite a long time. The EU concentrated, however, primarily on the assumption of these obligations while barely taking regard of the implementation process. On this basis many countries created the semblance of a human rights friendly policy while in reality their human rights record remained poor. Now form alone is no longer sufficient: substance counts.

On the basis of the GSP+-initiative the same 66% tariff lines that benefit from the general GSP scheme are completely exempted from duties.⁶⁵

- The third initiative concerns ‘Special Arrangements for the Least-Developed Countries’ (‘Everything But Arms’ – EBA).⁶⁶ Countries that have been identified by the UN as a ‘least-developed country’ are eligible for full duty-free, quota-free access for all products except arms and ammunition.⁶⁷ Currently, there are 49 beneficiaries of this regime.⁶⁸

While ACP countries have always been the main targets of EC development cooperation, over the years a network of cooperation agreements has been built up also with countries of other regions.⁶⁹ In this context the cooperation agreements with several countries and territories of the Mediterranean region⁷⁰ (Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia, West Bank and Gaza

⁶⁵ Presently there are 13 beneficiaries of this scheme: Armenia, Bolivia, Cape Verde, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Mongolia, Pakistan, Panama, Paraguay and Peru.

⁶⁶ Regulation 978/2012, *supra* note 59, at Art 17ff.

⁶⁷ European Commission, ‘The EU’s Generalised Scheme of Preferences (GSP)’ (October 2014) <http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152865.pdf> accessed 12 July 2017, at 3.

⁶⁸ Regulation 978/2012, *supra* note 59, at Annex IV.

⁶⁹ See, for details, Thomas Oppermann, *Europarecht* (1999) para 1746 *et seq.*

⁷⁰ See, in this context, the MEDA programme based on MEDA Regulation 1488/96, OJ L 189/1, as amended by Regulation 2698/2000, OJ L 311/1. MEDA II is more program-oriented and strategic than its predecessor. It is meant to be a preparatory initiative for the creation of a Euro-Mediterranean free-trade area to be set up by 2010. See Euromed Special Feature No 21 of 3 May 2001. See also the Barcelona Declaration adopted at the Euro-Mediterranean Conference 27–28 November 1995 where the foundations for the Barcelona Process, a new regional relationship, was laid; for a recent overview of this relationship, see Peter Schlotter, ‘Die Europäische Union als außenpolitischer Akteur?’ – Zur Kohärenz der EU-Mittelmeerpolitik und zur Rolle der Kommission’ (2005) 4/05 *Integration* 316.

Strip), with Israel,⁷¹ with the Latin American region and with Asian countries⁷² as well as with South Africa⁷³ have to be mentioned.

A general, all-encompassing policy of development is, however, only in the making at the most.⁷⁴

⁷¹ See, in particular, the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one part, and the State of Israel, on the other part, concluded on 20 November 1995 and which entered into force on 1 June 2000, OJ L 147/3. It was amended by a Protocol signed on 30 March 2004 to extend the application of this agreement as of 1 May 2004 to the 10 new EU member states. In 2007 it was superseded by the European Neighbourhood and Partnership Instrument (ENPI). See <<http://www.medea.be/en/themes/euro-mediterranean-cooperation/meda-programme/>> accessed on 16 August 2017.

⁷² See Council Regulation (EEC) 443/92, OJ L52. A policy of financial and technical cooperation with the Asian and the Latin American (ALA) developing countries outside the ACP-EEC relationship has been pursued since 1976. Later it was supplemented by economic cooperation programs. In this context ever-increasing importance was attributed to the promotion of human rights, to the support for the process of democratization, good governance, environmental protection, trade liberalization and the strengthening of the cultural dimension, by means of an increasing dialogue on political, economic and social issues conducted in the mutual interest; see Regulation 443/92, Article 1. With regard to Asia, in particular, the general strategy that guides all EC actions in this region – including development assistance – is contained in the 2001 Commission Communication ‘Europe and Asia: A Strategic Framework for Enhanced Partnership’. See, in this context, the EC Commission’s Strategy Paper and Indicative Programme for multi-country programs in Asia, 2005-2006.

⁷³ Although this country has adhered to the Cotonou Agreement, the provisions of the EU-South Africa Trade, Development and Cooperation Agreement (TDCA) take precedence over the Cotonou Agreement. In particular, the provisions of the Cotonou Agreement on development finance cooperation and those on economic and trade cooperation will not apply, see Protocol No. 3 to the Cotonou Agreement. The TDCA provisionally came into force in January 2000. While for the EU extensive trade liberalisation obligations for industrial goods (and lesser ones in the field of agricultural products) apply, the situation for South Africa is the opposite. The TDCA contains also a variety of provisions on economic development cooperation.

⁷⁴ This is not to say that specific endeavours by the Commission would be lacking. See, for example, the thorough study contained in the Communication from the Commission to the Council and the European Parliament, ‘The European Community’s Development Policy’, COM(2000) 212 final. In recent years, the Union tries to connect the development issue with other fundamental challenges such as environmental protection, climate change, security, fight against terrorism and state-building. The ‘European Consensus on Development’, the ‘Agenda for Change’ (2012) and the Communication ‘A Decent Life for All: From Vision

On a whole, the EU had to thoroughly redefine its development policy as the old privileges for the former colonies of single member states could no longer be maintained. This process is still going on as it is not yet clear how to reconcile the reciprocity requirement imposed by Article XXIV GATT and the need to grant special and differential treatment, an element to which also the Cotonou Agreement refers to. It is uncontested that already the existing legal regime provides instruments and ways for successful development cooperation. In fact, the conclusion of free trade agreements will allow for the creation of preferential regimes that should boost trade and development.⁷⁵ Furthermore, it will be possible also in the future to privilege ACP countries in the field of unilateral measures. Privileges of this kind are actually in place and find broad appreciation. In general, however, WTO law imposes strict limits for deviations from reciprocity and it is hard to imagine how the volume of preferences once in force within the Lomé system could be re-established within the Cotonou framework. Of course, the Lomé regime has proven to be rather ineffectual and the new development cooperation system should make a difference also in this sense. How this should be achieved still has to be sorted out. As evidenced by the developments on the international level of the last two decades, the search for a genuine and effective international development policy has become a paramount concern for the international community.⁷⁶ Economic development is also closely interconnected with

to Collective Action' (2014) provide a refreshing new look at the development issue.

⁷⁵ This is at least the traditional view of the role of free trade areas (as well as customs unions). See in this regard the literature starting with Jacob Viner, *The Customs Union Issues* (1950) up to the report by the WTO, *Regionalism and the World Trading System* (1995). A different attitude is, however, perceptible in a later report by the WTO, see WTO, 'Regional Trade Integration under Transformation' (2002), <http://www.wto.org/english/tratop_e/region_e/sem_april02_e.htm> accessed 12 July 2017. Lately, the criticism by the WTO towards regionalism seems to abound; see, in particular, the so-called 'Sutherland-Report', WTO, 'The Future of the WTO – Addressing Institutional Challenges in the New Millennium', at 19. See, in general on this issue, Hilpold, *supra* note 54. See also Peter Hilpold, 'Regionale Integrationsabkommen im GATT/WTO-System' (2015) 62 *Wirtschaftspolitische Blätter* 227, and the literature cited therein.

⁷⁶ See in this context the United Nations Millennium Declaration adopted by all UN member states in 2000 (UNGA Res 55/2 (LV), United Nations Millennium Declaration (18 September 2000) UN Doc A/RES/55/2). See also the so-called 'Sachs-Report', UN Millennium Project, 'Investing in Development: A Practical Plan to Achieve the Millennium Development Goals' (2005) <<http://www.unmillenniumproject.org>> accessed 12 July 2017. For a general analysis of this discussion, see Peter Hilpold, 'Reforming the United Nations: New Proposals in

several other pivotal concerns of the international community of the present days such as the fight against terrorism, against new infectious diseases and the effective implementation of the prohibition of the use of force.⁷⁷ For the future it is, therefore, very probable that the shape of the European Union's development policy will be much more influenced by the international discussion on this subject than it has been the case in the past. At the same time the prominent role played by the European Union in the field of international cooperation assures that the EU can also give a decisive contribution to the formation of these new international standards.

On a whole, it can be said that the EU development policy has undergone – especially in the last decade – a far-reaching reformulation whereby its scope of application has been amply broadened. Historic ties now count less and the effective needs of the single countries are now far more important. An ever-increasing importance is attributed to the evaluation of the effectiveness of this policy.⁷⁸

D. Institutional Aspects of the Cotonou Agreement

There is a dispute in literature whether the Cotonou Agreement is to be seen as a continuation of the Lomé system or whether it constitutes rather a total departure from it. There are surely elements of both. The guiding idea remained the same: to provide an instrument that should enhance the development of the ACP but the elements by which this should be achieved changed considerably as will be shown subsequently.

Already the formal structure of the Cotonou Agreement diverges clearly from that of the Lomé IV-bis Agreement. While the latter comprised 369 articles the former is limited to exactly 100 articles. The bulk of the provisions that regulate the actual working on the new relationship between the EC and the ACP countries was relegated to the annexes. On a whole, it represents a stocktaking of a long experience on development cooperation and an attempt to redress the major deficiencies that have shown up in this context. The

a Long-Lasting Endeavour' (2005) LII Netherlands International Law Review (2005) 389.

⁷⁷ See, in particular, the Report presented by the High-level Panel of Eminent Persons to the UNSG Kofi Annan of 1 December 2004, entitled 'A More Secure World: Our Shared Responsibility', UN Doc A/59/565. A new 'Responsibility to Protect' is evolving and in this context the European Union has to play a prominent role. See Peter Hilpold (ed), *The Responsibility to Protect* (2015).

⁷⁸ See also the European Commission Report on the public consultation on the future of EU development policy of June 2005.

primary goal to reduce poverty shall be achieved through five instruments of which the Cotonou agreement is mainly composed of:

- strengthened political dimension;
- broader integration of private actors and of the civil society as a whole;
- cooperation approach addressing more clearly poverty reduction;
- conclusion of new economic and trade partnerships; and
- more focused financial cooperation.

Article 2 of the Agreement declares fundamental principles, underpinning the ACP-EC cooperation:

- equality of partners and ownership of the development strategies;
- participation of all sections of society, including the private sector and civil society organizations;
- dialogue; and
- differentiation and regionalism: the needs, the performance and the long-term development strategy of each cooperation partner shall be taken into consideration. Special attention shall be given to the needs of the least-developed countries, of landlocked and island countries. The 2nd revision agreement of 2010 has emphasized that particular emphasis shall be put on regional integration, including at continental level.

The Cotonou Agreement is concluded for a period of 20 years.⁷⁹ At first sight, this constitutes an important modification with respect to the past. On the other hand, the important financial protocols are defined only for five-year periods. Thus, only the general framework is characterized by long-term stability. The flexibility of the financial provisions makes sure that periodical adaptations of the policies pursued are possible. As will be shown later on, a cornerstone of this new relationship, the Economic Partnership Agreements, still have to be defined in detail and will become operative only in the years to come.

As already mentioned, the Cotonou Agreement has already undergone two revisions according to Article 95, which foresees such adaptations in five year intervals. By the revision of 2005 it was attempted to bring the Cotonou Agreement more in line with the general orientations of the EC development

⁷⁹ Art 95 Cotonou Agreement.

policy and to streamline it with regard to actual political needs. Furthermore, it was also tried to relate the cornerstone of the EC development policy more closely to the activities set on the UN level. To this end, the preamble of the Cotonou Agreement contains a special reference to the UN Millennium Development Goals (MDGs) adopted by the UNGA in 2000.⁸⁰

In 2010, this approach was continued. New priorities were set (fight against organized crime, piracy and trafficking of, notably people, drugs and weapons, need to tackle challenges like international financial market shocks, climate change⁸¹ and pandemics⁸²; necessity to address situations of fragility; Article 11 of the Cotonou Agreement). The difficulty to meet the ambitious timetable for the conclusion of EPAs was recognized and therefore more flexibility was granted in this regard. Furthermore, some institutional reforms were undertaken.

The institutional provisions are to be found in Articles 14–17 of the Cotonou Agreement. According to Article 14, the institutions of this agreement are the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly.

The Council of Ministers is the most powerful, political organ.⁸³ It comprises, on the one hand, the members of the Council of the European Union and members of the Commission of the European Union, and, on the other hand, a member of the government of each ACP state. The office of the President of the Council of Ministers is held alternatively by a member of the Council of the European Union and a member of the government of an ACP state. As a rule, the Council meets once a year and whenever it seems necessary. The decisions are taken by consensus.⁸⁴

The Committee of Ambassadors comprises, on the one hand, the permanent representative of each EU member state and a representative of the Commission and, on the other, the head of mission of each ACP state to the European Union. This Committee primarily assists the Council of Ministers

⁸⁰ As will be explained below, these MDGs were superseded in 2015 by the Sustainable Development Goals (SDGs) which, on the one hand, build on the MDGs but, on the other hand, are more comprehensive and far-reaching.

⁸¹ See the provision in Art 32A on ‘climate change’.

⁸² See also the extensive provision in Art 31A on HIV/AIDS.

⁸³ Andreas Zimmermann, ‘Commentary to Article 179 TEC’ in Hans von der Groeben and Jürgen Schwarze (eds), *EU-/EG-Vertrag-Kommentar* (2003) para 38.

⁸⁴ Art 14 Cotonou Agreement.

in the fulfilment of its tasks and, in this context, fulfils a monitoring function with regard to the implementation of the agreement.⁸⁵

The Joint Parliamentary Assembly⁸⁶ assumes – to a certain extent – a representative role.⁸⁷ It is composed of an equal number of EU and ACP representatives. The members of the Joint Parliamentary Assembly are members of the European Parliament and members of parliament or other representatives nominated by the respective parliament. Exceptionally there is also the possibility that an ACP state may nominate its representatives for the Assembly if there is no parliament.⁸⁸ The Joint Parliamentary Assembly is a merely consultative body which meets twice a year, alternatively in the European Union and in an ACP state.

By the 2010 reform a new institution was added: the ‘Meeting of Heads of State or Government’ (Article 14A). This new institution assures both closer interaction between the Cotonou institutions and the participating governments as well as an immediate presence of the governments within the Cotonou setting.

E. Political Dialogue

One of the major innovations of the Cotonou Agreement is about the inclusion of substantially extended provisions on the basis of political dialogue. The parties have already accumulated some experience in the past but the results were not always satisfying. Now Article 2 of the Agreement considers a political dialogue not only as a fundamental principle but also attributes it a ‘pivotal role’. This is not merely an emphatic enunciation. The EU as well as the ACP countries have evidenced the importance attributed to political dialogue during the first revision conference to the Cotonou Agreement between May 2004 and February 2005. In the ambit of the conference the political dimension was strengthened and political dialogue more amplified. According to Article 8 of the Cotonou Agreement the ‘Parties shall regularly engage in a comprehensive, balanced and deep political dialogue leading to commitments on both sides’. On the basis of the First Revision Agreement (in force since 1 July 2008), political dialogue is attributed now a much more formal role within the Cotonou framework. Such a dialogue is mandatory

⁸⁵ Art 16 Cotonou Agreement.

⁸⁶ Art 17 Cotonou Agreement.

⁸⁷ Zimmermann, *supra* note 83, at para 40.

⁸⁸ In this case, however, these representatives need the prior approval of the Joint Parliamentary Assembly.

before recourse is taken to the consultation procedure according to Article 96 of the Agreement.⁸⁹ In Annex VII ‘Political dialogue as regards human rights, democratic principles and the rule of law’, introduced by the First Revision Agreement, detailed advice is given on how to structure this dialogue. Much care is taken to guarantee that the dialogue takes place according to internationally recognized standards and norms and with reference to jointly agreed agendas, priorities and benchmarks. This reform was hailed as an important step forward in order to make sure that the application of these provisions is felt to be a less subjective issue and, as a consequence, to render their implementation less confrontational. It has also been agreed that the political dialogue shall be systematic and formal.⁹⁰ As it involves each country, a further contribution is given in order to render this instrument acceptable on a broad basis.

With regard to material reforms, particular emphasis was laid on the fight against terrorism,⁹¹ non-proliferation⁹² and the introduction of an obligation to support the International Criminal Court.⁹³

On a whole, it can be said that these provisions on political dialogue opened up truly new avenues in North-South cooperation that could assume an exemplary role on a global scale. Thereby the basis was created for a more effective and meaningful dialogue than it was the case in the past, even if in the literature it has been argued that the EC has been partly too keen to push through their own position in this field.⁹⁴ In 2010 it was tried to remediate somewhat to this deficit by emphasizing the fact that political conditionality applies in a reciprocal way and it is therefore not dictated by the EU to its partners.⁹⁵

⁸⁹ Only the following consultations under Article 96 can go ahead without preceding intensified political dialogue: (1) if there is special urgency or (2) when there is a persistent lack of compliance with commitments taken by one of the Parties during an earlier dialogue, (3) or by a failure to engage in a dialogue in good faith.

⁹⁰ Annex VII Cotonou Agreement.

⁹¹ Art 11a Cotonou Agreement.

⁹² Art 11b Cotonou Agreement.

⁹³ Art 11 para 6 Cotonou Agreement. See also Sandra Bartelt, ‘Commentary to Article 209’ in Ulrich Becker *et al* (eds), *EU-Kommentar* (2012) 1965, para 24.

⁹⁴ See Karin Arts, ‘Political Dialogue in a “New” Framework’ in Olufemi Babarinde and Gerrit Faber (eds), *The European Union and the Developing Countries* (2005) 155, at 173.

⁹⁵ Art 9, para 4, subpara 4 Cotonou Agreement.

With this latest reform it was generally tried to further fine-tune the goals and objectives of political dialogue within the Cotonou Agreement. Particular emphasis is now put on fight against all forms of discrimination. The subject of ‘climate change’ has been newly added.

F. Financial Cooperation

Financial cooperation, a ‘euphemism for aid’⁹⁶, as it was called, is regulated in Articles 62 to 78 as well as in two annexes to the Cotonou Agreement. The relevant financial resources do not make part of the EU budget but are derived from the European Development Fund (EDF) which is supported directly by member states’ payments.⁹⁷ The revision agreements continued to maintain the existing situation. At the moment, for the period 2014-2020, the 11th European Development Fund with a total allocation of 30.5 billion is in force. In the past, repeatedly the integration of the EDF in the EU budget was requested. There would be good arguments for such a move, in particular the creation of more transparency, but on the other hand it was opined that preserving a special fund for ACP countries would not only allow for more flexibility but also strengthen the EU development budget as a whole.⁹⁸ Of course, also the old political, cultural and economic allegiances with these countries play a role when the decision was taken to postpone a radical reshuffling of the whole financing system to the period after 2020. The bulk of the means from EDF goes to Africa. In line with the ‘Agenda for Change’ (2011) the EU wanted to allocate resources to projects with the greatest impact.⁹⁹ As a rule, three priority sectors per country should be chosen (for fragile states four). Primary recipients are Ethiopia (745 million), Tanzania (626 million), the Democratic Republic of Congo (620 million) and Niger (596 million).¹⁰⁰

⁹⁶ See Udombana, *supra* note 48, at 83.

⁹⁷ Andreas Hecker, ‘Commentary to Article 179 TEC’ in Carl Lenz and Klaus-Dieter Borchardt (eds), *EU- und EG-Vertrag* (2003) 1785, para 11.

⁹⁸ See Kilnes *et al*, ‘More or Less? A Financial Analysis of the Proposed 11th European Development Fund’ (2012) European Centre for Development Policy Management, Brief Note No 29, 2.

⁹⁹ See Brussel Office Weblog, <http://brussels.cta.int/index.php?option=com_k2&view=item&id=9097:edf-2014-2020-following-the-money> accessed 12 July 2017.

¹⁰⁰ Amounts in Euro. For these data see the source in the previous footnote.

G. An Assessment and an Outlook

With regard to its relations with the ACP countries the EU is, at the moment, in the process of a difficult re-adjustment of its position and its policy. The previous policy of non-reciprocity and selective privileges for this group of countries has been subject of heavy criticism and is no longer sustainable in its original form. It has also become clear that aid of this kind has no lasting effects and can even be detrimental if it flows mainly to the established corrupt and autocratic elites. Nonetheless, the need for further aid is still given. There can be no doubt that the primary focus of EU development cooperation initiatives remains on Africa. However, new approaches and instruments are needed and the Agreement of Cotonou can be seen as an attempt to reconceive development cooperation. This agreement is, however, at the same time expression for the need of a re-orientation as it sticks to traditional visions of development aid. It can therefore be qualified as an instrument of transition and, at the same time, as a field of experimentation. Many elements that make out present EU development cooperation had been conceived and subjected to a first try within the EU-ACP relationship, and with the Agreement of Cotonou this tradition is continued. At the same time, however, EU development cooperation has taken a broader perspective and its further evolution takes place in an intense dialogue with a series of competent international institutions. Furthermore, it has to be considered that the internal political climate of the EU has profoundly changed. The sensibility for those goals and perspectives that stand at the center of political conditionality and for a fairer distribution of international wealth has greatly augmented. It is, therefore, very likely that the further development of the EU-ACP relationship will be strongly influenced by these developments. As shown, the last reforms to the Agreement of Cotonou already reflect these processes and it is most likely that the further reforms to this agreement will go along the same way.

V. Going from Amsterdam to Nice to Lisbon

A. The Treaty of Amsterdam, the Treaty of Nice and the Proposed ‘Constitution for Europe’

Neither the Treaty of Amsterdam nor the Treaty of Nice brought about greater changes for the provisions on development cooperation.¹⁰¹ The essence of these rules has remained largely untouched. The former Treaty strengthened the position of the European Parliament by applying the co-decision procedure according to Article 251 TEC to development cooperation. The latter treaty introduced Article 181a into Community law (now Article 212 TFEU). This provision created the normative basis for economic, financial and technical cooperation with third countries that are not developing countries. Thereby, instruments created in the field of development cooperation can now find application also beyond this area without necessity to overstretch the concept of development country. It can be argued that this new conceptual clarity will be in the interest also of the developing countries as this allows for a more effective targeting of the relevant measures. Really important changes in the field of development cooperation were contained in the Treaty establishing a Constitution for Europe¹⁰² especially with regard to the extension of the scope of this policy as with regard to the instruments available for its implementation.¹⁰³ As is well known, this Treaty never entered into force but important parts of this Treaty, and among them also the provisions on development cooperation, came to life within the Treaty of Lisbon.

B. The Treaty of Lisbon

The provisions formerly contained in the Articles 177-181 TEC are now to be found in the Articles 208-211 TFEU. This re-location of the relevant provisions had substantial implications. They now form an integral part of Title III on ‘Cooperation with Third Countries and Humanitarian Aid’

¹⁰¹ For the structure of EU development cooperation in 2003 see Ursula Werther-Pietsch, ‘Die Entwicklungszusammenarbeit der Europäischen Union’ in Bea de Abreu Fialho Gomes *et al* (eds), *Die Praxis der Entwicklungszusammenarbeit* (2003) 129.

¹⁰² Treaty Establishing a Constitution for Europe, 16 December 2004, OJ C 310.

¹⁰³ Andreas Zimmermann, ‘Gemeinschaftliche Entwicklungspolitik im Vertrag über eine Verfassung für Europa’ in Rainer Hofmann and Andreas Zimmermann (eds), *Eine Verfassung für Europa* (2005) 167.

(Articles 208-213 TFEU) which makes part of title V on ‘External Action’. Article 208 refers to the ‘principles and objectives of the Union’s External Action’. Many of the principles and objectives formerly contained in Article 177 TEC (now Article 208 TFEU) could therefore be deleted from the text of this provision as they now are part of the overarching framework which has been enriched with further principles and objectives and which offers a far more coherent overall setting in a European Union now considerably more ‘politicized’ than before and attributing far larger importance to the democratic component embodied by the European Parliament.

While in the past Community action in the field of development cooperation was governed by the principle of subsidiarity, now the Union competence is of a parallel nature and therefore Union and member states act on an equal footing.¹⁰⁴ This is also made clear by Article 4 para 4 TFEU which provides as follows:

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Now the ordinary legislation rules apply and thereby the European Parliament has a greater say in this field. Its role has become equal to that of the Council.¹⁰⁵

A further important structural change regards the location of the principle of coherence. While up to the Treaty of Lisbon a specific article was dedicated to this principle (Article 178 TEC), now it has been integrated into Article 208 para 1, 2nd sentence with a somewhat strengthened wording. As will be seen below, the new wording now requires that Union ‘take[s] account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries’ (while in the past it sufficed that the Union ‘contributed’ to them).

The EU continues to be represented externally by the European Commission, notwithstanding the introduction of a High Representative for Foreign

¹⁰⁴ See Article 4 para 4 TFEU, according to which ‘[i]n the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.’. See Wolfgang Benedek, ‘Commentary to Article 208’ in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), *EUV/AEUV* (2016) para 18.

¹⁰⁵ *Ibid.*, at para 19.

Affairs and Security Policy¹⁰⁶ and this holds true also for the development policy which is purely external in nature. Nonetheless, development policy activities have to be coordinated with those of the High Representative. The High Representative coordinates a series of aid instruments and in this he/she has to cooperate with the newly created European Diplomatic Service (EDS). A new Directorate-General for International Cooperation and Development (DE DEVCO) has been created that is responsible for formulating European international cooperation and development policy and delivering aid. It resulted from a merger of the EuropeAid Cooperation Office (AIDCO) and the Directorate General for Development and Relations with ACP States and was first entitled as ‘DG Development and Cooperation – EuropeAid (as of 1 January 2011) and got its actual name as of 1 January 2015.

VI. The Competence Situation After Lisbon and the Five C’s

As already mentioned, the position of the development policy has been enhanced by the Treaty of Lisbon. In the past, the text in Article 177 TEC spoke of this policy being ‘complementary’. There was broad agreement that this did not mean that the EC’s development policy should be of a subordinate nature. On the contrary, it was maintained that both policies were standing on the same footing¹⁰⁷ and as a consequence they had to be coordinated. What complementarity really means results, first of all, from statistical data. These data are evidencing that the means provided by the EU member states on their own by far exceed those coming directly from the EU.¹⁰⁸

Complementarity may also refer to the relationship between the donor and the recipient. In this context, according to the ‘European Consensus on Development’, ‘[t]he best way to ensure complementarity is to respond to partner countries’ priorities, at the country and regional level.’¹⁰⁹

¹⁰⁶ According to the Treaty of Amsterdam which introduced this post, its title was ‘High Representative for Common Foreign and Security Policy’.

¹⁰⁷ See extensively on this issue and with unequivocal clarity the opinion by GA Antonio La Pergola in Case C-268/94, *Portuguese Republic v Council of the European Union*, [1994] ECR I-6177, para 14 *et seq.*

¹⁰⁸ See G Vernier, ‘Commentary to Article 177 TEC’ in Philippe Léger, *Commentaire article par article des traités UE et CE* (2000) para 9.

¹⁰⁹ European Commission, ‘The European Consensus on Development’ (2006) 20, para 30.

Article 209 para 1 contains a general competence provision in the field of development cooperation. This provision is, of course, not the only one, which touches upon competence issues within development cooperation¹¹⁰ but it is surely the most important one. As the CJEU has stated on several occasions, a measure (or an agreement) has to be characterized according to its ‘essential object’ (and not on the basis of its formal designation) and the legal basis for its adoption has to be chosen accordingly.¹¹¹ Reference to more than one legal bases is allowed only if an ‘essential object’ of a measure, its ‘main focus’, cannot be determined and if the relevant procedures are not mutually incompatible.¹¹²

Recently, the CJEU has restated its jurisprudence in a case concerning (also) the issue of development cooperation:¹¹³

According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other (see, inter alia, Case C130/10 Parliament v Council EU:C:2012:472, Paragraphs 42 to 45 and the case-law cited).

In this instance, it must be determined whether, among the provisions of the Framework Agreement, those relating to readmission of nationals of the contracting parties, to transport and to the environment also fall within

¹¹⁰ See, in particular, Arts 207, 217 TFEU.

¹¹¹ Case C-268/94, *Portuguese Republic v Council of the European Union*, [1996] ECR I-6177, para 39. See in general Case C-300/89, *Commission of the European Communities v Council of the European Communities*, [1991] ECR I-02867, para 22, the leading case as to this question.

¹¹² See Rudolf Streinz and Tobias Kruis, ‘Commentary to Article 209 TFEU’ in Rudolf Streinz (ed), *EUV/AEUV, Kommentar* (2012) 1999, para 1.

¹¹³ Case C-377/12, *European Commission v Council*, [2014] ECLI:EU:2014:1903.

development cooperation policy or whether they go beyond the framework of that policy and therefore require the contested decision to be founded on additional legal bases.

According to Article 208(1) TFEU, European Union policy in the field of development cooperation is to be conducted within the framework of the principles and objectives – as resulting from Article 21 TEU – of the European Union’s external action. The primary objective of that policy is the reduction and, in the long term, the eradication of poverty and the European Union must take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. For implementation of that policy, Article 209 TFEU, upon which, *inter alia*, the contested decision is founded, provides in particular, in Paragraph 2, that the European Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 TEU and Article 208 TFEU.¹¹⁴

In the past, Article 179 contained the formulation that this competence provision applied ‘without prejudice’ to other competence provisions within the Treaty. By the deletion of this provision the pivotal role of Article 209 as a competence basis for the implementation of the development cooperation policy was further emphasized. This modification of the norm text appears to be justified also by the fact that its purview was considerably extended as a consequence of the integration of the provision on the conclusion of agreements with third countries and pertinent international organizations.

In general, the following rule can be applied: the provisions on trade policy (Article 207) prevail over those on development policy¹¹⁵ while measures with regard to food and humanitarian aid, the fight against drugs and measures in the sanitary area are – if taken with regard to developing countries – to be based on Article 209.¹¹⁶

¹¹⁴ *Ibid.*, at paras 34ff.

¹¹⁵ On this basis the General Preference System could be continued taking reference solely to Article 133. See Andreas Zimmermann and Bernd Martenczuk, ‘Commentary to Article 179 TEC’ in Jürgen Schwarze (ed.), *EU-Kommentar* (2000) 1704, para 3.

¹¹⁶ Natascha Solar, ‘Commentary to Article 179 TEC’ in Heinz Mayer (ed), *Kommentar zu EU- und EG-Vertrag* (2000) para 6.

Complementarity represents one of the five C's which characterize the EU development policy as a whole.¹¹⁷ The further elements are:

- coherence (Article 208 para 1, 2nd subpara, 2nd sentence TFEU): The aims set out in Article 208 have to be taken into regard in the implementation process of other policies if they touch upon development policies. According to the 'European Consensus on Development', '[t]he EU shall take account of the objectives of development cooperation in all policies that it implements which are likely to affect developing countries'.¹¹⁸ Awareness for the need to grant policy coherence dates to the farther past but the financial crisis had made greater coherence unpostponable. In 2009 the Commission issued a communication on 'Policy Coherence for Development' (PCD) requiring focusing on a few priority issues (like combating climate change or making migration work for development) and harnessing non-ODA financial flows for development.¹¹⁹ Still, however, the concept of coherence remains somewhat ambiguous.¹²⁰
- coordination (Article 210 para 1 TFEU): Measures in the field of development policy by the European Union have to be planned and carried out together with those of the Member States. Coordination is a necessary corollary of complementarity: To reach their utmost effectivity parallel (complementary) competences by the EU and their member states have to be coordinated. According to the

¹¹⁷ See in this regard Wolfgang Benedek, 'Prologue to Articles 177–181 TEC', in Eberhard Grabitz and Meinhard Hilf, *Das Recht der Europäischen Union* (2003) paragraph 18; Benedek, *supra* note 104, at para 22. Other authors mention three C's (coherence, complementarity, coordination) with a somewhat larger reach. See, for example, Rudolf Streinz and Tobias Krus, 'Commentary to Article 208 TFEU' in Rudolf Streinz (ed), *EUV/AEUV, Kommentar* (2012) 1989, para 14.

¹¹⁸ European Commission, 'The European Consensus on Development' (2006) 22, para 35.

¹¹⁹ European Commission, 'Policy Coherence for Development – Establishing the Policy Framework for a Whole-of-the-Union Approach' (15 September 2009) COM(2009) 458 final.

¹²⁰ Christophe Hillion, 'Tous pour un, un pour Tous! – Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (2008) 10.

‘Agenda for change’ of 2011¹²¹ ‘[f]ragmentation and proliferation of aid is still widespread and even increasing’.¹²² The Commission proposes ‘joint multi-annual programming documents’ resulting in a ‘single joint programming document’.¹²³

- cooperation: This element is closely related to the previous one although they are not fully equivalent. In fact, cooperation emphasized the element of solidarity more than coordination.
- consistency: This last requirement has gained greater attention only recently. Development cooperation should be entered into with countries in effective need of such measures and not made dependent from other conditions.

These five C’s can also be seen as auxiliary instruments and concepts in order to give more effect to the EU development policy as a whole and, ultimately, to create the much proclaimed ‘added value’ in this field.¹²⁴ In fact, in an area where success or failure of a policy depends so much on the ability to fine-tune the relevant measures the persistence of parallel competences both by the EU and its member states constitutes, at first sight, a drawback. There can be no doubt that an important reason for this enduring parallelism is to be found in a rivalry between the EU and its member states determined by political considerations. As this policy is associated with the disbursement of large sums it provides potentially considerable political clout. Therefore, this parallelism has to be accepted as a fact also for the future and it constitutes a great challenge for the years to come not only to avoid possible frictions between those actors but to find ways and means for a cooperative approach that justifies the maintenance of this peculiar competence situation also on objective grounds.¹²⁵

¹²¹ European Commission, ‘Increasing the Impact of EU Development Policy: An Agenda for Change’ (13 October 2011) COM(2011) 637 final.

¹²² *Ibid.*, at 10.

¹²³ *Ibid.*, at 11. See also Benedek, *supra* note 104, at para 60.

¹²⁴ See, e.g., Vernier, *supra* note 108, at 1398, para 9.

¹²⁵ See in this context European Commission, ‘The European Community’s Development Policy’ (26 April 2000) COM(2000) 212 final, at 13: ‘It is for the EC to promote coordination and ensure complementarity between the Community and Member States in the broader international framework. One of the most critical aspects of coordination within the EU is to enhance the ability of the EU to present common positions in international bodies, thus realizing the potential for increased European influence... . Building on past experience of coordination,

The five C's also point to the aim of aid effectiveness that has moved center-stage in the last years. Already at the European Council in Barcelona in March 2002 a specific commitment has been assumed to enhance trade effectiveness. This aspect has been further emphasized at the second High Level Forum on Aid Effectiveness of Paris in March 2005 where international donors and aid recipients formulated monitorable commitments with regard to ownership, harmonization, alignment, results and mutual accountability.¹²⁶ The need to ensure aid effectiveness was further confirmed at the 4th High Level Forum on Aid Effectiveness in Busan 2011¹²⁷, the Nairobi High Level Forum in 2016¹²⁸ and in the "New European Consensus on Development" of 7 June 2017¹²⁹.

In a certain sense, the five C's anticipated an approach towards development that became center-stage on the international level by the adoption of the Sustainable Development Goals (SDGs) in 2015, as will be shown below.¹³⁰ As will also be shown below, this further evidences the fact that in the conception of development instruments and approaches there is close interaction between the international and the European level.

the European Union has to move ahead and to establish a division of labour to achieve commonly established goals.'

¹²⁶ EU Report on Millennium Development Goals 2000-2004 of 12 April 2005. With regard to the important issue of ownership, see Peter S Heller, 'Making Aid Work' (2005) 42(3) *Finance & Development* 9.

¹²⁷ OECD, 'The Busan Partnership for Effective Development Co-Operation', <<http://www.oecd.org/development/effectiveness/busanpartnership.htm>> accessed on 16 August 2017.

¹²⁸ Global Partnership for Effective Development Co-Operation, 'Second High-Level Meeting (2016)', <<http://effectivecooperation.org/events/2016-high-level-meeting/>> accessed on 16 August 2017.

¹²⁹ European Commission, 'European Consensus on Development', <https://ec.europa.eu/europeaid/policies/european-development-policy/european-consensus-development_en> accessed on 16 August 2017. See paras 113ff of this document.

¹³⁰ It will also be shown that, to a certain extent, the philosophy standing behind the SDGs can be found already in the Millennium Development Goals (MDGs) of 2000.

VII. Development Policy Goals After Lisbon

A. The Paramount Importance of the Fight Against Poverty

The development policy of the EU primarily pursues the objective of poverty reduction and, in the long term, the eradication of poverty.¹³¹ Contrary to the pre-Lisbon situation, no further specific goals of development policy are mentioned in Article 208. However, para 1 of Article 208 states that ‘Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action.’

Accordingly, the EU seeks to promote the following values (also) in the field of development cooperation as they are stated in Article 21 para 1 TEU:

- democracy;
- the rule of law;
- the universality and indivisibility of human rights and fundamental freedoms;
- respect for human dignity;
- the principles of equality and solidarity; and
- respect for the principles of the United Nations Charter and international law.

This new norm that puts the fight against poverty at the center provides a leaner norm structure that emphasizes the most eminent goal disregarding the broader context. The panoply of goals to be pursued by development policy has therefore not been reduced but amplified and strengthened.

These goals of development cooperation introduced with the Treaty of Maastricht have to be read together with the 2030 Agenda for Sustainable Development adopted by the UN General Assembly on 25 September 2015¹³² which continued the development of the MDGs which had been adopted by the UN General Assembly in 2000.¹³³

¹³¹ Art 208 para 1 subpara 1, 1st sentence TFEU.

¹³² UNGA Res 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015), UN Doc A/RES/70/1.

¹³³ UNGA Res 55/2 (LV), United Nations Millennium Declaration (18 September 2000) UN Doc A/RES/55/2.

The MDGs were the following:

The MDGs had constituted an important step forward in international developments politics as they provided a coherent and highly inspirational point of reference for re-conceiving the attitude of the industrialized world towards the development issue. At the same time, however, they were partly over-reaching and illusionary, and partly incomplete. Furthermore, the financial crisis starting in 2008 made a dent in the capabilities by the developed world to engage in larger unilateral resource transfers.

As a consequence, it became clear that the deadline of 2015 could not be maintained and intense efforts were undertaken to devise new orientation, a post-2015 agenda, even though the general framework set by the Millennium Declaration should be upheld. An important contribution was given by the Rio+20 Conference on Sustainable Development in 2012 where consensus was found among the UN member states to draw up a new agenda for the 2015-2030 period.¹³⁴ It was agreed to formulate 17 sustainable development goals to be put forward for adoption by head of states at a UN summit in New York in September 2015. The establishment of new 'Global Partnership for Poverty Eradication and Sustainable Development after 2015' as an overarching framework with universally applicable goals, shared responsibility, the involvement of civil society, the private sector and academia and the creation

1. Eradicate extreme poverty and hunger. Lessen by a half the number of people in extreme poverty, and the number of people who suffer from hunger by 2015;

2. Achieve universal primary education. Ensure by 2015 that all children will be able to complete a full course of primary schooling;

3. Promote gender equality and empower women. Eliminate gender disparity in primary and secondary education by 2005, and in all levels of education by 2015;

4. Reduce child mortality. Reduce by two-thirds the under-five mortality rate by 2015;

5. Improve maternal health. Reduce by three-quarters the maternal mortality rate by 2015;

6. Combat HIV/AIDS, malaria, and other diseases. Lessen by a halt the spread of HIV/AIDS, malaria, and other major diseases, and begin to reverse the spread by 2015;

7. Ensure environmental sustainability. Lessen by a half the proportion of people without sustainable access to safe drinking water by 2015; and

8. Develop a global partnership for development. Further develop an open, rule-based, predictable, non-discriminatory trading and financial system.

¹³⁴ See Pamela S Chasek *et al.*, 'Getting to 2030: Negotiating the Post-2015 Sustainable Development Agenda' (2016) 25 *Review of European Community and International Environmental Law* 5.

of an effective monitoring¹³⁵ was envisaged. This partnership had to be based on human rights, good governance, the rule of law, support for democratic institutions, inclusiveness, non-discrimination, and gender equality. At the launching conference of the 2030 Agenda for Sustainable Development in 2015, the UNGA had to admit that progress had been uneven, particularly in Africa, least-developed countries, landlocked developing countries and small island developing states.¹³⁶ As it was stated, ‘the eight MDGs failed to consider the root causes of poverty or gender inequality, many of the underlying environmental issues or the holistice nature of development’.¹³⁷ The 2030 Agenda did, however, not abandon the MDGs. Rather, the new Agenda builds on the MDGs and develops them further in order to better reach the most vulnerable.¹³⁸ It goes beyond traditional goals such as poverty eradication and improvement of health, education, food security and nutrition and instead sets broader societal objectives that include the economy as a whole as well as broader social issues and the environment.¹³⁹ The new approach is based on sustainable development and human rights.¹⁴⁰ Perhaps most importantly, it includes the goal to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level’ (Goal 16). In a broader sense, Goal 16 refers to the issue of ‘good governance’ which

¹³⁵ With regard to monitoring the quality of EU aid internationally agreed targets shall be used such as those contained in the Paris Declaration (2005) and in the Accra Agenda for Action (2008) and revised by the Busan high-level forum, which created the Partnership for Effective Development Cooperation (2011). See European Commission, ‘International Cooperation and Development’ (2014) 7, <https://europa.eu/european-union/topics/development-cooperation_en> accessed 18 July 2017.

¹³⁶ UNGA Res 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015), UN Doc A/RES/70/1, para 16.

¹³⁷ See Chasek *et al.*, *supra* note 134, at 7.

¹³⁸ UNGA Res 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015), UN Doc A/RES/70/1, para 16.

¹³⁹ *Ibid.*, at para 17.

¹⁴⁰ See ‘The New European Consensus on Development – “Our world, our dignity, our future”’, Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission, 7 June 2017, https://ec.europa.eu/europeaid/new-european-consensus-development-our-world-our-dignity-our-future_en, accessed on 16 August 2017.

is surely crucial for lasting development and overcoming inequalities also within given national societies.¹⁴¹

The 2030 Agenda for Sustainable Development consists of the following 17 goals:

- Goal 1. End poverty in all its forms everywhere;
- Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture;
- Goal 3. Ensure healthy lives and promote well-being for all at all ages;
- Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all;
- Goal 5. Achieve gender equality and empower all women and girls;
- Goal 6. Ensure availability and sustainable management of water and sanitation for all;
- Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all;
- Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;
- Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation;
- Goal 10. Reduce inequality within and among countries;
- Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable;
- Goal 12. Ensure sustainable consumption and production patterns;
- Goal 13. Take urgent action to combat climate change and its impacts;
- Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development;
- Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss;
- Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels;

¹⁴¹ Hilpold, *supra* note 26. This aspect is of particular relevance in post-conflict situations. See on this issue Hilpold, *supra* note 44.

Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

The fight against poverty has been attributed paramount importance also in the past. Hence, both in the MDGs as in the SDGs this goal is ranked first in the hierarchy. Many of the further goals can be seen as a specification of the first one. The SDGs (and previously the MDGs) elaborated by the UN best exemplify how interrelated the various goals are and how the fight against poverty may be key to overcome the development challenge.

Although there is no unanimous consensus in the ongoing worldwide development policy discussion, *i.e.* whether the SDGs constitute an exclusive, overarching set of goals, there is an emerging consensus that poverty eradication should remain the goal of any new development policy strategy. The 2030 Agenda further develops the attempt, already present in the MDGs, to achieve this objective by the setting of concrete and simple targets.¹⁴²

In any case, it can be argued that the MDGs profoundly influenced the European development policy and eventually also the drafting of Article 208. A similar and even more enhanced influence which departs from international law and moves towards EU law emanates from the SDGs.¹⁴³

It is highly probable that the adoption of the post-2015 agenda will also have important implications for further activities under the UN Framework Convention on Climate Change.¹⁴⁴ In fact, the Paris Agreement of 2015, an agreement negotiated within the Framework Convention, emphasizes

¹⁴² See in this regard European Commission, *supra* note 78, at 14. See also Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 Human Rights Quarterly 755 and, more recently, European Commission, 'Fighting Hunger together with the European Union' (2015), <https://ec.europa.eu/europeaid/fighting-hunger-together-european-union_en> accessed on 16 August 2017.

¹⁴³ From a more nuanced perspective it can also be argued that this influence is reciprocal. In fact, the SDGs, with their emphasis on human rights and good governance, correspond even more closely to the very characteristics of EU law than it has been the case with the MDGs.

¹⁴⁴ See European Commission, 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015' COM(2015), at 44; German Federal Government, 'Post-2015 Agenda for Sustainable Development – Key Positions of the German Government' (February 2014), <<https://sustainabledevelopment.un.org/content/documents/8778germany.pdf>> accessed 18 July 2017, and Global Policy Forum, 'Post-2015 Sustainability Agenda', <<https://www.globalpolicy.org/social-and-economic-policy/the-millennium-development-goals/post-2015-development-agenda.html>> accessed 18 July 2017.

the achievement of the SD.¹⁴⁵ Already in 2007, the EU started the Global Climate Change Alliance (GCCA) aiming at fostering effective dialogue and cooperation on climate change with landlocked developing countries and small island developing states. In 2014, a new, enhanced initiative with more generous funding, the Global Climate Change Alliance+ (GCCA+) was started. According to this program, climate change must be an integral consideration in national development plans, policies and budgets, vulnerable countries shall be helped to prepare for climate-related hazards and furthermore understanding shall be increased about the specific consequences of climate change in the short, medium and long term.¹⁴⁶

From the very beginning, the EU gave much relevance to the measurement of actual progress towards the MDGs.¹⁴⁷ From the official UN list of 48 MDG indicators, several key indicators have been sorted out, on the basis of which the performance of countries and regions, which receive development assistance, are assessed. These are the following:

1. Proportion of the population having daily income below \$1 a day;
2. Prevalence of child malnutrition (underweight children) under-five years of age;
3. Net enrolment ratio in primary education;
4. Children under-five years of age mortality rate;
5. Proportion of one-year old children immunized against measles;
6. Proportion of births attended by skilled health personnel;
7. HIV prevalence among 15-24 years old pregnant women; and
8. Proportion of the population with sustainable access to an improved water source.

Whether a situation of poverty is given can therefore not be measured only in financial or economic terms. Poverty is rather a complex phenomenon

¹⁴⁵ See paras 6.4-6.7 of the Agreement. On this agreement see Sabine Rauch, *Das Pariser Klimaschutzabkommen – Grundlagen und Perspektiven* (2017).

¹⁴⁶ See Global Climate Change Alliance, <<http://www.gcca.eu/print/about-the-gcca/what-is-the-gcca>> accessed 16 August 2017.

¹⁴⁷ European Commission, 'EU Report on Millennium Development Goals 2000-2004. EU Contribution to the Review of the MDGs at the UN 2005 High Level Event' SEC(2005) 456, at 8.

and so are the strategies to fight it. In fact, the UN defined poverty in the following terms:

Fundamentally, poverty is a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or clinic to go to, not having the land on which to grow one's food or a job to earn one.¹⁴⁸

This broad vision of the goals of development cooperation, comprising not only the fight against poverty in a stricter sense, has been confirmed by the CJEU in C-377/12, the first judgment on development cooperation in the post-Lisbon context.¹⁴⁹ In this judgment the Court confirmed that 'European Union policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU [...]'.¹⁵⁰ It further reminds that '[a]s the Advocate General notes in points 40 and 41 of his Opinion and as is apparent in particular from Paragraphs 5 and 7 of the European Consensus, the main objective of development cooperation is the eradication of poverty in the context of sustainable development, including pursuit of the Millennium Development Goals'.¹⁵¹

On a whole, the MDGs and to some extent also already the SDGs have strongly influenced the understanding and the continuing re-conception of EU development politics. The traditional development goals, centred on the fight against poverty, remain important targets but it cannot be denied that the discussion has evolved further. As already spelled out and as will be reiterated in the conclusions, the post-2015 agenda has brought about a partial re-orientation towards a holistic concept of development that understands industrialized and developing countries as partners of a common project and that puts particular emphasis on a rights-based approach that should be implemented in a national legal environment based on good governance and the rule of law.

¹⁴⁸ Economic and Social Council, 'Statement of Commitment for Action to Eradicate Poverty Adopted by Administrative Committee on Coordination' ECOSOC/5759, 20 May 1998, para 3.

¹⁴⁹ Case C-377/12, *European Commission v Council*, [2014] ECLI:EU:2014:1903; The 'leading case' before was Case C-268/94, *Portuguese Republic v Council of the European Union*, [1996] ECR I-6177, para 39.

¹⁵⁰ *Ibid.*, at para 37.

¹⁵¹ *Ibid.*, at para 42.

B. Further Principles and Objectives of Development Cooperation

In the following the further principles and objectives of development cooperation, as they result by reference of Article 208 TFEU to Article 21 TEU, shall be specified.

1. Safeguarding the Union's Values, Fundamental Interests, Security, Independence and Integrity

This is an 'egoistic' objective that is common to all countries pursuing a development policy. In plain language, it is made clear that development cooperation is useful and beneficial for the 'assisting' or 'donor' country or entity as much as it is for the recipient. As a corollary of this statement it results that this policy has to be tailored accordingly. This is also made clear by the European Security Strategy (ESS) of 12 December 2003 where the EU confirmed *inter alia* that development cooperation can be a powerful tool for enhancing international security and thereby also the security of the EU and its member states.¹⁵²

2. 'Consolidate and Support Democracy, the Rule of Law, Human Rights and the Principles of International Law'

This objective was already present in the previous Article 177 TEC with a somewhat different wording ('development and consolidation of democracy, the rule of law, of human rights and fundamental freedoms').

In the past, this author has stated the following with regard to this objective in its previous formulation:

From the system of the Treaty and the wording of the relevant provision it becomes clear that the development and the consolidation of democracy, the rule of law, of human rights and fundamental freedoms are not independent goals enjoying the same relevance as those enlisted in Paragraph 1 of Article 177. They are rather of an auxiliary nature and furthermore

¹⁵² 'Trade and development policies can be powerful tools for promoting reform. As the world's largest provider of official assistance and its largest trading entity, the European Union and its Member States are well placed to pursue these goals.' European Council, 'European Security Strategy – A Secure Europe in a Better World' (2003) 10.

they are worded very cautiously.¹⁵³ The limited role attributed to these principles is a direct consequence of the competence situation of the EC in this field which is of a restricted dimension.¹⁵⁴ Nonetheless, there can be no doubt that these elements are continuously gaining more importance as the insight in the complexities of the development process grows and there is a broad awareness that a lasting development progress cannot be achieved if development incentives do not take place in a somewhat consolidated and participatory political and legal environment.¹⁵⁵

The slight changes in the wording of this goal refer to major changes in substance occurred in the meantime. In fact, no longer reference is made to the ‘development’ of democracy, the rule of law and human rights but rather to their ‘consolidation’. Thereby, it is made clear that the European Union has gone a long way in this process and much has been achieved. The EU is proud about these achievements. It would be inappropriate to speak about ‘development’ (of such rules) as they already exist and the EU has given a decisive contribution for their elaboration. Now the time has come to consolidate them and to support them on the international plane.

This policy is clearly directed towards the cooperating partners even though it has considerable repercussion for the Union and its member states. Again it becomes evident that the principles and objectives of development cooperation explain their effects both externally and internally. The values and goals indicated in this indent define much of the EU’s identity, in particular the way it wants to be seen on the international level. One drawback could be seen in the fact that these values and goals are not defined in EU legal instruments but, on the other hand, there are sufficient international instruments and documents available¹⁵⁶ that can be referred to in order to obtain at least the essential elements of such a definition: For the principle of democracy see, *e.g.*, the 1990 Copenhagen Conference on the Human Dimension of the CSCE or the Charter of Paris for New Europe of 1990, with regard to the rule of law, the CJEU has developed a broad jurisprudence, human dignity is recognized on a world-wide scale as a pre-requisite for any form of human

¹⁵³ Hilpold, *supra* note 26; Andreas Zimmermann and Bernd Martenczuk, ‘Commentary to Article 177 ECT’ in Jürgen Schwarze (ed), *EU-Kommentar* (2000) 1700, para 24.

¹⁵⁴ Hilpold, *supra* note 26, at 65.

¹⁵⁵ Hilpold, *supra* note 26. See also Benedek, *supra* note 117, at para 25.

¹⁵⁶ For a detailed analysis see Stefan Oeter, ‘Article 21’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU)* (2013) 833, at 844ff.

rights protection, solidarity is becoming a principle governing vast areas of international relations¹⁵⁷ and respect for the principles of the United Nations and international law has become a ‘mantra’ for the EU with continuous pledges by EU politicians and officials to uphold and further develop these principles on the universal level.¹⁵⁸ However, as has been convincingly argued in literature¹⁵⁹, there is not one common vision of international law but there

¹⁵⁷ See Peter Hilpold, ‘Solidarität als Prinzip des Staatengemeinschaftsrechts’ (2013) 51 *Archiv des Völkerrechts* 239; Ronald SJ MacDonald, ‘Solidarity in the Practice and Discourse of Public International Law’ (1996) 8 *Pace International Law Review* 259; Karel Wellens, ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’ in Ronald SJ Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (2005) 775; Rüdiger Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’ (2009) 49 *Indian Journal of International Law* 8; Peter Hilpold, ‘Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen’ (2007) 55 *Jahrbuch des öffentlichen Rechts* 195; and Rüdiger Wolfrum and Chie Kojima (eds) *Solidarity: A Structural Principle of International Law* (2010). For the relevance of the solidarity principle within the European Monetary Union see Hermann-Josef Blanke and Stefan Pilz, *Die Fiskalunion* (2014); and Peter Hilpold, ‘Eine neue europäische Finanzarchitektur – Der Umbau der Wirtschafts- und Währungsunion als Reaktion auf die Finanzkrise’ in Peter Hilpold and Walter Steinmair (eds), *Neue europäische Finanzarchitektur – Die Reform der WWU* (2013) 3.

¹⁵⁸ Reality often shows, however, a different picture with the EU tending to go for its own. The most remarkable case in kind is surely the *Kadi* case where both GA Poirares Maduro as well as the CJEU emphasized the EU’s commitment to the international legal order while at the same time they attributed priority to the immediate EU interests and goals. See the Opinion by GA Poirares Maduro in Case C-402/05 P, para 24: ‘[...] although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty.’ The CJEU, in Joined Cases C-402/05 P and C-415/05 P of 3 September 2008, para 291, first paid lip service to respect international law while afterwards emphasizing the predominance of the ‘very foundations of the Community legal order’ (para 304). See on this case Peter Hilpold, ‘EU Law and UN Law in Conflict: The Kadi Case’ (2009) 13 *Max Plank UNYB* 141; Peter Hilpold, ‘UN Sanctions Before the ECJ: the Kadi Case’ in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (2010) 18; Peter Hilpold, ‘Kadi die Dritte – EU-Recht und UN-Recht weiter auf Kollisionskurs’ [22/2010] *Eurpäische Zeitschrift für Wirtschaftsrecht* 844; and Peter Hilpold, ‘Im Spannungsverhältnis zwischen UN-Recht und EU-Recht – die unendliche Kadi-Saga’ (2011) 22 *Europäisches Wirtschafts- und Steuerrecht* 45.

¹⁵⁹ See Frank Hoffmeister, ‘The Contribution of EU Practice to International Law’ in Marise Cremona (ed), *Development in EU External Relations Law* (2008) 37.

are several.¹⁶⁰ The German model refers primarily to UN law containing the core values of international law, while the French seeks to pursue national interests through international law and the British interpret international law from a common law perspective, according to which the international legal order is a developing set of norms but not necessarily a complete one.¹⁶¹ Nonetheless, there are important fields – and they continuously grow in size – where these visions converge. One of these fields is surely that of conditionality. As has been shown above, human rights conditionality finds its roots already in the Lomé III Agreement of 1984 but only with the Lomé IV-bis Agreement of 1995 conditionality reached the status of a fully defined and actionable legal principle.

As respect for human rights, democratic principles and the rule of law have been qualified in this context as essential elements, the whole nature of the Lomé Agreement has changed. In fact, these elements were given such a weight that their violation could discharge the cooperation partner from its obligations and bring financial flows and privileged trade to a halt.

Although the qualification as ‘essential elements’ would have rendered Article 60 of the Vienna Convention on the Law of Treaties (Vienna Convention) applicable, a specific and precise mechanism was created upon which parties had to rely in case of an infringement of these principles. This procedure regulated in Article 366a of the Lomé Agreement remained, however, somewhat ambiguous as it hinted at an unresolved conflict between partnership and cooperation. In fact, on the basis of the partnership idea the application of sanctions required the holding of prior consultations. On the other hand, these consultations did not necessarily influence the final decision on the sanctions to apply nor did it impede the taking of sanctions in cases of special urgency. Thus, the cooperative process was confined to a first (possible) fact-finding and fact-assessing procedure. The final decisions were to be taken – and carried out – unilaterally. Despite official declarations to the contrary, the human rights policy of the EU was still largely based on the ‘negative’ approach which corresponded to the unilateral elements in the structure of the provisions described above. The results of this new instrument were not fully satisfactory as a lasting success of the single initiatives in the field of human rights could not be guaranteed. It was noticed that the relationship between democracy and the rule of law on the one hand and the

¹⁶⁰ *Ibid.*, at 125, referring to Ricardo Gosalbo-Bono, ‘Some Reflections on the CFSP Legal Order’ (2006) 43 *Common Market Law Review* 337, at 380-384.

¹⁶¹ *Ibid.*

protection of human rights, on the other hand, had to be further clarified. Still unclear was the relation of these principles with the concept of development.

The drafters of the successor regime to the Lomé Agreement, the Cotonou Agreement, had the precise intent to improve this situation. In this agreement, paramount importance was attributed to the principle of good governance, which should become the overarching concept on the basis of which the elements mentioned above should be structured and brought in a harmonious order. An important clarification has been undertaken by the EU Commission in a Communication to the Council and the European Parliament of 1998 – at a time when discussions about a successor regime to Lomé IV-bis Agreement had already started. In this document, good governance is defined as the management of public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law:

It encompasses every aspect of the State's dealing with civil society, its role in establishing a climate conducive to economic and social development and its responsibility for the equitable division of resources.¹⁶²

The Cotonou Agreement in Article 9 para 3 contains a similar definition of good governance:

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

The Commission Communication of 1998 adds the further elements:

Equity and the primacy of law in the management and allocation of resources call for an independent and accessible judicial system that guarantees all citizens basic access to resources by recognising their right to act against inequalities. In the specific context of governance, this involves establishing a legal and regulatory framework that encourages private enterprise and investment.

¹⁶² European Commission, 'Communication from the Commission to the Council and the European Parliament' COM(1998) 146 final.

The institutional capacity to manage a country's resources effectively in the interests of economic and social development implies an ability to draft, implement and supervise policies addressing the needs of the people. The government and civil society must be able to implement an equitable development model and guarantee the judicious use of all resources in the public interest. Building public and private institutional capacities is vital because it directly determines economic and social development, and especially the effectiveness of development cooperation.

Transparency, which entails being accountable and organising effective procedures and systems for monitoring the management and allocation of resources, implies that resource management is open to scrutiny and subject to controls. It is both a key factor in establishing trust between the various agents of development and a guarantee of institutional integrity.

Development without the public participation in the decision-making processes concerning the management and allocation of resources is inconceivable. Participation calls for the various agents of development to exchange views on major decisions relating to the management and allocation of resources and development programming. This dimension also concerns the scope to be given to private initiative, enterprise and civil society in development.

In the Communication on Governance and Development of 20 October 2003, the Commission has given further elucidation on this concept.¹⁶³ On this occasion the Commission has stressed that the concept of governance provides a terminology that is more pragmatic than democracy, human rights, etc. For the Commission this is a meaningful and practical concept relating to the very basic aspects of the functioning of any society and political and social systems.¹⁶⁴ It described good governance as a basic measure of stability, quality and performance of a society.¹⁶⁵

As demonstrated above, it is evident that much discussion is needed to give further content and consistency to the principle of good governance but nonetheless the European Community felt prepared to attribute to this concept such an important role in the Agreement of Cotonou (though it constitutes still 'only' a 'fundamental element' and not an 'essential element' of the agreement).

¹⁶³ European Commission, *supra* note 41.

¹⁶⁴ *Ibid.*, at 3.

¹⁶⁵ *Ibid.*

EU human rights conditionality is not limited to its special relationship with ACP states. Human rights clauses have rather become an essential element of all cooperation agreements with third countries, independently from their development status.¹⁶⁶ The EU Annual Report on Human Rights of 2005 states:

The EU views human rights clauses in agreements with third countries as an incentive for the promotion of human rights. The Commission issued in May 1995 a Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries which includes a list of targeted measures that may be taken in response to serious human rights violations or serious interruptions of democratic process. Such measures, ranging from the alteration of the contents of cooperation programmes to the suspension of elements of the agreement, are regularly applied. However, the principal role of the clause is to provide the EU with a basis for positive engagement on human rights and democracy issues with third countries.¹⁶⁷

As the concepts involved are still in large parts undetermined and furthermore subject to a rapid evolution the EU has considerable leeway for their concretization.¹⁶⁸ This activity has ultimately important consequences also for the formation of an international consensus on these concepts on a global scale.

At the moment, the most evolved ‘hard’ provisions on conditionality are probably to be found in the Cotonou Agreement. The 2005 revision to this agreement has emphasized the importance of dialogue prior to the application of sanctions¹⁶⁹ and in 2010 it was emphasized that ‘[t]he principles underlying the essential and fundamental elements as defined in this Article shall apply equally to the ACP States on the one hand, and to the European Union and its member States, on the other hand’.¹⁷⁰ Therefore, in principle, conditionality is an instrument applicable also against the EU and its member states.

¹⁶⁶ See Peter Hilpold, ‘Human Rights Clauses in EU-Association Agreements’ in Stefan Griller and Birgit Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (2002) 359.

¹⁶⁷ European Council, ‘EU Annual Report on Human Rights 2005’ (2005) 32.

¹⁶⁸ See Zimmermann/Martenczuk, *supra* note 153, at 1691, para 26.

¹⁶⁹ See Lorand Bartels, ‘The Trade and Development Policy of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (2008) 128, at 153.

¹⁷⁰ Art 9, para 4 subpara 4 Cotonou Agreement.

On a whole, it can be said that the EU has given important contributions for the definition and the further development of these concepts, although, in the end, their meaning can be identified only by common international consent. In fact, it would not be wise for the EU to unilaterally define concepts of this kind that by their very nature are destined for universal use and need also international contributions for their definition in order to obtain the broadest-possible acceptance.

There can be no doubt that the promotion of democracy, good governance and the rule of law is a goal sincerely felt by the EU. This is not only proven by an extensive practice in this field but also by a specific reference to this task in the ESS:

Contributing to better governance through assistance programmes, conditionality and targeted trade measures remains an important feature in our policy that we should further reinforce. A world seen as offering justice and opportunity for everyone will be more secure for the European Union and its citizens.¹⁷¹

The ongoing attempts to re-formulate the EU development policy is informed by the attempt to attribute even more importance to human rights, democracy, and good governance. Thus, the EU Annual Report on Human Rights and Democracy in the World¹⁷² announces a strictly rights-based approach:

The Agenda for Change, the EU Strategic Framework on Human Rights and Democracy and the Communication towards a Post-2015 Development Framework were calling for a move to a Rights Based Approach (RBA). The negotiation on the DCI has introduced a RBA as a key objective of the Regulation for the period 2014-2020.

To this purpose, the EU has been mandated to develop a toolbox for working towards a rights-based approach, encompassing all human rights, to development cooperation.¹⁷³

¹⁷¹ Zimmermann/Martenczuk, *supra* note 153, at 1691, para 26.

¹⁷² European Council, 'EU Annual Report on Human Rights and Democracy in the World in 2013' (2014), 11107/14.

¹⁷³ *Ibid.*, at 45.

3. Sustainable Economic, Social and Environmental Development of the Developing Countries

This goal is to be found in Article 21 para 2 lit (d): ('foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty').

A similar provision was to be found in the pre-Lisbon text of Article 177 TEC ('[t]he sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them'). The modifications have, therefore, been rather slight: Article 21 para 2 lit (d), which is now guiding external action as a whole, concentrates on the eradication of poverty, a goal which has now become of overarching importance. At the same time we have, however, to take into regard that 'poverty' has to be defined broadly so that in substance little has changed.

The concept of 'sustainable development' is intimately related to the broad field of environmental protection and with the Treaty of Lisbon explicit reference is now made to environment in the context of development cooperation. It has been shown in literature that this concept has been known in its very essence for quite a long time, both in national law and in international law.¹⁷⁴ It became prominent, however, only after it had been included in the Brundtland Report of 1987 where it was defined as 'a development which fulfils the present needs without risking that future generations cannot fulfil their own needs'.¹⁷⁵ Since the so-called 'Earth Summit', the World Summit on Sustainable Development, convened in Rio de Janeiro in 1992, the principle of sustainability has been at the focal point of any discussion on the further development of international economic law.¹⁷⁶ The concept of sustainability in the field of environmental protection touches in several ways upon the development issue:

- Environmental protection requires international action and the cooperation of the developing countries is essential in this context;

¹⁷⁴ Rudolf Dolzer, 'Wirtschaft und Kultur im Völkerrecht' in Wolfgang Vitzthum (ed), *Völkerrecht* (2004) 478, para 35, referring – with regard to international law – to the preamble provision in GATT.

¹⁷⁵ UNGA, 'Report of the World Commission on Environment and Development' (4 August 1987) UN Doc A/42/427.

¹⁷⁶ See also the results of the World Summit on Sustainable Development in Johannesburg, 26 August – 4 September 2002.

- As the development process is following generally a similar path according to which the developing countries aim first at the building-up of highly polluting industries before feeling able to concentrate on cleaner high-tech industries or services, to narrow the development gap earlier can contribute to a considerable reduction of the world-wide pollution;
- A lag in the development process is regularly associated with high population growth which puts additional strain on the future environmental sustainability of the biosphere; and
- Probably in no area the impact of development on the protection of the environment becomes more evident than in that of climate protection. The United Nations Framework Convention on Climate Change of 1992 together with the Kyoto Protocol of 1997 and the Paris Agreement of 2015 can be seen not only as an instrument for environmental protection of unprecedented reach but also as an important step towards a new global economic order protecting particularly the interests of the developing countries.¹⁷⁷

It is, however, not only the environment that this provision points at. The reference to a sustainable economic and social development makes this goal absolutely unique in the international development policy as it sets conditions that should guarantee lasting effects of such a policy and which should furthermore ensure that this policy does not become too narrowly interpreted.

Sustainability in the mere economic field requires, first of all, adequate planning of all initiatives and a thorough assessment of the consequences. In this context it can become evident, for example, that food aid provided outside a specific, urgent need can do more harm than good and is, therefore, detrimental to sustainable economic development.¹⁷⁸

Sustainability is furthermore required also in the social field. This requirement poses, probably, one of the most eminent challenges to the planning process of the European development policy, if due regard is paid to it. In fact, this requirement makes clear that it is not only the welfare of a developing country in absolute terms that counts, but at least as much the distribution

¹⁷⁷ As is well-known, lately, the migration problem has become a major challenge for the European Union. Again, there is a strong nexus between climate change, migration and development policy that the EU intends to address. See the 'New European Consensus on Development', *supra* note 140, at 20.

¹⁷⁸ Christian Pitschas, 'Commentary to Article 177 TEC' in Rudolf Streinz (ed), *EUV/EGV-Kommentar* (2003) 1765, para 16 with further references.

of it. The European development policy has, therefore, to make sure that the respective initiatives do not have a disruptive effect on social cohesion but also – positively – that social cohesion is furthered by these measures.

It is clear that all these concerns are even more accentuated for the most disadvantaged countries as it can be argued that the higher the degree of development is, the lesser will be the impact of EU development initiatives on the social and the economic fabric of a developing country, both in the positive and in the negative sense.

Already the ‘European Consensus on Development’ of 2006¹⁷⁹ highlighted the importance of environmental sustainability for any form of development policy.¹⁸⁰ This aspect has now become of paramount importance as has been evidenced by the ‘Agenda for Change’ of 2012. Therein, the EU development policy was identified as a key instrument for achieving ‘the transition to a green economy, including resource efficiency, and also contribute to food and nutrition security, environmental protection and climate change mitigation and adaptation’.¹⁸¹ Furthermore, strong coordination between the EU’s climate and development policies was qualified as ‘vital’.¹⁸²

Programs in the field of ‘climate change and environment’ are suitable for financing within the Financing instrument for development cooperation for the period 2014-2020.¹⁸³ By the 2010 revision of the Cotonou Agreement Article 32a was introduced in this agreement which refers to ‘climate change’. Finally, building on the commitments made at the 2012 United Nations Conference on Sustainable Development (Rio+20) goals and objectives in the field of environmental protection rank high in the post-2015 agenda. By the introduction of the SDGs in 2015 sustainability has become a pivotal element of development.

¹⁷⁹ European Commission, ‘The European Consensus on Development’ (2006).

¹⁸⁰ *Ibid.*, at 46, para 105.

¹⁸¹ Council Conclusions, ‘Increasing the Impact of EU Development Policy: An Agenda for Change’ (14 May 2012), para 8.

¹⁸² *Ibid.*, at para 12.

¹⁸³ Regulation (EU) 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44.

4. Encourage the Integration of All Countries into the World Economy, Including Through the Progressive Abolition of Restrictions on International Trade

Also this objective was already contained in Article 177 TEC, albeit with a slightly different wording ('smooth and gradual integration into the World Economy').

In this indent, formal expression is given to a principle that has characterized the EU development policy from its very beginnings and which corresponds also to the prevailing view always held by Western market-oriented countries in general. It is assumed that the political economy model at the basis of the success of the dominant economies and which requires the recourse to free trade in the external economic relations, could and should be adopted also by developing countries as the experience of the last two centuries has evidenced that there is no superior model available.¹⁸⁴ It has, however, also been generally recognized that the liberalization process can only be a gradual one as an immediate, unconditional market opening would make the building-up of a home-grown industry impossible.¹⁸⁵ As this exception, if improperly applied, could lead to particularly deleterious forms of protectionism, a difficult balancing is required where the final goal, the full integration of these economies in the world trading system, should never be lost from sight.

The proposition set out in this indent corresponds also fully to the approach adopted in this field by the WTO. While GATT law was somewhat ambiguous on this issue during the Uruguay Round a straightforward decision was taken to aim at a full integration of the developing countries. Only for the least developed countries larger exceptions should be granted.¹⁸⁶

It is doubtful whether this approach was a fortunate one. Within the Doha Round, started in 2001, solutions are looked for that should better cater for

¹⁸⁴ See generally on this issue, Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (2005).

¹⁸⁵ The infant industry argument stands behind this position, see *ibid.*, at 8.

¹⁸⁶ See Michael Finger and L Alan Winters, 'What Can the WTO Do for Developing Countries?' in Kym Anderson and Bernard Hoekman (eds), *The Global Trading System* (2002) 71; Peter van den Bossche, *The Law and Policy of the World Trade Organisation* (2005) 694; see also Wil D Verwey, 'The Preferential Status of Developing Countries in International Trade Law after the Uruguay Round' in Erik MG Denters and Nico Schrijver (eds), *Reflections on International Law from the Low Countries* (1998) 48.

the needs of developing countries.¹⁸⁷ The previous formulation (in Article 177 TEC) referred to ‘graduation’ and it can be assumed that with the ‘progressive abolition of restrictions on international trade’ the same concept is meant. ‘Graduation’ is an established principle in international economic law. First of all, the graduation principle is one of the most characteristic elements of the GSP which, being based on the Enabling Clause of 1979,¹⁸⁸ allows for the granting of unilateral preferences that can be differentiated according to a broad set of criteria.

As shown above, the EC’s GSP was challenged by India before the WTO Dispute Settlement Body under the allegation that this system constituted a violation of the GATT most favoured nation principle.¹⁸⁹ The WTO panel ruled in favour of India in 2003 finding that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) 2501/2001 was inconsistent with Article I:1 GATT.¹⁹⁰ The Appellate Body, however, has taken a position more favourable to the EC. In substance it argued that the enabling clause did not refer to the developing countries as a group and that different treatment of developing countries with different development, financial and trade needs was allowed. Also drug-trafficking could be an expression of a development problem. As the EC failed, however, to demonstrate that the preferences granted under the Drug Arrangements would be conceded to all developing countries that evidence a similar drug

¹⁸⁷ See Michael J Trebilcock, *International Trade Law* (2015) 197: ‘The future scope of special and differential treatment for developing countries has become a major fault line between developing and developed countries in the current Doha Round of multilateral trade negotiations, and in part explains the dramatic proliferation of PTAs in recent years.’

¹⁸⁸ GATT, ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries’ (Decision of 28 November 1979 (L/4903)), <https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf> accessed 12 July 2017.

¹⁸⁹ See also Matthew S Dunne *et al*, ‘International Trade’ (2005) 39 *The International Lawyer* 209, at 218.

¹⁹⁰ In particular, the GATT panel found that the phrase ‘developing countries’ in para 2(a) of the enabling clause refers to all developing countries. No differences in preferences except those contemplated by the UNCTAD negotiators would be allowed. See Gene M Grossmann and Alan O Sykes, ‘A Preference for Development: The Law and Economics of GSP’ (2005) 4 *World Trade Review* 41, at 50.

problem, the EC GSP was again qualified as being of a discriminatory nature.¹⁹¹

Graduation stands in close connection with the principle of more favorable and beneficial treatment (MFBT). Both are logically interconnected as a privileged treatment is justified only if and inasmuch specific needs are given. The principle of graduation provides for a dynamic element in the application of MFBT. Advancements in the degree of development shall lead to a reduction of the granted privileges. On the other hand, as soon as this treatment is no longer necessary it has to cease to exist.

According to the formulation of this goal previously in force, integration into the world economy has to take place in a ‘smooth’ way. Smoothness of integration should result, first of all, directly from graduality but at the same time it points at something more, namely the fact that the integration process should not lead to discontinuities in the development process or even to internal disruption. Indirectly, it refers also to the social aspect of development. The integration of developing countries in the world economic system with all the connected changes (restructuring of single economic branches, lay-off of workers, etc.) should not lead to unbearable social costs. The requirement of smoothness requires, therefore, the right balancing of all elements. It can lead to a slowdown or to an acceleration of the integration process, depending on the specific situation.

It can be argued that the element of ‘smoothness’ now makes part of the element of progressiveness.

¹⁹¹ Grossmann/Sykes, *supra* note 190, at 52. See also Claudio Di Turi, ‘Il sistema di preferenze generalizzate della Comunità Europea dopo la controversia con l’India sul regime speciale in tema di droga’ (2005) LXXXVIII Rivista di diritto internazionale 721; James Harrison, ‘Incentives for Development: The EC’s Generalised System of Preferences, India’s WTO Challenge and Reform’ (2005) 42 Common Market Law Review 1663. For the new GSP scheme, see the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 7 July 2004 entitled ‘Developing Countries, International Trade and Sustainable Development: The Function of the Community’s Generalised System of Preferences (GSP) for the Ten-Year Period from 2006 to 2015’, setting out the guidelines for the application of the GSP scheme for the period 2006 to 2015; and Council Regulation (EC) 980/2005, OJ 2005 L169/1 implementing those guidelines for the period until 31 December 2008.

5. Compliance with International Commitments

The Union and the member states have to comply with the commitments and to take account of the objectives they have approved in the context of the United Nations and other competent international organizations.

At first sight, this obligation seems to be only of a declaratory nature. Such a sight would make, however, the whole provision redundant or reduce it to a statement of a mere political character. First of all, this provision ties the Union and the member states together when it comes to make sure that international obligations of these entities have to be respected. Although both entities keep their respective legal obligations distinct¹⁹² they have to display loyal cooperation according to Article 4 para 3 TFEU. This provision is furthermore explicable by the fact that in this field competences are most often shared between the Union and the member states.¹⁹³

Second, and even more importantly, this provision opens the EU development policies in its orientation broadly towards general international trends. As it can be assumed that the EU and/or its member states are participating in a considerable part in the major multilateral international instruments of relevance in the field of development, it is hereby made sure that EU development law will always be friendly towards international law. Furthermore, this provision provides the EU development law with an important dynamic component. While development law and policy outside the EU undergoes fast changes, the Union counterpart cannot remain static and insensitive to new needs and trends.

The expressions ‘context’ and ‘competent’ have to be interpreted broadly. Commitments made and objectives approved within international organizations have to be obeyed even if the EU or its member states have not been members in the formal sense.¹⁹⁴ ‘Competent’ does not mean that the respective organizations need to be exclusively or even predominantly active in the field of development policy. A primary competence in this area has, however, to be given.

¹⁹² See also Natascha Solar, ‘Commentary to Article 177 TEC’ in Heinz Mayer (ed), *Kommentar zu EU- und EG-Vertrag* (2005) para 25; Zimmermann, *supra* note 17, at 1470, para 74; Kirsten Schmalenbach, ‘Commentary to Article 177 TEC’ in Christian Calliess and Matthias Ruffert (eds), *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft – EUV/EGV* (2002) para 19.

¹⁹³ See Benedek, *supra* note 117, at para 43.

¹⁹⁴ See in this sense Zimmermann, *supra* note 17, at 1470, para 74.

The EU, together with its members, is a great spender of development aid but still much needs to be done. According to the EU the world has the technology and resources to eradicate extreme poverty in our lifetime and put the world on a sustainable path to ensure a decent life for all by 2030.¹⁹⁵

6. Assisting Populations, Countries and Regions Confronting Natural or Man-Made Disasters

Experience shows that developing countries are particularly vulnerable for natural or man-made disasters. Their infrastructure is often not resilient enough to confront such challenges. When disaster hits, resources are needed that are often not available in developing countries. Furthermore, it is to say that many developing countries are situated in regions particularly exposed to such disruptions (earthquakes, flooding, storms and so on). The EU has recognized that disaster risk reduction (DRR) has a high cost-benefit ratio in the context of development cooperation.¹⁹⁶

Disaster relief is therefore one of the priorities of developing cooperation and suitable for financial assistance.¹⁹⁷

VIII. Financing

With regard to financing, the European Investment Bank (EIB)¹⁹⁸ is of considerable importance which has been active in the field of development cooperation since 1963 granting loans at reduced interest rates and conditions for the financing of projects in developing countries.¹⁹⁹

¹⁹⁵ See European Commission, 'A Decent Life for All: From Vision to Collective Action' COM(2014) 335 final, 2.

¹⁹⁶ See the European Commission, 'EU Strategy for Disaster Risk Reduction in Developing Countries' COM(2009) 84 final, 2.

¹⁹⁷ See, e.g., Regulation (EU) 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44 which under 'A. Common Areas of Cooperation under Geographic Programmes', 'III. Other areas of significance for development', refers to 'Resilience and disaster risk reduction'. See also Andreas Zimmermann, 'Commentary to Article 208' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (2015) 374, para 79.

¹⁹⁸ Art 209 para 3 TFEU.

¹⁹⁹ See Streinz/Kruis, *supra* note 112, at 2008, para 32.

Beyond that, specific financing instruments have been introduced. Some are dedicated exclusively to development projects, others partly. On 2 December 2013 the Council adopted the regulation on the Multiannual Financial Framework mentioning the External Action Financing instruments.²⁰⁰ This Framework refers to six instruments with the following amount agreed for spending over the six years period (2014-2020):

| | |
|---|------------------|
| Instrument for Pre-accession Assistance (IPA): | € 11,699 million |
| European Neighbourhood Instrument (ENI): | € 15,433 million |
| Development Cooperation Instrument (DCI): | € 19,662 million |
| Partnership Instrument (PI): | € 955 million |
| Instrument contributing to Stability and Peace (IfSP): | € 2,339 million |
| European Instrument for Democracy & Human Rights(EIDHR) | € 1,333 million |

In the field of development cooperation, the Development Cooperation Instrument (DCI) is the most important one. For the period 2014-2020 this instrument has been established by Regulation No. 233/2014 of 11 March 2014. Under this instrument the EU may finance:

- geographic programs aimed at supporting development cooperation with developing countries that are included in the list of recipients of Official Development Assistance (ODA) established by the OECD/DAC, except for countries eligible for other funds;
- thematic programs to address development-related global public goods and challenges and support civil society organizations and local authorities in partner countries;
- a Pan-African program to support the strategic partnership between Africa and the Union.²⁰¹

Geographic programs stand at the center of the DCI. They may be of a regional or a bilateral character and they shall encompass cooperation in appropriate areas of activity. Thematic programs shall add value to, and be complementary

²⁰⁰ European Commission, 'The Multiannual Financial Framework: The External Action Financing Instruments (MEMO/13/1134)' (11 December 2013).

²⁰¹ Art 1 Regulation (EU) 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44.

to and coherent with, actions funded under geographic programs.²⁰² Subjects are environment and climate change, sustainable energy, human development, including decent work, social justice and culture, food and nutrition security and sustainable agriculture, and migration and asylum. For both geographic programs and thematic programs strategic papers shall be elaborated.

The Pan-African program is of a complementary nature. According to Article 9 of Reg. 233/2014, the objective of Union assistance under this program shall be to support the strategic partnership between Africa and the Union, and subsequent modifications and additions thereto, to cover activities of a trans-regional, continental or global nature in and within Africa.

Outside the EU budget remains the European Development Fund (EDF) created by an intergovernmental agreement of June 2013.²⁰³ The 11th EDF (2014-2020), which applies provisionally pending ratification, covers cooperation with ACP countries and Overseas Countries and Territories (OCTs).²⁰⁴ It is sustained that keeping the EDF outside the EU budget will allow for a more flexible use of this instrument and for a more efficient, long-term planning. Furthermore, this could also be a means to protect the overall level of the development aid budget which, in times of financial restraint, is also subject to closer scrutiny.²⁰⁵

IX. Conclusions: Towards a True Partnership based on the respect of human rights, democracy, the rule of law and gender equality

EU development cooperation has a history of more than half a century. In this period, this policy has undergone profound changes whereby its main traits have been completely modified. There can be no doubt that initially, the EEC and its member states started from a paternalistic and in a certain sense also egoistic attitude. By the way, in this attitude the EEC and its member states were not alone. It was a rather common relationship between ‘donor’ countries and recipients. Now, this situation has changed. The respective

²⁰² Art 6 Regulation (EU) 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44.

²⁰³ European Commission, *supra* note 200.

²⁰⁴ *Ibid.*

²⁰⁵ See also above Section VI.F. Financial Cooperation.

process has taken place slowly, often even nearly imperceptibly, but over the years the changes were substantial. The focus is now on a truly egalitarian partnership. For many reasons the original approach could not be maintained further. First of all, industrialized and developing countries do not form closed groupings that would not be subject to change over time. On the contrary, it could be noticed that over a longer period some developing countries can become politically and economically strong while so-called industrialized countries may go the opposite direction. The factual pre-conditions for a strong hierarchical relationship between these two groups are simply not given. Furthermore, such a relationship would run counter to a basic principle of modern international law, the principle of sovereign equality of all states.²⁰⁶

It took some time for the state community to fully internalize this philosophy²⁰⁷ but states have gone great lengths in this regard in the last decades. The EU has been an active sponsor of this process, may be also because the continuous enlargement process has increased the difference of economic and political strength between the single member states, thereby prompting weaker countries to emphasize their sovereign equality.

This process has been fostered, however, not only by political susceptibilities. This search for a more equal partnership has grown out also by economic considerations and by new insights into the nature of global commons and global challenges.

In fact, it has been noticed that asymmetrical integration with limited market opening on both sides was often associated with next to no growth and economic development. On the contrary, such trade relations were conducive to the preservation of traditional trading structures that were typical for the colonial and the immediate post-colonial situation. It is hoped that reciprocal trade integration as it is regulated in Article XXIV GATT will change this and spur both competition and development. As has been shown, it is not intended to fully apply the rules on regional integration. It shall be taken notice of the factual difference between industrialized countries and developing countries. Is the concept of 'Economic Partnership Agreements' more than a buzzword? It is true that it has largely to be filled with details and content

²⁰⁶ See Art 2 para 1 of the UN Charter. At the San Francisco Conference this term was deliberately adopted as a 'new term'. See Bardo Fassbender, 'Commentary to Article 2 Paragraph 1' in Bruno Simma *et al* (eds), *The Charter of the United Nations* (2012) 153, para 47.

²⁰⁷ See now in particular UNGA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc A/8028.

but nonetheless the intention can be noticed to give it a workable meaning. The reference to ‘partnership’ brings to bear that this relationship shall be egalitarian and it shall be tried to overcome in this context all elements of hierarchy. The first consequences of this approach can be seen in the field of conditionality policy, a set of rules widely criticized in the past for being the expression of unilateralism and for a mindset qualifying the EU member states as countries with an impeccable human rights and rule of law record and for implicitly submitting that their trading partners should be the natural addressees for lecturing and guidance by the first world. The EU has tried to dispel this criticism first by making the insertion of conditionality rules in trade and cooperation agreements mandatory with whomever they are concluded²⁰⁸ and afterwards by accepting that these principles apply also against the EU. This has been spelled out very clearly by the 2010 reform of the Cotonou Agreement adding the following subpara 4 to Article 9 para 4:

The principles underlying the essential and fundamental elements as defined in this Article shall apply equally to the ACP States on the one hand, and to the European Union and its Member States, on the other hand.

The switch to partnership is, however, not only to be seen as a re-qualification of the specific relationship between the EU and the developing world (and, in particular, with countries of the ACP area). This partnership shall rather reach out to a far broader set of goals and involve countries far beyond the traditional relationship between industrialized and developing countries. In its most recent documents the EU points out that industrialized and developing countries should attempt to pursue goals common to the whole state community.

In its Communication of 2 June 2014 fittingly entitled ‘A Decent Life for All: From Vision to Collective Action’²⁰⁹, the Commission emphasized, on the one hand, the paramount importance of ‘eradicating poverty and achieving sustainable development’²¹⁰ but on the other it underscored that this challenge is to be addressed in a globalized and inter-linked world. Consensus is looked for ‘for a new transformative post-2015 agenda’. The Commission points out

²⁰⁸ See European Commission, ‘Communication on the Inclusion of Respect for Democratic Principles and Human Rights in all Agreements between the Community and Third Countries’ COM(95) and EU Council Conclusions of 29 May 1995 ((1995) 5 EU Bull. point 1.2.3).

²⁰⁹ European Commission, ‘A Decent Life for All: From Vision to Collective Action’ COM(2014) 335 final.

²¹⁰ *Ibid.*, at 2.

that '[t]his includes tackling issues of global concern that were not sufficiently covered in the MDGs such as inclusive and sustainable growth, inequalities, sustainable consumption and production, migration and mobility, decent work, digital inclusion, health and social protection, sustainable management of natural resources, climate change, disaster resilience and risk management, and knowledge and innovation.'²¹¹

With regard to financing, in the post-2015 development policy, in the implementation process of the 2030 agenda, more emphasis will have to be given to private financing, to raise domestic tax revenues and to create a supportive investment climate.²¹²

We see that the idea of developing cooperation has gone a long way from its early times when it was mainly understood as requiring a resource transfer from industrialized countries to developing ones – and preferably to those with which before longstanding colonial ties had existed. Development has become a multidimensional issue that no longer knows two opposed groups, an upstairs and a downstairs, patronizing donors and grateful, submissive receivers. Development has become a common project where the parties involved may have partly diverging tasks but widely identical goals. It has become a dialogue based on the respect of human rights, democracy, the rule of law and gender equality.²¹³ As has been shown, the term of 'partnership' has been used for quite some time in the EU development cooperation context but only recently it seems to be taken seriously. If the policy is continued along this line, EU development cooperation is really set for a great leap forward and may become lasting and sustainable in the sense of the new SDGs.

²¹¹ *Ibid.*, at 3.

²¹² See European Report on Development, 'Combining Finance and Policies to Implement a Transformative Post-2015 Development Agenda' (2015) 26ff. See also the 'New European Consensus on Development' of 2017, *supra* note 140, at 48f: 'Enhancing domestic resource mobilization is key to all governments' efforts to achieve inclusive growth, poverty eradication and sustainable development'.

²¹³ See the 'New European Consensus on Development' of 2017, *supra* note 140, at 7.