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Study

A Model Human Rights Clause for the EU's International Trade Agreements

Lorand Bartels

German Institute for Human Rights

MISEREOR
IHR HILFSWERK

Imprint

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The Institute

The German Institute for Human Rights is Germany's independent National Human Rights Institution (NHRI). It contributes to protecting and promoting human rights.

The Institute promotes the integration of human rights into domestic and foreign policy decisions and monitors the implementation of international human rights obligations in and through Germany.

The Institute is a non-profit association and politically independent. The Board of Trustees, composed of 18 members, decides the framework and sets thematic priorities for the Institute. It is comprised of representatives of politics, academia, civil society and the media.

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Study

A Model Human Rights Clause for the EU's International Trade Agreements

Lorand Bartels

German Institute for Human Rights

MISEREOR
IHR HILFSWERK

Foreword

"States must protect against human rights abuse". Thus begins the first of the UN's Guiding Principles on Business and Human Rights, adopted unanimously by the Human Rights Council in June 2011. The adoption of the Guiding Principles represents a moment of global consensus that states must shape their trade and economic policy in a way that consistently protects human rights. They must take "appropriate steps to prevent, investigate, punish and redress" human rights violations caused by economic activity. The Guiding Principles deal explicitly with international trade and investment agreements and make clear that states are expected to consistently fulfill their obligation to protect human rights across all these areas.

The Guiding Principles call on states not to enter trade or investment agreements that prevent them "from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so." The Guiding Principles caution states to reserve and maintain "adequate policy and regulatory ability to protect human rights under the terms of such agreements." For European countries, this obligation extends to treaties negotiated and entered into by the European Union.

This study by Lorand Bartels was commissioned jointly by the German Institute for Human Rights and MISEREOR in order to consider the implications of these provisions in the Guiding Principles and to examine how they might be implemented in practice. Bartels examines the origins of the current human rights clause in EU trade and investment cooperation agreements and its limited scope, which is chiefly concerned with revoking trade preferences in countries where serious violations of human rights or breakdown of democratic governance principles occur.

The study then goes on to examine ways in which it would be possible to revise the standard human rights clause to include negative consequences for human rights, including economic, social, and cultural rights, as a result of the treaty itself. This is not a simple matter: Bartels acknowledges that documenting these types of human rights violations and attributing them to a trade or investment treaty is not easy. But even if it proves challenging in practice, Bartels reiterates that the Lisbon Treaty obligates the European Union to protect human rights in its external activities as well, and that the EU and its member states have committed to implementing the UN Guiding Principles on Business and Human Rights.

The German Institute for Human Rights and MISEREOR seek to present in the form of this study a proposal for the reworking and future development of human rights clauses in EU trade and investment agreements which will hopefully serve as a basis for wider discussion. Such discussions are always more fruitful against the background of a concrete reform proposal. For both organizations, the key question is how to improve the current toolkit in EU trade and investment treaties in such a way that the protection of human rights is strengthened rather than limited by the treaties themselves.

We intend to pursue these proposals in national and European political processes over the coming months, and look forward to your comments and feedback on them and this study.

Dr. Bernd Bornhorst
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Contents

Foreword 6

Abstract 11

1 Introduction 12

2 Evolution of EU human rights clauses . . . 14

3 The adequacy of human rights clauses today 16

4 Extraterritorial human rights obligations of the EU and its Member States 17

4.1 Articles 3(5) and 21 of the EU Treaty 17

4.2 Other external human rights obligations under the EU Treaty 20

4.3 International human rights obligations 22

4.4 Conclusions 26

5 Gaps and shortcomings in the current standard human rights clause 28

5.1 The necessity of a human rights clause . . . 28

5.2 Potential effects on human rights of obligations in trade agreements 28

5.3 Deficiencies of the standard human rights clause 30

6 A new human rights clause: necessary and optional reforms 32

6.1 Necessary reforms: unilateral action 32

6.2 Potentially necessary changes: human rights impact assessments and review of the operation of the agreement 33

6.3 Optional reforms to improve the functioning of the human rights clause 34

7 A model human rights clause with commentary 38

Bibliography 41

Abstract

Since the early 1990s the EU's international trade agreements have been governed by a human rights clause that permits one party to take 'appropriate measures' in the event that the other party violates an 'essential elements' clause containing an obligation to comply with human rights and democratic principles. These clauses thereby permit the application of sanctions in response to human rights violations. In practice, the EU has used these clauses to suspend financial aid to regimes following *coups d'état* or other politically motivated irregularities.

The object of this study is to consider the extent to which these clauses also operate in a different scenario, namely, to ensure that the implementation of the agreement itself does not prevent the parties from complying with their own human rights obligations. This is particularly important for the EU because, as the study shows, the Treaty on European Union requires that EU policies – including its trade policies – comply with human rights norms protecting persons in third countries. The study concludes that human rights clauses, as currently drafted, are inadequate to ensure that EU trade agreements will not inhibit the EU from complying with its human rights obligations.

To remedy this situation, the study makes various recommendations for future EU trade agreements. The principal recommendations are that future agreements should contain:

- a human rights exception permitting either party to suspend its trade obligations when this is necessary to comply with its obligations.
- a permanent human rights committee with a mandate to consider the compliance of the parties with their human rights obligations under the agreement.
- a mechanism for periodic human rights impact assessments.
- a mechanism for civil society to bring complaints to the parties to initiate an investigation by the European Commission into human rights issues arising under the agreement.

1
Introduction

Since 1995 the European Union has had a formal policy requiring all of its international trade and cooperation agreements[1] to be governed by[2] a 'human rights clause'. This clause gives each party a right to take 'appropriate measures' in the event that the other party violates human rights or democratic principles. The EU has adhered to this policy with admirable consistency, at times in the face of opposition. There are functioning human rights clauses in trade and cooperation agreements covering around 120 states.[3] Most of these, and all recent agreements, are so-called 'mixed agreements' concluded by the EU and its Member States together.[4]

The wording of the human rights clause evolved during the 1990s, and even now varies somewhat from agreement to agreement. The version of the clause in the Cotonou Agreement is particularly elaborate, and, uniquely, comes with an internal implementation mechanism. Nonetheless, it is possible to speak of a 'standard' human rights clause, which comprises an 'essential elements' clause setting out basic human rights and democracy standards, and a 'non-execution' clause setting out the mechanism for applying 'appropriate measures' in the event that an 'essential element' of the agreement has been violated'.

Compared to the wide range of situations in which they could be used, the EU's human rights clauses have been applied in comparatively few types of cases. The clause can be invoked in any circumstances in which there is a violation of human rights or democratic principles. However, the EU has only ever adopted 'appropriate measures' (usually a suspension of development aid) in response to *coups d'état* or significant deteriorations in a political situation.[5] It is, in effect, seen as a political clause rather than as a human rights clause.[6] Indeed, it is rare that human rights *per se* are cited as a reason for the adoption of appropriate measures: the main trigger for their application is the violation of democratic principles and the rule of law.

It is not here suggested that appropriate measures should not be adopted in these politically inflected

1 There are no human rights clauses on sectoral agreements on, for example, steel or fisheries. This omission was criticised in the European Parliament resolution on the human rights and democracy clause in European Union agreements [2006] OJ C 290E/107, para 8.

2 The EU's original policy required each new trade and cooperation agreement to contain an independent human rights clause: European Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95) 216. In 2009, it is understood that this policy was revised such that it is sufficient if the new agreement is governed by an existing human rights clause in a different agreement between the parties. This policy is confidential, and the European Ombudsman is investigating the rejection of an application for disclosure: http://register.consilium.europa.eu/pdf/en/12/st17/st17451.en12.pdf (retrieved on 5 February 2014).

3 Association agreements are free trade agreements. There is also a range of other free trade agreements, sometimes with a straightforward name (eg EU-Korea), but sometimes with names that are far from straightforward, such as the South Africa 'Trade, Development and Cooperation Agreement' or the EU-ACP 'Economic Partnership Agreements'. Generally, 'Partnership and Cooperation Agreements' provide for trade on a most-favoured-nation basis with non-WTO members, while ordinary 'cooperation' agreements provide for cooperation, including financial cooperation, but not trade preferences.

4 These are generally cases of 'false mixity', where Member State involvement is legally unnecessary, but they wish to be involved for political reasons. For discussion of the implications of such mixity for the respective responsibilities of the EU and the EU Member States see Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP, 2005), Ch 6.

5 Liisa Laakso et al, *Evaluation of Coordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement*, Studies in European Development Co-operation Evaluation No 6 (Amsterdam: Aksant, 2007). More recent cases are similar. It should be noted that there are examples of non-political measures taken under development financing and autonomous trade instruments, such as the GSP Regulation. For a general overview, see Clara Portela, *European Union Sanctions and Foreign Policy: When and Why Do They Work* (London: Routledge, 2010).

6 Remark by one senior European Commission official in private conversation.

cases, nor is it the purpose of this paper to consider the consistency of the EU's application of the clause in these circumstances. It is also not the purpose of this paper to discuss why the human rights clause has not been applied in a wider range of cases involving clear human rights abuses. Suffice it to say that there are many such cases. Rather, the purpose of this paper is to examine the extent to which, regardless of practice, the human rights clause can – and indeed must – be applied to a more limited set of human rights violations that result from the implementation of the free trade agreements in which they are contained.

This paper begins with a history and analysis of the existing standard human rights clause. It next outlines the obligations of the EU and its Member States in relation to the human rights of persons in third countries. Third, it identifies the types of human rights violations that can result from the EU's free trade agreements. Finally, it proposes a new model human rights clause that can properly ensure that the EU and its Member States have the legal means to comply with their extraterritorial obligations. This model clause also contains various other improvements on the existing standard human rights clause, some of a technical nature, and some designed to facilitate the process of deciding on the taking of measures under the clause.

2
Evolution of EU human rights clauses

The EU's human rights clause has its origins in the late 1970s and 1980s, when the EU was faced with the apparent problem that it was bound by treaty obligations to continue supporting states that had committed serious human rights violations. The European Commission expressed this problem in the following way in an answer to a question from the European Parliament on whether it would suspend development aid to the Central African Empire following abuses in that country. It said: 'the *rebus sic stantibus* clause [a rule of treaty law] could be invoked only when there had been a fundamental and unforeseeable change in the circumstances that existed when the treaty was concluded.'[7] It was to remedy this perceived situation that the EU initiated a policy of including human rights clauses in newly negotiated international agreements. At least for the EU, such clauses are still necessary today, except in cases in which compliance with such an obligation would violate a peremptory principle of international law (*jus cogens*), such as the prohibitions on genocide, slavery or apartheid.[8]

The first operative human rights clause was included in the 1990 EC-Argentina cooperation agreement, and stated as follows:

> Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the Community and Argentina.

It will be noticed that this clause does not actually commit the parties to comply with democratic principles or human rights. Rather, it states an assumption on which the continuing application of the agreement is based. This might seem peculiar, but it follows the logic of the Commission's view, as seen in the above quoted answer to the Parliament. The idea was to create, by means of a treaty clause, a set of circumstances that, if they changed, would enable the EU to invoke *rebus sic stantibus*. In fact, this was not a very sensible solution, because *rebus sic stantibus* is only available for situations that were unforeseen at the time the obligation was undertaken. A situation to which an agreement refers cannot, logically, have been unforeseen at that time.

It was probably for this reason that in the next round of agreements (beginning with Brazil) the EU added the phrase 'and constitute an essential element of this agreement' to the end of the clause. Most likely, the idea was to abandon *rebus sic stantibus* as a reason for suspension or termination, and rely instead on a different rule of treaty law, which allows the suspension or termination of a treaty when there has been a

7 Written Question No 115/78 [1978] OJ C 199/27. In fact, the rule requires merely that the change has been unforeseen, not unforeseeable: Article 62(1) of the Vienna Convention on the Law of Treaties (VCLT).

8 The UN Special Rapporteur on the Right to Food has said that human rights obligations always trump other treaty obligations: UN Human Rights Committee, *Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, Addendum – Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, UN Doc A/HRC/19/59/Add.5 (19 December 2011), para 2.6. This statement must be treated with some caution. At most non-derogable human rights obligations have the status of peremptory norms (*jus cogens*), and it is not immediately obvious why it is relevant that human rights treaties generate rights for individuals (indeed, so do investment treaties), while other treaties are based on reciprocity. More can be said for the argument that Article 56 of the UN Charter contains binding human rights obligations that by virtue of Article 103 prevail over other treaties concluded by UN Members: see n 36. But even so, it would not be relevant to the EU, which as a non-UN Member is not bound by Article 103: Piet Eeckhout, *EU External Relations Law*, 2nd ed (Oxford: OUP, 2011) at 416. Indeed, as the EU has not assumed the functions of the Member States in the field, the EU would not even be bound under the internal EU doctrine of 'functional succession', applicable for example to the pre-1995 GATT 1947: cf Robert Schütze, 'The "Succession Doctrine" and the European Union' in Anthony Arnull et al (eds), *A Constitutional Order of States?* (Oxford: Hart, 2011). The decision of the EU Court of First Instance to opposite effect in Case T-315/01, *Kadi I* [2005] ECR II-3649 is logically inconsistent with the ECJ's decision on appeal in Joined Cases C-402/05P and C-415/05P, *Kadi I* [2008] ECR I-6351, even though it was not expressly overruled.

'violation of a provision essential to the accomplishment of the object and purpose of the treaty'.[9] In fact, this new attempt to draft a clause was barely more effective, because simply stating that a situation is an 'essential element' does not create any obligation for the parties to make sure that that situation continues to exist. And without an obligation, there cannot be a 'violation', which is necessary for this doctrine of treaty law to apply. But, probably inadvertently, this version of the clause was effective under a different, rarer, rule of treaty law, according to which a party can be considered to have repudiated a treaty by acting in a manner contrary to an assumption on which it is based.[10]

In any event, these problems are, at least to some extent, cured by the modern standard form of the clause, which adds a 'non-execution' clause, modelled on the EU's standard safeguards clause,[11] enabling either party to adopt 'appropriate measures' in the event that there is a violation of the 'essential elements' of the agreement.[12] It is necessary to add the qualification 'to some extent', because technically the 'essential element' described in the first clause is 'respect for human rights and democratic principles', not the human rights and democratic principles themselves, and it is not clear how one can violate a noun. But despite the EU's continuing failure to draft a clause properly, it is sufficiently clear what is intended, and the clause can be taken as having this intended effect.

There are also certain conditions on the application of appropriate measures. In keeping with the origins of the 'non-execution' clause as a safeguards clause, one condition is that '[in the] selection of measures, priority must be given to those which least disturb the functioning of this agreement'.[13] Another condition, which is not always included, is that the measures adopted must be in accordance with international law, must be proportionate, and that suspension is a measure of last resort. But so long as these conditions are complied with, where they are included, it is possible for the other party to take measures immediately, and in some cases this is not even subject to dispute settlement proceedings.

9 Article 60(3)(b) VCLT.
10 Article 60(3)(a) VCLT. For further explanation see Bartels, above n 4, at 104-6.
11 Safeguards clauses are an economic exception to free trade obligations that permit the adoption of measures in response to sudden surges of imports. They are discussed further below.
12 This also meant that Article 60 VCLT is not applicable to these clauses. Article 60(4) VCLT states that '[t]he foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach'. Oddly, with very few exceptions the legal commentary on these clauses misses this.
13 This clause makes little sense in the context of sanctions in response to ordinary human rights abuses committed by a state, because in such cases 'appropriate measures' are designed precisely to 'disturb the agreement'. It makes more sense in the context of inadvertent human rights violations resulting from the implementation of a free trade agreement.

3
The adequacy of human rights clauses today

The 'essential elements' clause has been used as a basis for the establishment of a number of bilateral human rights subcommittees in some agreements, and a process of political dialogue in the Cotonou Agreement. In addition, the 'non-execution' clause establishes a 'stick', permitting a party to withdraw benefits provided under the agreement if the other violates human rights and democratic principles.[14] As mentioned, there are some technical problems with the wording of the clauses, and some suggestions are made below on how to improve this wording. There are also certain improvements that can be made concerning the mechanisms for implementing the clause in terms of the Member States, and of other actors, such as the European Parliament and civil society. Nonetheless, in its basic outline the existing human rights clause serves its current function relatively well.

The question, however, is whether the human rights clause is equally adequate for the more recent problem – or, perhaps more accurately, more recently perceived problem – that economic liberalization as effected by means of free trade agreements can result in violations of human rights, in particular economic and social rights. There are various complications associated with such violations, including the difficulty of establishing violations and of allocating responsibility for the violation between the parties responsible for the liberalization; in particular, the state in which the violations occur bears the primary responsibility for complying with its own human rights obligations. Nonetheless, to the extent that the EU and its Member States bear responsibility in this regard, there is the possibility of such violations and that these violations result from obligations in a free trade agreement, there is a need for a human rights clause that will enable the EU and its Member States to comply with these obligations. The following discusses these issues in turn.

14 A great deal of emphasis is sometimes placed upon the 'positive' dimension of the human rights clause, which seems in practice to amount to the reinstatement of these benefits.

4
Extraterritorial human rights obligations of the EU and its Member States

The Lisbon Treaty in 2009 represented a watershed for the human rights obligations of the EU and its Member States. It introduced into the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) concrete human rights obligations applicable to the EU's external action, gave the status of primary law to the EU Charter on Fundamental Rights and Freedoms (the EU Charter), and provided for the EU's future accession to the European Convention on Human Rights (the ECHR). It also continued, naturally, the existing human rights protections applicable to the EU and its Member States, which draw on the European Convention and the constitutional traditions of the EU Member States. The following analyses the extent to which these various sources of law require the EU and its Member States to respect, protect and fulfil human rights in third countries.

4.1 Articles 3(5) and 21 of the EU Treaty

The EU Treaty (TEU) sets out a number of overlapping obligations binding on the EU. Article 3(5) TEU states, firstly, that the EU 'shall uphold and promote' its values in its relations with the wider world. These values are described in Article 2 TEU as being 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.' The use of the word 'shall' indicates that the provision establishes obligations, and the nature of these obligations is spelled out by the words 'uphold and promote'. Accordingly, the EU has two distinct obligations: to 'uphold' these values and to 'promote' these values.

In addition, Article 3(5) states that, in its relations with the wider world, the EU 'shall contribute to' a range of additional values, listed as 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

Article 3(5) TEU is reinforced by Article 21 TEU, which has several parts. Paragraph 1 states as follows:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

It is not clear what the EU's obligation to 'be guided by' the listed principles in its 'action on the international scene' adds to its obligation to 'uphold' a slightly different set of values 'in its relations with the wider world'.

Paragraph 2 adds further obligations:

> The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
>
> (a) safeguard its values, fundamental interests, security, independence and integrity;
>
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
>
> (c)-(h) [various other objectives]

This means, first, that the EU must pursue policies and actions directed at the objectives mentioned in the subparagraph. In other words, the EU must establish policies aimed at the 'consolidation and support of democracy, the rule of law, human rights and the principles of international law'. The EU's policies to promote these values are accordingly not optional, but required by the EU Treaty. Second, the EU must 'work for a high degree of cooperation' to the same ends. This duty of cooperation is of key importance to the implementation of obligations with respect to extraterritorial social and economic rights.

Paragraph 3 adds yet more. It states:

> The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

This is a concrete obligation defined by the principles listed in paragraph 1 and the objectives listed in paragraph 2. Again, it divides into two parts.

First, it requires the EU to 'respect' the principles set out in paragraph 1, not just to be 'guided' by them, as stated in paragraph 1. It also has a broader scope. Paragraph 1 refers to 'action on the international scene'. By contrast, paragraph 3 applies both to 'the development and implementation of the different areas of the Union's external action' (which is broadly the same) and 'of the external aspects of [the EU's] other policies'. This is an ambiguous phrase. On the one hand, this could be a reference to any international action involving policies normally seen as internal. More broadly, the term 'external aspects' might be read as 'external effects'. This would then require the EU to respect extraterritorial human rights in relation the *effects* of its internal policies. The significance of such a reading will be addressed below.

The second part of paragraph 3 requires the EU to 'pursue the objectives' set out in paragraph 2, though more broadly than in that paragraph. Whereas paragraph 2 refers to conduct 'in all fields of international relations', paragraph 3 refers to 'the development and implementation of the different areas of the Union's external action [and] of the external aspects of [the EU's] other policies'. Otherwise, however, paragraph 2 is more specific than paragraph 3 on how to pursue these objectives.

Taken together, this complex of provisions can only be described as confusing. One set of values must be 'upheld' in the EU's relations with the wider world; another set must be both a 'guide' for action on the international scene, and 'respected' in the context of external policies and other (ie internal) policies with external aspects. The EU must also establish policies that 'promote' the first set of values as well as act in concrete ways 'in order' to achieve yet another set of values, which it must also 'pursue'. Nor is this all. In the parallel Treaty on the Functioning of the European Union (TFEU) there are further provisions to the same effect. Article 205 TFEU on the general provisions on the EU's external action requires the EU's external action to 'be guided by the principles, pursue the objectives and be conducted in accordance with [[these] general provisions' (Article 205 TFEU); and similar language is used in Articles 207 TFEU on the common commercial policy and Article 208 TFEU on development cooperation.[15] There are also a number of other sources of human rights norms that are binding on the EU under Article 6 TEU, again overlapping both with each other and with those just described.

Application to EU acts with extraterritorial effect

The most important question, for present purposes, is the extent to which the obligations contained in Articles 3(5) and 21 TEU apply to EU acts with extraterritorial effect, and, if so, to what extent. This question is best approached by way of some general remarks about the range of *extraterritorial situations* to which human rights obligations can apply and about the range of *types of obligations* which can exist in relation to any of these given situations.

Types of extraterritorial situations

There are essentially four types of extraterritorial situations to which human rights obligations can apply. The first involves extraterritorial acts – for example, acts of diplomats or military officials. The second con-

15 Article 214(2) TFEU also states that '[h]umanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.'

cerns acts relating to territories that are controlled by a state – for example, by military occupation. The third concerns extraditions and expulsions of persons to a country where they might be at risk. The last-mentioned cases are not truly extraterritorial because both the act and the affected person are within the territory of the state at the relevant time.[16] But there is obviously an extraterritorial element (where the risk is manifested), and sometimes these situations are confused with extraterritorial situations. The fourth concerns acts that take place domestically but which have an effect on persons outside of that territory. These situations of extraterritorial effect are of principal relevance to this paper. Because they are potentially the broadest in scope, they are also the most controversial.

Types of human rights obligations

In principle, any obligations must be one of two types: 'negative' obligations to refrain from conduct or 'positive' obligations to engage in conduct. In human rights law these basic categories have been given further precision, with a terminology that is by now well understood.

(a) Obligations to 'respect' human rights

The minimum type of obligation is for states to refrain from themselves committing violations (which includes conduct that can be attributed to them under the law of state responsibility). In relation to obligations protecting a person abroad, this would require a state not to engage in any conduct that would infringe the rights of that person. An example might be a subsidy that so depresses world prices that a producer in another country is unable to enjoy his/her rights to food or education. Of course, it must be established that such an obligation exists in the first place.

(b) Obligations to 'protect' human rights

The obligation to 'respect' human rights only applies to state conduct. A different obligation to 'protect' human rights require states to ensure that other actors – usually private parties – do not prevent the enjoyment of rights by other persons. Thus, if there is an obligation protecting a person abroad, an obligation to 'protect' the rights of that person could require a state to take positive steps (eg by regulation) directed at the acts of private persons. A concrete example would be an obligation to regulate the extraterritorial activities of EU national corporations.[17] The conduct, for purposes of the obligation, is still territorial, but it is directed at human rights in third countries.

(c) Obligations to 'fulfil' rights

There is also a third category of obligations to 'fulfil' rights. This latter obligation then breaks down into three further sub-obligations (i) to 'facilitate' (eg to 'provide an enabling environment'); (ii) to 'promote' (eg raising awareness); and (iii) to 'provide' (ie direct provision of rights, eg by financial assistance).[18] These obligations proceed in ascending order of government involvement, with those at the final end of the spectrum tending to be the most controversial. Finally, there are a number of specific obligations to cooperate internationally to promote respect for human rights.

Analysis

The extraterritorial scope of Articles 3(5) and 21 TEU is very broad indeed. These provisions refer, respectively, to 'relations in the wider world' and 'development of its external action ... and external aspects of its other policies'. There can be no doubt that these provisions cover not only extraterritorial acts, but also policies with extraterritorial effects. As to their nature, Article 21(3) TEU imposes a clear obligation on the EU to 'respect' human rights, which means, according to the standard usage of this term, that it must not by its own conduct violate human rights. Whether there is a further obligation to 'protect' human rights in relation to the acts of third parties is doubtful. It is true that the word 'uphold,' which is used in Article 3(5) TEU, might be read in such a way. However, the word is ambiguous. Moreover, the CJEU's recent decision in

16 The leading case is *Soering* (ECtHR, Appl No 14038/88, 7 July 1989). For an explanation of why *Soering* was not extraterritorial, see *Bankovic* (ECtHR, Appl No 52207/99, 12 December 2001), para 70.

17 There is no doubt that a home state has the necessary *power* under international law; the question is whether it has the *duty* to do regulate in this way.

18 UN Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, UN Doc E/2007/82 (25 June 2007), para 12.

Mugraby indicates that there is no such additional duty.[19]

The background to *Mugraby* was an allegation that Lebanon had violated the applicant's human rights. The applicant argued that the Commission and Council were obliged to adopt 'appropriate measures' under the EU-Lebanon association agreement. The General Court and, on appeal, the Grand Chamber of the CJEU disagreed, stating that the 'non-execution' clause in this agreement established a right to adopt 'appropriate measures', not an obligation to do so.[20]

As an interpretation of the non-execution clause, this ruling is undoubtedly correct. What is relevant for present purposes, however, is that neither Court at any point considered that there might be an equivalent obligation under the EU Treaty requiring the EU to adopt appropriate measures. It is true that the precise question was not at issue, but this indicates that if the EU Treaty does contain an obligation to 'protect' human rights it is not a particularly obvious obligation.

Even so, the EU does have several obligations to 'fulfil' human rights. It must 'promote' human rights in its relations with the wider world (Article 3(5) TEU) by establishing common actions to this effect (Article 21(2) TEU) and also in its designated external policies and external aspects of 'other policies' (Article 21(3) TEU). The EU is also under an obligation to 'work for a high degree of cooperation in all fields of international relations' in order to pursue the listed objectives (Article 21(2) TEU). This is a concrete obligation to cooperate with international actors. What this means in the context of free trade agreements is elaborated below.

4.2 Other external human rights obligations under the EU Treaty

As mentioned, there are a number of other potentially relevant obligations binding on both the EU and its Member States. As a matter of EU law, both the EU and its Member States (when acting within the scope of EU law) must respect fundamental principles of EU law derived from the European Convention on Human Rights and the constitutional traditions of the Member States (Article 6(3) TEU), the EU Charter of Fundamental Rights and Freedoms (Article 6(1) TEU) as well as customary international law, which includes human rights obligations. In addition, the Member States as signatories to the ECHR are directly bound by this convention and by other basic international human rights treaties to which they are all party, and both the EU and its Member States are bound directly by customary international law. The question to be addressed is whether these sources of law impose any obligations applicable to legal acts of the EU and its Member States with extraterritorial effect.

European Convention on Human Rights (Article 6(3) TEU)

The extraterritorial situations to which the ECHR applies are quite limited. Article 1 of the ECHR imposes obligations on states parties only in respect of 'persons within their jurisdiction'. Quite what 'jurisdiction' means in this context is a difficult and contested question.[21] Nonetheless, as far as the present issue is concerned the picture is clear. The European Court of Human Rights has applied the ECHR to situations involving the first three of the situations mentioned above (extraterritorial conduct, territorial control and extradition/expulsion). But it has never applied the ECHR to situations in which domestic policies have had a mere effect on persons abroad.[22]

It also appears unlikely that it will ever do so. In *Bankovic*, the Court expressly rejected such a proposition. In this case, the applicant argued that the ECHR applied to persons affected by the NATO bombings in Belgrade. The Court responded as follows:

> The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State,

19 Case T-292/09, *Mugraby* [2011] ECR II-255 (General Court, Order, 6 September 2011); Case C-581/11 P, *Mugraby* [2012] ECR I-0000 (Grand Chamber, Order, 12 July 2012).

20 General Court, ibid, para 60; Grand Chamber, ibid, para 70.

21 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857; and cf Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: OUP, 2011).

22 There is an exception in the case of property rights. The Court has considered that a person is within the jurisdiction of a state party when property of that person is on the territory of the state party at the time of the violation, even if the person is not: *Bosphorus* (ECtHR, Appl No 45036/98, 30 June 2005), para 137. It is admittedly difficult to reconcile this with the general aversion to an effects test, but it is best seen as an anomaly, not an indication that a broader effects test might also be legitimate.

> wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[23]

In short, there is no indication that the Court would read the 'jurisdiction' requirement so broadly as to extend protection to persons affected by an ordinary government policy with extraterritorial effects.[24] Those who have cited the Court's decisions to this effect take them out of context.[25]

This conclusion is principally relevant to the Member States when acting outside of the scope of EU law, because in such cases they are bound only by the ECHR and international law (discussed below). For the EU, and for the Member States when acting within the scope of EU law, this conclusion is only a starting point, as the modern practice of the CJEU is to adopt the jurisprudence of the European Court of Human Rights on the ECHR as a minimum standard of protection and then, in certain cases, to supplement this standard with higher levels of protection derived from the EU Charter.[26]

EU Charter of Fundamental Rights (Article 6(1) TEU)

Unlike the ECHR, the EU Charter contains no jurisdictional or territorial conditions, so it is an open question whether it applies to situations of mere territorial effect.[27] There are some indications that it might. First, though this is far from determinative, this seems to be the view of at least some of the EU institutions. In 2011, the European Commission and the CFSP High Representative stated jointly that:

> EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights.[28]

Similarly, the European Parliament has said, in a Resolution on the establishment of the European External Action Service, that 'the EEAS must guarantee full application of the Charter of Fundamental Rights in all aspects of the Union's external action in accordance with the spirit and purpose of the Lisbon Treaty'.[29] Again, this statement is more of political than legal value, but it may indicate a broad approach to the issue.

There is also some tentative support in the case law of the CJEU to this effect. In Case C-130/10, *Parliament v Council*, the Parliament challenged an EU regulation on the basis that it was adopted under an external relations power, and was not therefore covered by the EU's human rights guarantees.[30] The Court disagreed:

23 *Bankovic*, above at n 16, para 75. *Bankovic* was partly overturned in *Al Skeini* (ECtHR, Appl No 55721/07, 7 July 2011) but not on this issue.

24 For recent surveys, see eg Besson and Milanovic, both above at n 21, and Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff, 2012), Ch 2.

25 For example, Principle 9(b) of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights ('Maastricht Principles') states that '[a] State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: … situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory' and the Commentary to this principle cites a number of ECtHR cases in support of this proposition. See Oliver de Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084, at 1108; also available at http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2012/HRQMaastricht.pdf. However, all of these cases cited concerned extraterritorial acts or an extradition/expulsion situation and are not relevant to the principle for which they are cited.

26 In addition, with the exception of the right to property, social and economic rights are not directly covered by the ECHR, so in many cases it will offer no guidance. On the indirect protection of social and economic rights under the ECHR see Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart, 2007), Ch 2.

27 See the different views of Valentina Bazzocchi, 'The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice' in Giacomo di Federico, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer: Vienna: Springer, 2011) at 196 and Valeria Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade', in di Federico, ibid, at 260.

28 European Commission and High Representative of the European Union for Foreign Affairs and Security Policy Communication on Human Rights and Democracy at the Heart of EU External Action – Towards and More Effective Approach, COM (2011) 886 final, 12 December 2011, at 7. See also Tamara Hervey, 'The "Right to Health" in European Union Law' in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford: Hart, 2003) at 212.

29 European Parliament resolution on the institutional aspects of setting up the European External Action Service [2010] OJ C/265E, para 5.

30 Case C-130/10, *Parliament v Council* [2012] ECR I-0000 (19 July 2012).

> So far as concerns the Parliament's argument that it would be contrary to Union law for it to be possible for measures to be adopted that impinge directly on the fundamental rights of individuals and groups by means of a procedure excluding the Parliament's participation, it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union.

This statement does not necessarily mean that the Charter applies to the human rights of persons outside the EU. It could simply mean that the Charter would cover any incidental effects of the regulation on persons located in the EU. However, it might also have that broader meaning, especially in light of Articles 3(5) and 21 TEU, as discussed above.

There are, however, also countervailing considerations. Above a minimum level, human rights protections depend very much on the society in which they are applied, and it is impossible to equate the levels of protection that might be appropriate in the EU with those that might be appropriate in third countries. If it decided that general principles of EU law and/or the Charter applied extraterritorially, the CJEU would therefore face a choice. Either it would have to apply the same levels of protection to third countries, which is unrealistic, and possibly even imperialist. One can scarcely imagine the EU withdrawing support from a financed project in a developing country because not 'everyone [in that country] has the right of access to a free placement service' (Article 29 EU Charter). Alternatively, the CJEU could fragment its jurisprudence according to whether the situation is extraterritorial or not. But this is an undesirable option.

This choice has not arisen in quite the same way for the European Court of Human Rights because of the limited situations in which these rights have to be protected under that Convention,[31] and the nature of the rights that are likely to be infringed in these situations. By contrast, even if the CJEU were to be conservative on the extraterritorial situations to which the general principles of EU law and/or the Charter applied, it would still be faced with a full range of economic, social and cultural obligations. It might therefore be that the CJEU will reserve Articles 3(5) and 21 TEU (which only apply to the EU) for external situations, and those in Article 6 TEU (which apply both to the EU and the Member States) for domestic situations. But only time will tell.

4.3 International human rights obligations

As mentioned, the EU Member States are fully bound by the standard set of international human rights treaties, to which they are all parties, as well as by customary international law. In addition, EU and its Member States are bound by customary international law, both directly and as a matter of EU law (in the latter case the Member States are only so bound when acting within the scope of EU law).[32]

Treaties

It is clear, first of all, that states have a duty to cooperate to promote human rights. Article 56 of the UN Charter expressly requires UN members 'to take joint and separate action in co-operation with the [UN] for the achievement of the purposes set forth in Article 55 [which includes the 'promotion of universal respect for and observance of human rights and fundamental freedoms for all']'.[33] More concretely, without the reference to cooperation with an organization, the Committee on Economic, Social and Cultural Rights has said:

> international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.[34]

This has not been universally accepted, and, in particular, developed countries have always denied that there is an obligation to finance developing countries. Thus:

> The representatives of the United Kingdom, the Czech Republic, Canada, France, and Portugal

31 See above at n 26.
32 This has been a longstanding rule of EU law. In Case C-366/10, *ATAA* [2011] ECR I-0000 (21 December 2011), para 101, the CJEU stated that, for the EU, this was because of Article 3(5) TEU. However, as Article 3(5) TEU is not addressed to the Member States, presumably the Court's original jurisprudence will continue to explain why, under EU law, they are also bound by customary international law when acting within the scope of EU law.
33 See below at n 36.
34 CESCR General Comment No 3 on the Nature of States Parties Obligations (14 December 1990), para 14.

> believed that international co-operation and assistance was an important moral obligation but not a legal entitlement, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid.[35]

Such views cannot be discounted, especially given that the Committee's interpretations are non-binding. However, in the present case, it is also relevant that even EU Member States who have, at times, expressed doubts of this kind have by Article 21 TEU now committed to just such a duty (perhaps even including financial undertakings) in respect of the EU.

The question whether international human rights treaties cover measures with extraterritorial effects is also difficult. As far as judicial decisions are concerned, the situation at the international level parallels that at the regional level. In *Namibia*, the International Court of Justice held that the UN Charter imposes human rights obligations on its members in situations of effective territorial control.[36] In *Wall*, it held that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child applied to extraterritorial acts carried out 'in the exercise of [a state's] jurisdiction'.[37] In *CERD* it gave an even broader application to the Convention on Racial Discrimination, applying it to extraterritorial acts and ordering both parties to the dispute to do 'all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination'.[38] The Court has never, however, ruled on the application of human rights treaties to situations of mere extraterritorial effect.

By contrast, there have been relevant statements on the point by the UN human rights committees, which interpret and apply the UN human rights instruments. The majority of these statements are recommendations, in which the Committees say that state parties 'should' respect human rights in third countries. On some occasions, however, the Committee on Economic, Social and Cultural Rights has gone further. In 1997, it said, in the context of economic sanctions (and particularly in light of the sanctions on Iraq), as follows:

> Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too *must* that State and the international community itself do everything possible to protect *at least the core content of the economic, social and cultural rights* of the affected peoples of that State ... While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it.[39]

In 2000, the Committee said, in its General Comment on the right to health:

> To comply with their international obligations in relation to article 12, *States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries*, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.[40]

35 Commission on Human Rights, *Report of the Open-ended Working Group established with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN.4/2005/52 (10 February 2005), para 76.

36 *Namibia*, Advisory Opinion [1971] ICJ Rep 16, para 131. Whether Article 56 establishes any obligations and, if so, whether these exceed a mere obligation to cooperate with the UN has been debated since the beginnings of the Charter. For a conservative point of view see P Gandhi, 'The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact' (1998) 41 German Yearbook of International Law 206, 225. Arguably, however, this decision firmly answers the question in the affirmative on both points, and additionally contains an extraterritorial dimension: for discussion, see Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 American Journal of International Law 337, 348, and Stephen Schwebel, 'Human Rights in the World Court' in Stephen Schwebel (ed), *Justice in International Law* (Cambridge: CUP, 1994) at 163-4.

37 *Wall*, Advisory Opinion [2004] ICJ 136, paras 111, 112 and 113. The ICJ confirmed the ruling with respect to the ICCPR and the CRC in *Armed Activities (DRC/Uganda)* [2005] ICJ Rep 168, para 219.

38 *CERD (Georgia/Russia)*, Provisional Measures [2008] ICJ Rep 353, paras 109 and 149.

39 CESCR, General Comment No 8 on the relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/1998/22 (1997), paras 7-8 (emphasis added). In later General Comments on the same issue the CESCR reverted to using the word 'should'. See General Comment No 12 on the Right to Adequate Food, UN Doc. E/C.12/1999/5 (1999), para 37 and General Comment No 14 on the Right to Health, UN Doc E/C.12/2000/4 (2000), para 41.

40 CESCR, General Comment 14 on the Right to the Highest Attainable Standard of Health, (2000), para 39 (emphasis added).

The Committee used the same terminology in its 2002 Comment on the right to water, although now the reference to the 'protection' of rights is only a recommendation:

> To comply with their international obligations in relation to the right to water, *States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries*. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction. … *Steps should be taken* by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.[41]

This model was also used in the 2007 Comment on the right to social security:

> To comply with their international obligations in relation to the right to social security, States parties *have to respect the enjoyment of the right* by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries. … *States parties should* extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries.[42]

In short, the Committee considers there to be an obligation to 'respect' human rights in other countries in relation to economic sanctions, food, water and social security. In relation to the right to health, it has also said that there is an obligation to 'protect' human rights in third countries by regulating private actors where this is possible.

In all other cases, at most it has recommended that States respect economic, social and cultural rights in other countries. Furthermore, there is some doubt about the statement on the obligation to 'protect' in relation to the right to health, this being taken to mean that there is an obligation to regulate the extraterritorial acts of nationals (predominantly corporations). In its more recent 2011 Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, the Committee refers to its General Comments on the rights to water, work and social security, using the term 'should' in connection with the right to 'protect' and 'shall encourage' in connection with the right to 'fulfil'.[43] Perhaps significantly, however, it omits any reference at all to the right to health. If this is indeed significant, it indicates an alignment with the assessment of the UN Special Rapporteur on Business and Human Rights, John Ruggie in 2007, that '[w]hat is difficult to derive from the treaties or the treaty bodies is any general obligation on States to exercise extraterritorial jurisdiction over violations by business enterprises abroad.'[44]

The precise wording used by the Committee is frequently treated as insignificant, with 'should' being read as 'must'.[45] But it is evident from the Committee's practice that when it wants to say 'must' it does. Nor does the fact that the statements are contained in sections of the General Comments entitled 'international obligations' convert a recommendation into a mandatory requirement.[46] One cannot read more into the Committee's statements than they say.

Of course, the Committee's interpretations of the Covenant are not binding, and may be both too broad and too conservative. In this regard it is relevant that state practice is not unambiguously supportive of an obligation to respect economic, social and cultural rights in situations of mere economic effect. Indeed, some states have expressly rejected such an interpretation.[47]

In short, while the law may well evolve, at present it is at best inconclusive whether the Covenant imposes general obligations on states parties to ensure respect for economic, social and cultural rights in third coun-

41 CESCR, General Comment 15 on the Right to Water (2002), paras 31-2 (emphasis added).
42 CESCR, General Comment 19 on the Right to Social Security (2007), paras 53-4 (emphasis added).
43 CESCR, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, E/C.12/2011/1 (12 July 2011), paras 5-7.
44 John Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UN Doc A/HRC/4/35/Add.1 (13 February 2007), para 84.
45 Eg the Maastricht Principles, above at n 22. An exception is Jochen von Bernstorff, 'Extraterritoriale menschenrechtliche Staatenpflichten und Corporate Social Responsibility' (2011) 49 Archiv des Völkerrechts 34, at 53.
46 For this argument, see John Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012), 80.
47 Commission on Human Rights, Fifty-Ninth Session, Summary Record of the 56th Meeting, E/CN.4/2003/SR.56, para 49 (Canada); Commission on Human Rights, Sixtieth Session, Summary Record of the 51st Meeting, E/CN.4/2004/SR.51, para 84 (USA).

tries in relation to situations of mere extraterritorial effect, even if a strong case can be made in relation to obligations concerning health, water and social security, based on the statements of the Committee on Economic, Social and Cultural Rights. Particular caution is advisable in relation to the duty to protect, for example, requiring states to regulate the extraterritorial activities of their multinational corporations.

Customary international law

This is not quite the end of the analysis. Customary international law also contains certain basic obligations to respect human rights in third countries. According to the rule that treaties are to be interpreted by taking into account relevant rules of law applicable between the parties (which includes customary international law),[48] this means that the international human rights treaties impose on their parties at least some minimum obligations in this regard. On the other hand, these rules are in any case directly applicable not only to the EU Member States but also to the EU. For present purposes it is therefore more important to treat the rules as such, rather than as interpretive context for the international human rights treaties.

There are four rules of customary international law that are of particularly importance. The first concerns the second of the quoted paragraphs in the previous section, which dealt with the effect of economic sanctions on populations in third countries. The second concerns ancillary responsibility for human rights violations committed by third states. The third involves duties arising from grave breaches of peremptory norms by third states (such as genocide, torture, slavery or apartheid). The fourth, much relied upon by the Maastricht Principles, is a general norm of due diligence that requires states not to allow their territories to be used in a manner that harms human rights in third countries.

Effect of sanctions

Article 50(1)(b) of the Articles on State Responsibility states that '[c]ountermeasures shall not affect ... obligations for the protection of fundamental human rights'.[49] This provision was also expressly approved by the Eritrea-Ethiopia Claims Commission.[50] It is likely that it reflects customary international law. It must be noted, that the norm is limited to 'fundamental' human rights from which no derogation is possible. This accords with the reference to 'the core content of [...] economic, social and cultural rights' in the statement, quoted above, of the Committee on Economic, Social and Cultural Rights.

Ancillary responsibility for involvement in violations by third states

The Articles on State Responsibility also contain a number of obligations ancillary to the obligations of third states. States are prohibited from aiding and abetting another state in the commission of a wrongful act (Article 16), directing or controlling the commission of the wrongful act by another state (Article 17), and coercing another state to commit a wrongful act (Article 18). An intention to facilitate the wrongful act is required in all of these cases, expressly in relation to Articles 17 and 18, and by implication in relation to Article 16. The Commentary to Article 16 states that a state 'must know the circumstances in which its aid or assistance is intended to be used by the other State', and that the aid 'must be given with a view to facilitating the commission of the wrongful act, and must actually do so.'[51] In this connection, it has been noted that 'where, using its economic leverage or other means of influence at its disposal, one State requires that another State accept the inclusion in a trade or investment agreement of a provision that will prohibit that State from complying with its human rights obligations towards its own population or that will impede such compliance, the former State may be seen as coercing the latter State, which engages its international responsibility.'[52]

Obligations arising from grave breaches of peremptory norms

The Articles on State Responsibility also contain provisions on states' obligations arising from serious breaches of peremptory norms of international law

48 Article 31(3)(c) VCLT.
49 The ILC cited in support the CESCR Committee General Comment No 8, above at n 39 and certain obligations in international humanitarian law requiring states to allow the free passage of all consignments of medical and hospital stores intended for civilians: Commentary to Article 50, (2001) II(2) Yearbook of the International Law Commission 132.
50 *Prisoners of War – Eritrea's Claim 17 (Eritrea/Ethiopia)*, Partial Award (1 July 2003) [2003] 26 Reports of International Arbitral Awards 23, para 160.
51 Commentary, above at n 49, at 65.
52 Guiding Principles, above at n 8, para 2.6.

(such as apartheid, torture, slavery and genocide) committed by other states. Article 41 provides that 'States shall cooperate to bring to an end through lawful means any serious breach [of peremptory norms]' and that '[n]o State shall recognise as lawful a situation created by a serious breach [of peremptory norms], nor render aid or assistance in maintaining that situation.' As opposed to Article 16, this Article imposes upon states a positive duty to cooperate to bring such a situation to an end, and also a duty not to recognise 'situations' created by such breaches.[53]

It might be commented that, in principle, it could appear as though in such situations a human rights clause is unnecessary, given the connection with peremptory norms. However, this is not the case. Article 41 is not itself a *jus cogens* obligation. A human rights clause would therefore enable a party to a trade agreement from engaging in conduct required by that agreement if this conduct would violate Article 41.

Transboundary harm

Some commentators have in this context referred to an additional obligation of possible relevance, concerning a prohibition on causing transboundary harm to other states. This obligation has its foundation in modern international law in the 1941 *Trail Smelter* arbitration, which was a case about pollution. The tribunal stated that:

> Under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[54]

This statement was reinforced, in a more general context, in the 1949 *Corfu Channel* case, in which the International Court of Justice referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. In this case, Albania was held responsible for failing to warn the UK about the danger of mines laid in its territory by a third state (assumed to have been Yugoslavia). These two cases are generally considered to be the foundation of international environmental law, and have been reflected in more recent judgments of the International Court of Justice on a number of occasions.[55]

The question, then, is whether these cases require states to protect human rights in third countries. The argument is that states are under an obligation not to allow their territories to be used for acts that harm individuals in third states. Certainly, there are some cases in which the analogy would seem to hold. For example, if *Trail Smelter* identified an obligation not to cause (or allow to be caused) 'injury by fumes in or to the territory of another or the properties or persons therein' it is but a small step to replace 'injury by fumes' to injury by harmful products, such as poisoned food or, perhaps instruments of repression.[56] On the other hand, these cases are limited to physical harms emanating from a territory (eg pollution or mines), and this is quite different from non-physical harms, such as the legal or administrative acts of governments or private actors.[57] The principle is therefore of use in some situations, namely those involving exports, but not in all.

4.4 Conclusions

The survey above leads to the following conclusions. First, the EU and its Member States (when acting within the scope of EU law) are bound by obligations in Article 3(5) and 21(3) TEU to refrain from any acts that affect the human rights of persons in third countries. They are also under obligations under Article 3(5) and Article 21(2) and (3) TEU to promote the fulfilment of human rights by establishing concrete programmes and by cooperating internationally to this end. The significance of these obligations cannot be overstated. In most respects, they exceed anything on the international plane, as has been demonstrated, let alone in domestic constitutions.

It is also clear that the ECHR offers nothing in this respect. Whether or not general principles of EU law or the EU Charter of Fundamental Rights would apply to situations involving extraterritorial effects is unclear

53 *Wall*, above at n 37, para 159. Related to this is a customary international obligation not to recognise territorial acquisitions resulting from the use of force or other unlawful acts.
54 *Trail Smelter (US/Canada)* (1941) 3 Reports of International Arbitration Awards 1905, at 1965.
55 *Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para 29.
56 The argument was first made by Sigrun Skogly and Mark Gibney, 'Transnational Human Rights Obligations' (2002) 24 Human Rights Quarterly 781; Commentary to Principles 13 and 24 of the Maastricht Principles, above at n 22.
57 This is ignored by the Commentary to Principles 13 and 24 of the Maastricht Principles, ibid.

(and on balance unlikely), but even if they did they are unlikely to exceed the protections in Articles 3(5) and Article 21 TEU. As for the international human rights treaties, it is still unsettled whether these cover measures with extraterritorial effects, as is the extent of any duty of international cooperation (especially one entailing financial assistance). Other rules of customary international law do, however, have a bearing on the situation, and this is of significance, as will be mentioned below.

5
Gaps and shortcomings in the current standard human rights clause

5.1 The necessity of a human rights clause

The existence of these obligations is – or at least should be – an important constraint on the activities of the EU and its Member States, and in particular in the context of the negotiation, conclusion and implementation of their trade and cooperation agreements with third countries. However, this does not mean that it is *necessary* for these agreements to contain a human rights clause. In many cases, the EU and its Member States do not need a human rights clause, or even an international agreement, to promote human rights in third countries.[58] They do not need a human rights clause to terminate harmful agricultural subsidies. And they need a human rights clause to regulate the extraterritorial activities of EU corporations. A human rights clause is only necessary if a norm in the international agreement stands in the way of the EU's ability to comply with its human rights obligations. It is therefore necessary to consider these obligations, and how they might have this effect.

In this regard, it is relevant that under Article 21(2) TEU the EU is obliged not only to respect human rights, but to cooperate with the third state in assisting that state to comply with its own human rights obligations. Furthermore, it is possible, though not clear, that the EU Member States are also under an obligation to cooperate, based on Article 56 of the UN Charter, and the human rights treaties. For these reasons, there is no need to draw a distinction between obligations that are binding on the EU and its Member States and those that are binding on the third state. If an obligation binding on the third state is an obstacle to the third state's ability to comply with its own human rights obligations, it is incumbent on the EU to cooperate by suspending, to the necessary extent, the application of that obligation.

5.2 Potential effects on human rights of obligations in trade agreements

This section outlines some of the most common obligations found in the EU's free trade agreements, and the ways in which these obligations may be an obstacle to the realization of human rights in third countries. As stated, it is of secondary importance whether the obligation is binding on the EU and its Member States or on the other party. Such situations still have legal implications for the EU and its Member States due to their duty of cooperation.

Financial cooperation

Some (not all) EU agreements contain an obligation to provide financial cooperation. An example is the EU-Egypt association agreement, which states that '[i]n order to achieve the objectives of this Agreement, a financial co-operation package shall be made available to Egypt in accordance with the appropriate procedures and the financial resources required.'[59] This is very similar to the situation which led to the EU's policy on human rights clauses. Thus, a human rights clause is necessary to terminate the provision of financial cooperation should such continued cooperation be causally connected with human rights violations in the third country.

58 This is not to say that the existing human rights clauses cannot be used as a basis for such activities. It seems like unnecessary duplication, just that they are not necessary for this purpose. For the former argument, see Elena Fierro, 'Legal Basis and Scope of the Human Rights Clause in EC Bilateral Agreements' (2001) 7 European Law Journal 41.

59 Article 72 of the EU-Egypt association agreement.

Trade obligations

Trade obligations typically restrict the ability of the parties to discriminate against products (and sometimes services and service providers) from the other party, whether in the form of customs duties, quantitative restrictions or other discriminatory regulations. Quantitative export restrictions are also typically prohibited and export duties also prohibited or capped.

There are many ways in which such obligations can have an impact on human rights in third countries. At the broadest level, free trade alters the distribution of income between social groups, and also between women and men.[60] These effects are complex, but it is conceivable that they include a significant deterioration in standards of living, or disproportionate effects on women.[61] This can be the result of reductions in demand for local production, with negative effects on local producers. But this can also result from increases in demand for local production, due to new export opportunities. Such opportunities could encourage unregulated labour, or 'land grabbing' to the disadvantage of indigenous peoples.

Trade obligations can also be expensive. One author has calculated that the estimated cost of trade facilitation for many small developing countries exceeds the amount they spend on education.[62] Similar issues arise in connection with the implementation of intellectual property obligations, which are often included in trade agreements. More directly, many developing countries derive a large part of their income from tariff revenue, on average about 25 per cent in Sub-Saharan Africa, and 15 per cent for developing countries worldwide.[63] In theory, losses in tariff revenue can be recovered via domestic taxation, and where trade has positive effects on a country's economy, overall tax revenue will rise. However, a study conducted by the IMF found that while high income countries recover all of their lost tariff revenue, middle income countries recover only 45 to 60 per cent of theirs, and low income countries (mainly least developed countries) recovered as little as 30 per cent of their lost income.[64] The authors of this study noted specifically that this would impact on the ability of these countries to provide funds for poverty relief and development, with 'troubling' effects on the prospects of future liberalization.[65]

In addition, some trade obligations can impede government action which require exceptional measures. For example, it may be necessary to regulate in a discriminatory manner to support particular disadvantaged groups, or to restrict trade in order to ensure food security.

Not all of these situations require a human rights clause. Some of the negative economic and financial effects of these trade liberalization obligations can be ameliorated with financial support, and this is typically provided by the EU.[66] As to the inhibitions on third country action, all trade agreements already contain exceptions for emergency situations, and some of these would be relevant in those situations. Trade agreements routinely permit the adoption of 'safeguard' measures and 'countervailing duties' when unforeseen import surges and subsidised imports cause injury to domestic producers. There are typically also exceptions to the prohibition on exports when this is necessary to protect food security. (And, to reiterate the point made above, there are also harms associated with trade agreements, such as those flowing from subsidised exports, that can be addressed by the EU and its Member States without the need for a human rights clause).

60 Marzia Fontana, 'The Gender Effects of Trade Liberalization in Developing Countries: A Review of the Literature' in Maurizio Bussolo and Rafael De Hoyos (eds), *Gender Aspects of the Trade and Poverty Nexus: a Macro-Micro Approach* (Washington, DC: World Bank/Palgrave, 2009), 26.

61 Human rights law provides limited guarantees against 'retrogression'. See, for a relevant discussion, Gillian Moon, 'Fair in Form, but Discriminatory in Operation – WTO Law's Discriminatory Effects on Human Rights in Developing Countries' (2011) 14 Journal of International Economic Law 553.

62 Prabhash Ranjan, 'International Trade and Human Rights' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005), 317.

63 Thomas Baunsgaard and Michael Keen, *Tax Revenue and (or?) Trade Liberalization*, IMF Working Paper, WT/05/112, June 2005, 3. See also Negotiating Group on Market Access, *Market Access for Non-Agricultural Products – Revenue Implications of Trade Liberalization – Communication from the United States – Addendum*, WTO Doc TN/MA/W/18/Add.2, 11 April 2003. Some regional trade agreements provide for compensation: Peter Walkenhorst, 'Revenue Loss Compensation Mechanisms in Regional Trade Agreements' (2006) 18 Journal of International Development 379.

64 Baunsgaard and Michael Keen, ibid, 22. There were some exceptions, such as Uganda, at 23.

65 Ibid.

66 This does not mean that the negotiations on financial support are straightforward. In the context of the EU-ACP Economic Partnership Agreements, the EU initially argued that specific support for trade liberalization did not need to be provided under these agreements because it was already covered by general financial assistance provided under the Cotonou Agreement.

However, it is possible that the strict conditions for the application of these exceptions are not met. Also, while these exceptions take into account certain detrimental economic effects, they do not look at impacts on all social and economic rights.[67] Finally, there are also obligations that have no viable exceptions. For example, it is not always clear that the general exception permit a party to impose trade restrictions in order to safeguard human rights in the other country: indeed, a specific exception to this effect in the EU-Cariforum agreement proves the rule.[68] This can complicate restrictions on imports of products produced in violation of core labour standards, or restrictions on exports of weapons used for repressive purposes. Nor are there usually any exceptions that would allow a party to an agreement to discriminate in favour of minority groups. For such cases, it could be useful to include a human rights clause that specifically authorises a party to comply with – or facilitate compliance with – human rights obligations.

Other economic obligations

Some agreements contain provisions on services, government procurement, intellectual property and investment. In each of these cases, it is possible that these provisions can inhibit the third state's ability to comply with its human rights obligations. In all of these cases, a human rights clause can be necessary to ensure that the obligations in these agreements do not inhibit the third country's ability to comply with its human rights obligations or implicate the EU in human rights violations occurring in that third country. Obligations on services and government procurement are particularly problematic in relation to discrimination, while obligations on intellectual property can interfere with the right to food (for example, in relation to the creation of rights over plant varieties under UPOV 91) or the right to health (for example, in relation to the patenting of essential medicines). Another issue concerns the large compensation sums payable by developing countries as a result of losing investment cases.

5.3 Deficiencies of the standard human rights clause

The analysis in section 4 of this paper showed that the EU and (in part) its Member States have independent human rights obligations in relation to the extraterritorial effects of their internal and external policies. The discussion in sections 5.1 and 5.2 has shown that there are occasions when these obligations require the EU and (in part) its Member States to act in a manner that would be prohibited by obligations commonly found in trade agreements, and for which there are no standard exceptions. The conclusion is that there is, therefore, a need for a specific human rights clause that enables the parties to such agreement to adopt appropriate measures when necessary. This raises the question whether the standard human rights clause is adequate to this task. For two main reasons, it is not.

First, the standard human rights clause does not allow a party to protect human rights in its own territory. The general exceptions that are found in trade agreements permit measures to protect human health and life, but, as noted above, this is barely sufficient. For this reason, all trade agreements should contain clauses permitting exceptional measures to be adopted to protect human rights domestically. For both the EU and the third country, this is necessary in order for them to be able to comply with their own obligations to ensure the protection of human rights in areas for which they are primarily responsible. In addition, as has been shown, under EU law the EU is also subject to an additional obligation to cooperate with third countries in this respect. This obligation can justifiably be read as requiring the EU to include such a clause for the benefit of the third party as well.

The second problem is that the standard human rights clause is triggered by a violation by the other party. This is too limited. As has been shown, the EU has an independent obligation to ensure that it respects human rights in a third country, regardless of the obligations of the third country. Indeed, this obligation may require the EU to act even when the third country is itself not responsible, due to a lack of capacity. It is therefore legally necessary, under EU law, for the EU to be able to adopt measures under a human rights clause without having to demonstrate that a third state is responsible for human rights violations.

The following section discusses two potential solutions to these problem. It also proposes reforms to the existing human rights clause which might not be strictly necessary, on the present state of the law, for the EU

67 There is, exceptionally, a broader than usual 'safeguards' clause in Article 25(2)(b) of the EU-Cariforum Agreement. This clause permits safeguard measures to be adopted in cases of 'disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party'.

68 See below at n 69.

to be able to comply with its extraterritorial human rights obligations, but which will make this easier to do. These include the introduction of a mandatory periodic human rights impact assessment, together with enhanced powers (and duties) of the joint council established under the agreement to take action to implement the results of any such assessment, and an enhanced role for civil society, the EU Member States and the European Parliament in the monitoring and enforcement of the human rights obligations in the agreement.

Before turning to these issues, however, a caveat is necessary. Regardless of the deficiencies of the standard human rights clause in terms of the EU's legal obligations, it should not be forgotten that the human rights clause is also a key instrument in the EU's projection of its ethical foreign policy. In its existing form, the clause allows the EU to impose sanctions on third countries that violate human rights. Whether or not it is a legal requirement that the EU act in this way may be doubted: in *Mugraby* the CJEU held that it was not. For this reason, there has been little emphasis on this aspect of the clause in this paper, which is focused on necessary changes to the human rights clause. Nonetheless, it is worth noting that this is not its only function.

6
A new human rights clause: necessary and optional reforms

6.1 Necessary reforms: unilateral action

As mentioned, the key legal difficulty with the existing human rights clause is that it does not permit a party to take unilateral action to protect human rights domestically or extraterritorially independent of a human rights violation committed by the other party. There are two ways to address this problem. One is to rewrite the existing non-execution clause to provide for such a right. An example would be as follows (in bold):

> *P1. If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement* **or that a provision of the Agreement restricts its own ability to meet its human rights obligations** *it may take appropriate measures. Before doing so, it must supply the [Joint Council] within 30 days with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.*

It must be observed that many non-execution clauses are not subject to dispute settlement. This, of course, would put the party adopting the measure in a relatively strong position. Whether this is politically palatable is of course an open question.

A second option is to add a clause to the general exceptions that are included in every trade agreement, permitting a party to adopt measures taken to respect, promote or fulfil human rights as defined in the essential elements clause. Importantly, it would need to be clear that measures may be adopted with respect to human rights domestically as well as extraterritorially. This is because it is normally contested whether there is a right to take measures to protect interests in other countries (other than under the public morals exception, where technically the interest is that of the regulating state anyway).

In some cases the EU has begun to do this. An example has been cited: the EU-Cariforum agreement contains a footnote stating that '[t]he Parties agree that ... measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.'[69] Other countries have similarly broadened the scope of these provisions. For example, New Zealand has included a clause in its free trade agreements permitting it to adopt 'measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.' Other regional trade agreements also make allowance for positive discrimination, but in the more limited contexts of cross-border services, investment and government procurement.[70] These clauses are all steps along the way. But for the EU to comply with its obligations, a more robust clause is needed.

Both options – for an amendment to the existing non-execution clause, and for an expanded general exceptions clause – are presented below as Draft Clauses X2 and X4 respectively. It should be pointed out that it would be preferable to decide on one of these options, at least for measures that are necessary for the parties to respect human rights (which is also what is necessary for the EU, according to its obligations). The reason is that otherwise there is a risk of opening two procedural routes for the same type of measure, with different procedures and slightly different conditions.

69 Article 224(1) footnote 1, Cariforum-EU Economic Partnership Agreement.
70 Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Vol 1 (Cambridge: CUP, 2009) at 351.

6.2 Potentially necessary changes: human rights impact assessments and review of the operation of the agreement

In the long term, it would also be desirable – and possibly necessary – for the EU's agreements to provide for a mechanism for reviewing the implementation of the agreement in accordance with human rights norms, on the basis of a human rights impact assessment, and for making amendments to the agreement where possible.

This would be in accordance with the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements drafted by the UN Special Rapporteur on the Right to Food, which recommend that '[a] human rights impact assessment should be conceived of as an iterative process, taking place on a regular basis, for instance, every three or five years.'[71] Importantly, however, this may also be an important means of remaining in compliance with EU law, which is beginning to emphasise the importance of conducting impact assessments.

The law on this issue is still developing, but in *Spain v Council*, the European Court of Justice annulled an EU Council Regulation on the grounds that it was disproportionate, this being because the EU Council, not having conducted an impact assessment, was not able to show that it had taken into account all necessary factors and circumstances in its decision to adopt the measure.[72] In this case, the necessity of these factors was established in the measure itself. But it would be logical that the necessity of relevant factors can be established by other EU norms, and in particular primary EU law. One could therefore argue that, following *Spain v Council*, an EU institution adopting a measure must be able to demonstrate that it has taken into account the impact of that measure on human rights, which is a relevant factor under EU law. Of course, this remedy is only available for EU measures: it has no application in the context of omissions to adopt measures, which are equally important in the present context.

The EU-Cariforum agreement presents a framework for a procedure based on human rights impact assessments and review of the agreement. Article 5 states that:

> The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that the objectives of the Agreement are realised, the Agreement is properly implemented and the benefits men, women, young people and children deriving from their Partnership are maximised. The Parties also undertake to consult each other promptly over any problem that may arise.

A provision to this effect should be included in all future EU trade agreements, ideally with greater specificity as to the human rights aspects of the monitoring process. An effective means of doing this would be to make specific reference to the carrying out of a human rights impact assessment.[73] The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements also list certain minimum principles that should be followed. These are: the independence of the body carrying out the review, transparency in the review process, inclusive participation of all persons affected, sufficient expertise and funding.[74] A model clause is set out below that takes these principles into account.

Another principle made by the Guiding Principles concerns the 'status' of recommendations. The Principles give the example of the public presentation of the results of a review, for example before parliament. In the context of a trade agreement, it is essential that the results of a human rights impact assessment lead to concrete action, if necessary by an amendment of the agreement, or a suspension of its provisions. From a legal and political perspective, this is most easily done by the organs of the agreement, and in particu-

71 Guiding Principles, above at n 8, para 3.3. The report was well received: see FES Geneva Reports, Report on the 19th Regular Session of the UN Human Rights Council, 23 March 2012, http://www.fes-globalization.org/geneva/documents/2012_03_Report_HRC19_TR.pdf, at 7 (retrieved on 5 February 2013).

72 C-310/04, *Spain v Council* [2006] ECR I-7318, paras 133-5. It is important to note that the Court did not find that there was an obligation to conduct an impact assessment. The problem concerned the consequences of not conducting an impact assessment, namely that there was no evidence that relevant factors had been taken into account. Conceivably, there are other ways of showing that relevant factors have been taken into account, but an impact assessment is the most common means of doing this, and consistent with the EU's practice in many other areas.

73 See James Harrison and Alessa Goller, 'Trade and Human Rights: What Does "Impact Assessment" Have to Offer?' (2008) 8 Human Rights Law Review 587 and the information at http://www.humanrightsimpact.org/.

74 Guiding Principles, above at n 8, paras 4.1-4.7.

lar the joint council established under each of the EU trade agreements. Again, the EU-Cariforum agreement affords an example. Article 5, just quoted, is accompanied by a Joint Declaration on the Signing of the Economic Partnership Agreement, which states (with emphasis) as follows:

> We understand that, in the context of our continued monitoring of the Agreement within its institutions, as provided for under article 5 of the Agreement, a comprehensive review of the Agreement shall be undertaken not later than five (5) years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement, including the costs and consequences of implementation *and we undertake to amend its provisions and adjust their application as necessary.*

A provision to similar effect could also be included in all future EU trade agreements. However, a caveat must be noted, which is that the EU-Cariforum joint council has, unusually, a general power 'to take decisions in respect of all matters covered by the Agreement' (Article 229). This includes the power to suspend the application of provisions of the agreement in appropriate cases, including those cases mentioned here. By contrast, most of the equivalent bodies established under other agreements have more limited powers. For these bodies to be able to amend or suspend the operation of their respective agreements for human rights reasons, it may be necessary to give them an express power to do so. The precise powers of these organs differ from agreement to agreement, and accordingly so will such a power.

It might also be noted that, from an accountability perspective, there are certain difficulties with the broad powers of the Joint Council under the EU-Cariforum agreement. In particular, this organ has the power to add to obligations in the agreement, as well as to suspend them. It is not therefore suggested that all these powers should be replicated in other agreements. What is suggested, however, is that such organs have a specific power – and even a mandate – to suspend or amend provisions of the agreement where this is necessary for human rights reasons.

6.3 Optional reforms to improve the functioning of the human rights clause

The foregoing has focused on the type of human rights clause that is necessary for the EU and its Member States to be able to comply with their human rights obligations. There are, however, are a number of reforms which are not necessary for the EU to comply with its human rights obligations, but which would improve the functioning of the human rights clause.

Relationship between the human rights clause and the labour provisions in recent EU trade agreements

Since the 2008 EU-Cariforum agreement, the EU's trade agreements have all contained 'sustainable development' chapters, focusing on labour and environmental standards, and setting out specific mechanisms for the implementation, monitoring and enforcement of these obligations. There is an undeniable overlap between the coverage of the human rights clause and these provisions, and in particular those on labour standards.[75] It is beyond question that International Labour Organization (ILO) core labour standards are also human rights;[76] and indeed the European Commission has acknowledged that core labour standards are covered by the standard human rights clauses.[77] Likewise, there is an increasing overlap between human rights and environmental protection, particularly in the context of indigenous rights and transboundary pollution.[78]

Ideally, of course, one would wish for consistency in these provisions. It is indeed regrettable that, after a decade of experience with human rights clauses, the EU should have drafted what are in some respect duplicate provisions. The reason lies in the EU's commitment to an overall policy of sustainable development,

75 Lorand Bartels, 'Human Rights and Sustainable Development Obligations in the EU's Free Trade Agreements', University of Cambridge Faculty of Law Research Paper No 24/2012, available at http://ssrn.com/abstract=2140033. The overlap is not perfect. There is no equivalent for 'democratic principles' in the sustainability chapter; nor does the human rights clause necessarily prevent a treaty party from reducing the level of protection offered by domestic labour and environment legislation.

76 Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 14 European Journal of International Law 457, at 476 and Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal 151.

77 European Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416, at 12.

78 Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.

but that does not quite explain the adoption of these 'sustainable development' chapters. These chapters are based completely on a model dating back to NAFTA, and found in all US and Canadian trade agreements since then, without a significant link being made to the concept of sustainable development, and certainly not in relation to the labour chapter. One suspects that this duplication of effort was based on a narrow view of the human rights clause as, *expressis verbis*, limited to the political situations in which it has so far been applied. The question, however, is whether it causes any harm.

The question, then, is whether in such cases it makes sense for such different provisions on implementation and remedies to apply to the same state conduct, and, if not, what should be done about it. In fact, having two different mechanisms for the same violation is not necessarily problematic. This simply gives the injured party a choice of options. There are, admittedly, situations in which the question of how to frame a violation has turned out to be important. US administrators once rejected a petition under the US GSP system in relation to the murder of a trade union leader on the basis that this constituted a violation of 'human rights' rather than of 'worker rights' (under which this could have been relevant).[79] But this is a peculiar case, and it is more likely that such a violation would be seen as both a human rights violation and a worker rights violation, depending on where it is presented.

What this means is that the real difficulties with these duplicate clauses is not substantive but institutional. In some respects, the human rights clauses are stronger. They cover additional norms (compared to the labour obligations), and they are enforceable by way of sanctions. On the other hand, what the labour obligations lack in terms of raw enforceability, they gain in administrative sophistication. The provisions on civil society discussed above are located in the sustainable development chapters of the respective trade agreements. One solution, then, would be to increase the mandate of these groups to cover human rights as well. But too much emphasis on this track might weaken the possibility of gaining greater access to the more wide-ranging norms available under the human rights clause.

In short, the best solution is probably to seek to improve both sets of provisions: the human rights clause by making it more transparent and viable, and the labour standards provisions by increasing their enforceability. And in the process, there is little to be lost by cross-fertilizing the best aspects of each set of provisions with those of the other.

A role for the European Parliament

While the European Parliament's consent is required for new trade agreements,[80] it has only a limited role in relation to the suspension of these agreements. Article 218(9) TFEU authorises the Council to suspend agreements. The European Parliament is at most entitled to be informed. This right derives from Article 218(10) TFEU, supplemented by the Framework Agreement on relations between the European Parliament and the European Commission, which adds that '[t]he Commission shall inform the Council and Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement and of the reasons therefor.'[81]

One might question whether this is an ideal situation. The European Parliament plays a key role in relation to the EU's human rights policy, and an argument could be made that it should be involved in any decisions to suspend the application of an agreement if this is necessary for human rights reasons. This is particularly the case in relation to human rights issues that go beyond the 'political' issues in relation to which the EU's human rights clause has traditionally been invoked, but stem from the effects, short and long term, of the trade agreement itself. How such involvement might be operationalised depends on the powers that are granted under the agreement itself. If the agreement endows a Joint Council with wide-ranging powers to amend the agreement (as in the EU-Cariforum agreement), then arguably the Parliament should have a role at that stage. An alternative would be for the Parliament to have a role in the formation of common positions by the Council. The details obviously require further thought, and it is beyond the scope of this paper to make suggestions in this regard.

79 US General Accounting Office, *International Trade: Assessment of the Generalized System of Preferences*, GAO/GGD-95–9, November 1994, 109, at http://www.gao.gov/assets/160/154744.pdf, cited in Bob Hepple, *Labour Laws and Global* Trade (Oxford: Hart, 2005), 96.

80 Article 218(6)(a)(v) and Article 207(2) TFEU. See Markus Krajewski, 'The Reform of the Common Commercial Policy' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds), *EU Law After Lisbon* (Oxford: OUP, 2012) at 309.

81 Framework Agreement on relations between the European Parliament and the European Commission [2010] L304/47, Annex III, point 8.

A role for the Member States

It is now routine for trade agreements to be concluded by the EU and the Member States jointly, making these what is known as 'mixed agreements'.[82] In principle, this means that the EU should act in matters for which it is competent and the Member States in matters for which they are competent. This can complicate the taking of 'appropriate measures' falling within the competences of both the EU and the Member States. To account for this, in relation to the human rights clause in the Cotonou Agreement the EU and the Member States have concluded an Internal Agreement in which the Member States authorise the EU Council to take decisions concerning 'appropriate measures', and which further specifies that such decisions are taken by qualified majority voting (which the Member States undertake to implement).[83] The Internal Agreement also deals with certain other procedural issues.

To date, all of the cases in which appropriate measures have been adopted under a human rights clause have involved the Cotonou Agreement. It is not certain that the absence of an equivalent internal agreement in the other agreements has had the effect of inhibiting the use of the human rights clauses in those agreements. However, it seems likely that a detailed procedure setting out the way that the mechanism can work in practice could only facilitate their use, should the possibility of such use arise.

A role for civil society

Existing role for civil society

It is also appropriate to consider the role of civil society in relation to the human rights impact of trade agreements. The most recent EU free trade agreements do foresee a role for civil society, either via a agreement-specific consultative committee (EU-Cariforum agreement), joint and separate meetings of agreement-specific 'Domestic Action Groups' (EU-Korea agreement) or individual meetings of agreement-specific civil society groups administered by a joint consultative committee composed of organised civil society in the EU and the other party (EU-Central America agreement). Others only foresee a very weak role for civil society (EU-Colombia/Peru) or none at all (eg EU-Iraq, which provides not for full free trade but for trade on a most favoured nation basis).

The most advanced of these agreements is the EU-Cariforum agreement, and it is suggested that in relation to civil society it should be taken as a model. The EU-Cariforum Consultative Committee has the status of an organ of the agreement, has direct access to the principal Joint Council, providing it with recommendations after consultation or on its own initiative. In addition, the Consultative Committee receives the reports of the Committees of Experts tasked with resolving disputes on the implementation of the labour and environment obligations.[84] The mandate of the Consultative Committee is to promote dialogue and cooperation 'encompass[ing] all economic, social and environmental aspects of the relations between the [parties], as they arise in the context of the implementation of this Agreement.'[85] This broad mandate is to be welcomed, although it should be enhanced by specific reference to human rights.

A complaint mechanism

It remains to be considered whether a mechanism should be envisaged for civil society to enforce human rights obligations. Various models might be envisaged, depending on the issues arising. However, it is difficult, without adding significantly to the institutional structure of the agreements, to provide for a direct action brought by a private party in relation to violations of obligations by the parties. The difficulty is that there is no standing independent institution to receive such a complaint, either in the form of a standing judicial organ or even in the form of a permanent secretariat.

There is one precedent for such a mechanism, which is for environmental (but not labour) complaints under the environmental side agreement to NAFTA, and subsequently in CAFTA. These agreements provide for complaints to a designated secretariat. In the case of NAFTA, the secretariat was established under that agreement, while in the case of CAFTA the parties subsequently requested the Secretariat for Central Amer-

82 An unusual exception is the EU-Pacific Interim Partnership Agreement concluded with Fiji and Papua New Guinea.
83 Internal agreement between the representatives of the governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376, amended by another Internal Agreement [2006] OJ L247/48.
84 Article 189(6) and Article 195(6) of the EU-Cariforum agreement.
85 Article 232(1) of the EU-Cariforum agreement.

ican Economic Integration to establish a new unit to act as a secretariat for these purposes.[86] It is unlikely that this approach would be adopted for the EU trade agreements. Indeed, it has not even been adopted by the US for labour matters.

A more realistic alternative is to opt for a domestic mechanism providing for complaints to be made to the EU, with a mandatory requirement that the EU take appropriate measures, either with or without the cooperation of the other party, depending on the nature of the violation. There are precedents for such models. In relation to the labour standards provisions contained in the US free trade agreements, the US, by domestic legislation, gives any person (including natural persons and other organizations) the right to file a submission with the Office of Trade and Labor Affairs requesting that the government instigate consultations with the other party for alleged violations.[87] A detailed procedure exists, including public hearings, prior to the instigation of consultations. There have been many complaints since NAFTA came into force, and recently there has also been a request for a panel by the US against Guatemala under CAFTA.

There is nothing directly equivalent in the EU in relation to such matters, although there are related procedures in slightly different contexts. The new GSP Regulation, due to come into effect in 2014, gives the European Commission the power to withdraw GSP+ preferences from beneficiaries that have failed to implement certain human rights conventions. It states that:

> In drawing its conclusions concerning effective implementation of the relevant conventions, the Commission shall assess the conclusions and recommendations of the relevant monitoring bodies, as well as, without prejudice to other sources, information submitted by third parties, including civil society, social partners, the European Parliament or the Council.[88]

In relation to economic matters, the procedures for individual complaints are far better developed. Thus, under the Trade Barriers Regulation companies and industry associations are able to bring a complaint to the European Commission alleging violations of trade obligations (under both WTO law and free trade agreements), which, following an investigation and report, can lead to the bringing of legal action by the EU.[89] There are similar mechanisms for antidumping and countervailing duty cases.

The absence of any possibility for EU civil society to bring a complaint about human rights violations associated with a trade agreement stands in stark contrast to these examples. This also stands in stark contrast to the EU's values, which prize human rights, democracy and the rule of law. It is entirely consistent with these values to expect that a mechanism similar to the Trade Barriers Regulation be established, accessible to individuals and civil society, with a mandate to investigate and report on issues arising under the human rights obligations set out in the EU's free trade agreements, with the possibility of dispute settlement or other appropriate measures should the matter not be resolved satisfactorily.

86 See Agreement Establishing a Secretariat for Environmental Matters Under the Dominican Republic- Central America- United States Free Trade Agreement, 27 July 2006, available at: http://www.oas.org/dsd/Tool-kit/Documentos/MOduleII/CAFTA%20-%20Agreement%20to%20Establish%20Secretariat.pdf (retrieved on 5 February 2013).

87 Bureau of International Labor Affairs; Notice of Reassignment of Functions of Office of Trade Agreement Implementation to Office of Trade and Labor Affairs; Notice of Procedural Guidelines (2006) 71 (245) Federal Register 76691, available at http://www.gpo.gov/fdsys/pkg/FR-2006-12-21/pdf/E6-21837.pdf#page=1. For an example of a complaint under this provision, see http://www.usleap.org/files/Guatemala%20CAFTA%20Complaint%202008.PDF (retrieved on 5 February 2014). For an explanation, see http://www.dol.gov/ilab/programs/otla/freetradeagreement.htm#.UPGbABIrTfg (retrieved on 5 February 2014).

88 Article 14(3) of EU Regulation 978/2012 [2012] OJ L303/1, concerning the withdrawal of GSP+ preferences. No reference is made to civil society in relation to the procedure for temporary withdrawal of other GSP preferences, inter alia, for serious and systematic violations of these conventions: Article 19(6). However, Recital 15, which is in similar terms of Article 14(3), indicates that Article 19(6) should be read in this way as well.

89 Regulation No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [1994] OJ L349/71, as amended. See consolidated version at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1994R3286:20080305:EN:PDF. For an outline, see http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/ (retrieved on 5 February 2014).

7
A model human rights clause with commentary

This section outlines a set of draft provisions for a new model human rights clause. It is based on clauses found in EU agreements, with additional revisions in marked up text.

X1. Human rights obligations

The parties reaffirm their obligations concerning *democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, and the rule of law,* **and undertake to comply with these obligations** *in their internal and international policies.*

Comment

This clause clearly establishes an obligation to respect democratic principles and human rights. There is no need to refer to 'essential elements', as a breach of this obligation is regulated in the agreement in any case by the non-execution clause (this does not represent a change).

The reference for the relevant principles is 'the Universal Declaration on Human Rights and other relevant international human rights instruments'. This phrase is sufficiently broad to cover all situations. By implication, all treaties binding on the parties are 'relevant', and others not binding on the parties might also be 'relevant'. There is nothing to be gained by further specificity, and indeed the present wording also allows for future agreements to become 'relevant'.

X2. Non-execution clause

P1. If one of the Parties considers that the other Party has failed to fulfil an obligation under this Agreement **or that a provision of the Agreement restricts its own ability to meet its human rights obligations** *it may take appropriate measures. Before doing so, it must supply the [Joint Council] within 30 days with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.*

In this selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Cooperation Council and shall be the subject of consultations in the Cooperation Council if the other Party so requests.

P2. By way of derogation from paragraph [P1], any Party may immediately take appropriate measures in accordance with international law in case of:

(a) denunciation of this Agreement not sanctioned by the general rules of international law;

(b) violation by the other Party of **Article [X1]**

In such cases, 'appropriate measures' must be taken in accordance with international law, and must be proportional to the violation. In the selection and implementation of these measures, the Parties will pay particular attention to the circumstances of the most vulnerable groups of the population and will ensure that they are not unduly penalised.

The other Party may ask that an urgent meeting be called to bring the Parties together within 15 days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

Comment

This clause is an amalgam of various existing human rights clauses, with the exception of the underlined words, which now refer clearly to a violation of the clause on human rights obligations (formerly the 'essential elements' clause), as opposed to a violation of (hitherto undefined) 'essential elements'.

The clause also contains an option (underlined) for permitting a party to adopt appropriate measures unilaterally in the event that this is necessary for the party to comply with its human rights obligations, both internal and extraterritorial. This responds to the main deficiency of the existing human rights clause, as discussed above. As mentioned, this clause should be treated as one option to solve this problem; the other being contained in draft clause X4.

X3. Human Rights Committee

A Human Rights Committee is hereby established composed of representatives of the Parties and with a view to assist the [Joint Council] in its duties. The Committee shall discuss any matters arising in connection with the obligations of the parties concerning human rights, democratic principles and the rule of law.

Comment

Human rights subcommittees have been established under some of the EU's agreements. It is however appropriate that human rights committees be established as permanent features of all agreements. The mandate of such a committee, as described here, is broad, covering all matters arising under the essential elements clause.

X4. General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods [, services or establishment], nothing in this Agreement shall be construed to prevent the adoption or enforcement by the parties of measures:

P1. undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies

Comment

The first paragraph is standard in general exceptions clauses in trade agreements (which are originally based on Article XX GATT). The novelty is the new paragraph P1, which permits a party to adopt measures in relation to their internal and international policies. This is one of the two options necessary to insert in trade agreements in order to ensure that the EU and its Member States are always able to comply with their human rights obligations. The other is above in draft clause X2.

It should also be noted that this clause goes further, and permits measures to 'protect' and 'fulfil' human rights. This can be justified on the grounds that, unlike draft clause X2, such measures are subject to the condition that the measures may not be unjustifiably or arbitrarily discriminatory.

It is important to note that paragraph P1 does not have an express territorial limitation. The phrasing that is used is 'in their internal and international policies', which is taken from Article X1. It allows the parties to take measures sufficient to ensure that each party is able to take action with respect to human rights in the territory of the other party as well; and indeed, in other territories as well, if the need ever arises.

X5. Human rights impact assessment and review clause

The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that **the implementation of the agreement does not affect the obligations of the Parties in [Article X1]**.

A comprehensive review of the Agreement shall be undertaken **by the parties** *not later than five (5) years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement* **on human rights**, *including the costs and consequences of implementation.*

The review will be undertaken on the basis of a human rights impact assessment conducted by an independent body with appropriate expertise in the subject of human rights impact assessments, on the basis of transparent information and procedures, taking into account all available and relevant evidence from all sources, especially civil society, and will be appropriately resourced.

The human rights impact assessment and a report of the review will be published. The parties, and the Joint Council, as appropriate shall *amend its provisions and adjust their application as* **recommended by the review of the Agreement.**

Comment

This clause is based on the EU-Cariforum revision clause and declaration, and the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements. It envisages two steps: an independent human rights impact assessment, and a follow-up intergovernmental review (both published), leading to possible amendments or other action under the agreement.

Because different forms of action might be envisaged, this clause leaves it open whether appropriate action is to be undertaken by the parties or the Joint Council. The Joint Council is also specifically empowered to take action for this purpose, which would be exceptional for many agreements in which the Joint Council has no specific powers to amend the agreement.

X6. Interpretation

Joint Council

Either Party may refer to the Joint Council any dispute relating to the application or interpretation of this Agreement. **The Joint Council shall ensure that in the application and interpretation of the Agreement [Article X1] is observed.**

The Joint Council may settle the dispute by means of a recommendation.

Comment

The EU's trade agreements typically provide for two forms of dispute settlement. One is dispute settlement by the Joint Council, and the other is dispute settlement by an arbitral tribunal. In many cases, this special form of dispute settlement is restricted to trade issues, but not always. In addition, agreements containing 'sustainable development chapters' also provide for special dispute settlement procedures for labour and environmental matters, in this respect following the procedures applicable to other disputes. In each case it is desirable to include a clause stating that all obligations must be interpreted consistently with Article X1.

The wording used here is taken directly from Article 19 TEU (ex Article 220 EC), where it was the source of the CJEU's original fundamental rights jurisprudence. The reference to Article X1 replaces a reference to 'the law' in that provision.

Arbitration panel

Any arbitration panel shall interpret the provisions referred to in Article Z [referring to trade obligations] in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the obligations **set out in [Article X1]**.

The original last sentence is based on Articles 3.2 and 19.2 of the WTO Dispute Settlement Understanding. The sentence is technically redundant, because by definition a treaty interpreter will be unable to add to or diminish obligations in the treaty being interpreted, as those depend on the interpretation in the first place. Nonetheless, it is usually taken as a warning against judicial activism and that explains its inclusion in the more recent of the EU's free trade agreements. The revision here deletes the original (and redundant) reference to the provisions being interpreted and replaces it with a reference to Article X1. This is not redundant, at least in those cases in which there is no dispute about Article X1 itself. In such cases, this sentence is ineffective but also harmless.

X7. Civil society complaint mechanism

It was suggested above that a complaint mechanism based on the Trade Barriers Regulation be adopted to enable civil society to bring complaints to the European Commission. The detail of such procedures must be the subject of further discussion, but in broad outline what is required is a right to activate a procedure by which the Commission would investigate and report on the situation, with the possibility of taking further action to address the issue. Such action might involve unilateral action, if the issue lies with the EU, or joint action, or enforcement action against the other party, depending on the nature of the violation.

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