



## **What Is the Direction for the EU's Development Cooperation after Lisbon?**

### **A Legal Examination**

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## What Is the Direction for the EU's Development Cooperation after Lisbon?

### A Legal Examination

MORTEN BROBERG\*

**Abstract.** Jointly the EU Member States and the European Union provide more than half of all development assistance in the world. The European Union's development cooperation policy was first launched with the Treaty of Rome in 1957, but only in 1992 were specific provisions on EU development cooperation introduced at Treaty level. With the entry into force of the Lisbon Treaty, most of these provisions were carried over in the Treaty on the Functioning of the European Union. The Lisbon Treaty has, however, introduced a number of both minor and major novelties, and certain parts of the provisions have been re-arranged. Moreover, the Lisbon Treaty proposes to introduce a higher degree of consistency in the European Union's external relations – including also its actions in the field of development cooperation. This article sets out to provide a brief but systematic examination of the extent to which the substantive provisions of the Lisbon Treaty will affect the direction of the Union's development cooperation policy. To this end, it first provides an outline of how this policy has developed from the Union's inception until the entry into force of the Lisbon Treaty. It then goes on to identify the changes brought about by the Lisbon Treaty before finally providing an evaluation of the changes.

### I Introduction

Jointly, the EU Member States and the European Union (EU) provide more than half of all development assistance in the world.<sup>1</sup> The EU's development cooperation policy was first launched with the Treaty of Rome in 1957. The most important ports that this ship has called at are the conventions and treaties named after Yaoundé, Lomé, Maastricht, Cotonou, and, most recently, Lisbon. At times, the course has changed significantly when the ship has set off from one of the ports, while at other times, it appears to have remained unchanged.

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<sup>1</sup> OECD, Development Assistance Committee (DAC), 'European Community – Peer Review' (Paris 2007), 12, <[www.oecd.org/dataoecd/57/6/38965119.pdf](http://www.oecd.org/dataoecd/57/6/38965119.pdf)>, 5 Aug. 2011.

This article sets out to provide a brief but systematic examination of the extent to which the substantive provisions of the Lisbon Treaty will affect the direction of the Union's development cooperation policy.<sup>2</sup> It does so by first providing an outline of how this policy has developed from the Union's inception more than fifty years ago until the entry into force of the Lisbon Treaty (section 2). It then goes on to identify the changes brought about by the Lisbon Treaty (section 3) before finally providing an evaluation of these changes (section 4).

## II Outline of the Evolution of EU Development Cooperation Policy until Today

EU development policy dates back to the inception of the European Economic Community with the signing of the Treaty of Rome in 1957. The early inclusion of development policy as a specific part of the EU was strongly rooted in European colonialism in that France, supported by Belgium, made it a condition of participation in the Union that it will establish and maintain permanent relations with what were then colonies of the Member States.<sup>3</sup>

In the early days, EU development policy was much narrower in scope compared with contemporary development policy. Under Part IV of the Treaty of Rome, 'association status' was accorded to the so-called Overseas Countries and Territories (OCTs), meaning the non-European countries and territories that had 'special relations with Belgium, France, Italy and the Netherlands', as it was phrased in Article 131 of the Treaty of Rome.<sup>4</sup>

The main implication of the accordance of association status to the OCTs was that the tariff measures that applied among the EU members were extended to them, thereby allowing both OCT and EU products reciprocal customs duty-free access to their respective markets.<sup>5</sup> The EU also provided development assistance to the OCTs.<sup>6</sup> Hence, already from this early stage, the EU-OCT relationship

<sup>2</sup> For an examination of the Lisbon Treaty's institutional changes that are likely to affect the European Union's development policy, see H. Klavert, 'EU External Action Post-Lisbon: What Place Is There for Development Policy?', *The Bulletin of Fridays of the Commission*, Newsletter 4, no. 1 (2011): 18–23.

<sup>3</sup> M. Holland, *The European Union and the Third World*, 1st edn (Houndmills: Palgrave, 2002); J.A. McMahon, *The Development Co-operation Policy of the EC*, 1st edn (London: Kluwer Law International Ltd, 1998), 31; and H. Noor-Abdi, *The Lomé IV Convention, The Legal and Socio-Economic Aspects of African, Caribbean and Pacific States (ACP) and European Community (EC) Cooperation* (Stockholm: Stockholm University, 1997), 33–36.

<sup>4</sup> Whereas today the 'association' of a country with the European Union implies the prospect of future membership, the association provided for in Art. 131 did not carry with it such prospects.

<sup>5</sup> 'Implementing Convention on the Association of the Overseas Countries and Territories with the Community' (Rome, 25 Mar. 1957), Art. 9.

<sup>6</sup> *Ibid.*, Arts 1–7.

included market access as well as economic assistance, the two components that today still constitute the main pillars of EU development policy.

From the outset, EU development policy was intended not to replace but merely to supplement the development policies of individual Member States.<sup>7</sup> However, not all the founding members of the EU found it attractive to finance what primarily were French colonies.<sup>8</sup> Rather than financing development assistance through the EU's general budget, a special financing mechanism – called the European Development Fund (EDF) – was therefore established in 1958 providing for a division of the Member States' financing obligations, which differed from those of the general budget. The first EDF was established for a limited period, and its budget was kept separate from the general budget of the Union. When this EDF expired, it was followed by a second EDF, and this has continued so that, today, a tenth EDF is in place.

De-colonization, which primarily took place in the EU's early years, sparked demands for a redefinition of the relationship between the Union and the former colonies.<sup>9</sup> As a consequence, the First Yaoundé Convention of Association covering the period 1964–1969<sup>10</sup> was agreed to replace the provisions of the Treaty of Rome as the legal framework governing the relationship between the Union and the so-called Associated African and Malgache Countries, generally known under the French acronym EAMA.<sup>11</sup> Arguably, the main difference between the Treaty of Rome's provisions on OCTs and the Yaoundé Convention was that the former was designed to govern the Union's relationship with dependent or 'subordinate' territories whereas, in principle, the Yaoundé Convention was negotiated between equal and sovereign parties.<sup>12</sup>

The accession of the United Kingdom to the EU in 1973 facilitated a geographical widening of EU development policy. Former United Kingdom colonies were offered 'association status' corresponding to that of the EAMA.<sup>13</sup>

<sup>7</sup> *Ibid.*, Art. 1.

<sup>8</sup> L. Bartels, 'The Trade and Development Policy of the European Union', *European Journal of International Law* 18, no. 4 (2007): 715–756, at 718–719.

<sup>9</sup> Holland, *supra* n. 3, 3.

<sup>10</sup> *Journal Officiel des Communautés européennes* 93 (1964): 1431. The First Yaoundé Convention was followed by the Second Yaoundé Convention covering the period 1969–1975; see further 'Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté – Signée à Yaoundé le 29 juillet 1969', *Journal Officiel des Communautés européennes* L-282/2 (1970).

<sup>11</sup> For those overseas countries and territories that did not acquire independence, the Treaty's OCT provisions continued to apply.

<sup>12</sup> Noor-Abdi, *supra* n. 3, 41–42.

<sup>13</sup> Indeed, such association status was offered to some former UK colonies even before 1973. See, in particular, 'Agreement Establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda, and the Republic of Kenya and annexed documents, signed on 24 September 1969', *Journal officielle des Communautés européennes*, L282/55 (1970).

From 1975, the Yaoundé Convention framework was replaced by the First Lomé Convention.<sup>14</sup> Along with subsequent Lomé Conventions, which together covered the period up until 2000, the First Lomé Convention marked both a geographical widening of the Union's development policy and the inclusion of new areas of cooperation as compared with the Yaoundé Conventions. Like its predecessors, the Lomé Conventions were centred on trade and aid. With regard to trade, the Lomé I Convention represented an important shift in the EU's commercial policy by introducing *non-reciprocal* preferential schemes favouring a number of former colonies in Sub-Saharan Africa, the Caribbean, and the Pacific (ACP countries).<sup>15</sup> Lomé I was replaced by Lomé II in 1980,<sup>16</sup> by Lomé III<sup>17</sup> in 1986, and by Lomé IV in 1990, which expired in 2000.<sup>18</sup>

Lomé III and IV provided for a further widening of the scope of the Union's cooperation with developing countries. In addition to trade and development aid, new policy fields were included in the framework of cooperation.<sup>19</sup> Moreover, a new political dimension was introduced into the framework of EU development policy in that respect for democracy, human rights, and the rule of law was made an integral part of the Union's relations with developing countries.<sup>20</sup>

With the accession of Spain and Portugal to the EU in 1986, Latin America and the non-European states bordering the Mediterranean received increased attention. Hence, the Union concluded broad development agreements with these countries, as well as with India, Pakistan, and the then five ASEAN states of Indonesia, Malaysia, Philippines, Singapore, and Thailand. Moreover, with the political changes that swept through Central and Eastern Europe towards the end of the 1980s, the EU decided to direct considerable development funds to the countries in this region.

In 1992, the Maastricht Treaty brought about the most important regulatory change within EU development cooperation policy since 1957 when it introduced a specific Treaty title on development. The new provisions laid down the framework for the EU's development policy, establishing its objectives as the sustainable economic and social development of the developing countries; their smooth and gradual integration into the world economy; the campaign against poverty;

<sup>14</sup> OJEC, L25/1 (1976).

<sup>15</sup> Bartels, *supra* n. 8, 733; P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004).

<sup>16</sup> OJEC L347/1 (1980).

<sup>17</sup> OJEC L86/1 (1986).

<sup>18</sup> OJEC L229/1 (1989).

<sup>19</sup> Including *inter alia* cultural cooperation, environmental protection, support for structural adjustment, and the question of debt relief.

<sup>20</sup> L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005), 13–15; see, for example, the preamble to the Lomé III Convention and Art. 5 of the Lomé IV Convention.

and the promotion of democracy, human rights, and the rule of law.<sup>21</sup> The ‘new’ policy was founded on what is often referred to as the ‘three Cs’, namely (1) that the policy vis-à-vis developing countries and other policies must be *coherent*, (2) that Union policy and Member State policies in the area of development cooperation must be *complementary*, and (3) that the Union and the Member States are obliged to *coordinate* their efforts in the field of development cooperation.<sup>22</sup>

Since the late 1990s, EU development policy has been strongly influenced by the Union’s attempts to define and establish itself as a strong global actor. The EU’s increased attention to security issues has spilled over on to its development agenda in that greater attention has been given to conflict prevention and political emergencies taking place well beyond Europe’s borders.<sup>23</sup> This is clearly reflected in the Cotonou Partnership Agreement, which replaced Lomé IV in 2000.<sup>24</sup> Moreover, with respect to trade, the Cotonou Agreement constituted a marked change from the unilateral trade preferences of the Lomé conventions in that EU products must also benefit from preferential treatment in ACP countries. Hence, in the words of Bartels, this ‘brings the EU’s trade and development policy back full circle to its free trade ambitions in Part IV of the EEC Treaty’.<sup>25</sup> The Cotonou Agreement remains in force until 2020, albeit subject to revision by the parties every five years.

Finally, mention must be made of the so-called European Consensus on Development agreed in 2005 by the European Commission, the European Parliament, the Council of Ministers, and all Member States.<sup>26</sup> This measure establishes a common framework for the provision of development assistance to developing countries provided by the EU or by Member States. The European Consensus clearly emphasizes that the relationship between donor and recipient is one of partnership and equality, and it unequivocally establishes ‘that development is a central goal by itself; and that sustainable development includes good governance, human rights and political, economic, social and environmental

<sup>21</sup> EC Treaty, Art. 177(1) and (2).

<sup>22</sup> There is a large body of literature on the three C’s. See, for example, <[www.three-Cs.net](http://www.three-Cs.net)>, 5 Aug. 2011.

<sup>23</sup> M. Carbone, *The European Union and International Development: The Politics of Foreign Aid* (London and New York: Routledge, 2007), 34; G.R. Olsen, ‘Changing European Concerns: Security and Complex Political Emergencies Instead of Development’, in *EU Development Cooperation: From Model to Symbol*, ed. K. Arts & A.K. Dickson (Manchester: Manchester University Press, 2004), 81.

<sup>24</sup> OJEU L317/3 (2000).

<sup>25</sup> Bartels, *supra* n. 8, 751.

<sup>26</sup> European Parliament, Council, Commission, ‘Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: The European Consensus’, OJEU C46/1 (2006).

aspects'.<sup>27</sup> Like the Cotonou Agreement, the European Consensus continues to be in force.

### III Apparent Changes Brought about by the Lisbon Treaty

On 1 December 2009, the Lisbon Treaty entered into force so that the EU's legal foundation is now formed by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). At least at first glance, the Lisbon Treaty has brought about a number of substantive changes within the area of development cooperation. Below, I shall consider these changes. First, I will consider the new provision on the Union's competence in the field of development cooperation (section 1). I will then consider the apparent change with regard to the stated objectives of the Union's development cooperation policy (section 2). Following this, I will examine the principle of coherence (section 3) and the missionary principle (section 4). I will then move on to the complementarity obligation (section 5), before ending by considering the new provision on humanitarian aid (section 6).

#### 1. Competence

The limits of the EU's competences are governed by the principle of conferral.<sup>28</sup> This essentially means that the Union can act only within the limits of the competences conferred upon it in the Treaties to attain the objectives set out therein. If the Treaties do not confer competence on the Union, it is precluded from acting.<sup>29</sup>

The principle of conferral means that it is of considerable importance to establish what competence has been vested in the Union in a given policy area. As a rule, competence may be either exclusive or shared. Where a competence is exclusive, only the Union may legislate and adopt legally binding acts.<sup>30</sup> Where a competence is shared, both the Union and the Member States may legislate and adopt legally binding acts in the area in question, but the Member States may only exercise their competence to the extent that the Union has not exercised its competence. In other words, if the Union has legislated on a given matter, this pre-empts the Member States from legislating on the same matter. One of the novelties introduced with the Lisbon Treaty is the explicit categorization of the Union's competence in the various policy areas.

<sup>27</sup> See para. 7 as well as paras 12–13 of the European Consensus.

<sup>28</sup> Article 5(1) TEU.

<sup>29</sup> Article 5(2) TEU.

<sup>30</sup> Cf. Art. 2(1) TFEU.

Article 3 TFEU lays down the areas where the Union has exclusive competence, whereas Article 4 TFEU identifies the areas where the Union and the Member States have shared competence. With particular regard to development cooperation policy, however, Article 4(4) provides as follows: ‘In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs’.

It follows that, within the areas of development cooperation and humanitarian aid, the fact that the Union has legislated on a given matter does not pre-empt the Member States from legislating on the same issue. In these two areas, the Union’s and the Member States’ legislative schemes regarding the same issues may therefore develop side by side.<sup>31</sup>

## 2. (Explicit) Objectives of European Union Development Policy

Prior to the Lisbon Treaty, Article 177(1) of the EC Treaty provided that the EU’s development cooperation policy should foster:

- the *sustainable economic and social development* of the developing countries, and more particularly the most disadvantaged among them,
- the smooth and gradual *integration of the developing countries into the world economy*,
- the *campaign against poverty* in the developing countries.<sup>32</sup>

And in its second section, Article 177 EC went on to provide that ‘Community policy in this area shall contribute to the general objective of developing and consolidating *democracy* and the *rule of law*, and to that of *respecting human rights and fundamental freedoms*’.<sup>33</sup> In contrast, Article 208(1)(2) TFEU only provides that ‘Union development cooperation policy shall have as its primary objective the *reduction and, in the long term, the eradication of poverty*’.<sup>34</sup>

Hence, on the face of it, it would seem that with the Lisbon Treaty, objectives *such as* ‘sustainable economic and social development’ and ‘developing and consolidating democracy’ have been abandoned so that today, the EU’s development policy focuses exclusively on poverty eradication. A closer examination, however, shows that none of the above objectives have been abandoned; in fact they have been given a more prominent position in the Treaties.<sup>35</sup>

<sup>31</sup> This would seem to be well in line with the Court of Justice’s ruling in Case C-316/91, *Parliament v. Council* [1994], ECR I-625, at para. 26.

<sup>32</sup> Emphasis added.

<sup>33</sup> Emphasis added.

<sup>34</sup> Emphasis added.

<sup>35</sup> It may be noted that the reshuffling of the objectives may lead to a different ‘internal ranking’ among the objectives.

Development Cooperation falls within Part Five on ‘External Action by the Union’ of the TFEU. The first provision in Part V provides that ‘[t]he Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union’.<sup>36</sup>

Chapter 1 of Title V of the TEU in Article 21(2) *inter alia* provides that:

[t]he 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) ...
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) ...
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

It follows that the Lisbon Treaty has not led to a limitation of the objectives that will guide the EU’s development cooperation policy but rather to a ‘re-arrangement’ of these objectives. Indeed, it seems arguable that this re-arrangement may enhance the coherence among the Union’s various external policies and thereby lead to the strengthening of the objectives!

### 3. Principle of Coherence

As a general rule, legislators are not obliged to create a coherent body of legislation. Therefore, intentionally or unintentionally, they may adopt pieces of legislation that are mutually incoherent or even incompatible.<sup>37</sup> In this regard, the EU appears to be the exception to prove the rule since some Treaty provisions require the Union’s legislation to comply with a formal requirement of coherence.<sup>38</sup>

<sup>36</sup> Article 205 TFEU.

<sup>37</sup> Indeed, an important feature of modern democracy arguably is that elected legislators are free to introduce legislation that is clearly incoherent with that adopted by previous legislators. Otherwise, the incumbent legislative majority would be able to ‘bind’ future legislators – which would seem to be at odds with the fundamental idea of modern democracy.

<sup>38</sup> For a careful examination of the notion of coherence, see C. Hillion, ‘*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union’, in *Developments in EU External Relations Law*, ed. M. Cremona (Oxford: Oxford University Press, 2008), 10. It may be noted that

The actual impact of these provisions appears questionable, however, at least with regard to new legislation that affects developing countries.<sup>39</sup>

Before the entry into force of the Lisbon Treaty, the EC Treaty in Article 178 provided that ‘The Community shall take account of the objectives referred to in [the Article laying down the EU’s policy in the area of development cooperation] in the policies that it implements which are likely to affect developing countries’. In practice, Article 178 EC appears not to have played any material role.

Equally, before the entry into force of the Lisbon Treaty, Article 3 of the (then) EU Treaty provided that:

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.<sup>40</sup>

With particular regard to the EU’s policies towards developing countries, the role played by Article 3(2) of the EU Treaty (prior to Lisbon) requiring ‘consistency’ between the development policy and the Common Foreign and Security Policy (CFSP) policies (external relations and security) is not clear. Formally speaking, it required ‘consistency’ between the external activities under pillars I and II, respectively, but in practice, such ‘consistency’ appears merely to have been introduced on an ad hoc basis. The main obstacle to ensuring cross-pillar consistency was arguably the Union’s inconsistent organizational structure, and so it would seem to be for good reasons that the drafters of the Lisbon Treaty set out first of all to ensure a higher degree of coherence in the EU’s external policies through a new organizational structure.

If, however, we exclude the institutional changes and instead focus exclusively on the formal requirements on attaining consistency and coherence, it appears

the present article is only concerned with Union legislation as such, i.e., horizontal coherence. It therefore does not cover coherence requirements regarding the relationship between Union legislation and Member State legislation, i.e., vertical coherence, which is achieved *inter alia* through the fulfilment of the principle of sincere cooperation (Arts 4(3) and 24(3) of the Treaty on European Union).

<sup>39</sup> With the 2010 revision (second revision) of the Cotonou Agreement, the European Union has accepted the duty of enhancing coherence of those Union policies that can support development priorities of ACP states, cf. OJEU L287/3 (2010).

<sup>40</sup> See also Art. 27a(1) of the (then) EU Treaty.

that the Lisbon Treaty has merely carried over the two above provisions into the new treaties. Thus, Article 208(1) of the TFEU now provides as follows:

The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

And today, Article 21(3) (2) of the TEU provides:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

However, in Article 7 of the TFEU, the Lisbon Treaty introduces a change that may prove to be important: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’.

While this provision is not concerned with consistency with regard to the Union’s external activities, as it does not cover the CFSP, it must be recalled that Part V of the TFEU covers the ‘External Action of the Union’. This, among other things, includes the common commercial policy; economic, financial, and technical cooperation with third countries; and humanitarian aid. It therefore clearly strengthens the obligation of consistency weighing on the EU.

#### 4. *Missionary Principle*

a) *The Duty to Promote the Union’s Values.* Over the last two decades in particular, the EU has actively tried to promote the so-called European values as part of its external relations policies. However, only with the entry into force of the Lisbon Treaty has this become an explicit obligation weighing on the Union in its external actions, as Article 3(5) of the TEU now provides that:

In its relations with the wider world, the Union shall *uphold and promote* its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.<sup>41</sup>

<sup>41</sup> Emphasis added.

The missionary principle is also reflected in Article 21(1) of the TEU,<sup>42</sup> which provides that:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, *and which it seeks to advance in the wider world*: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.<sup>43</sup>

Moreover, in Article 21(2)(a)-(c) of the TEU concerning the Union's external action, it is laid down that:

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

The duty to further European values in the wider world, as set out above, applies with respect to all third countries, not merely developing ones. With particular regard to the latter group of countries, Article 208(1) of the TFEU merely provides that 'Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action'.<sup>44</sup>

This somewhat bland formulation does not really reflect the fact that, in practice, European values play a particularly important role in the Union's development policy (as well as in its neighbourhood policy).<sup>45</sup>

*b) What are European Values?* The Lisbon Treaty thus now explicitly obliges the EU to further its values in the wider world. But what are those values that must be furthered? Article 3(5) not only lays down the missionary principle but also

<sup>42</sup> See also Art. 205 TFEU, which provides that '[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in [Arts 21 and 22] of the Treaty on European Union'.

<sup>43</sup> Emphasis added.

<sup>44</sup> The phrase 'the framework of the principles and objectives of the Union's external action' is presumably a reference to Art. 205 TFEU, which in turn refers to Arts 21 and 22 TEU, cf. *supra* n. 42.

<sup>45</sup> See in this regard s. c) below.

sets out the objectives that are to guide the Union's behaviour on the international scene.<sup>46</sup> These objectives are (or at least should be) a reflection of the Union's values – but they are not values as such. In contrast, Article 21(1) of the TEU provides the following (non-exhaustive) list:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*<sup>47</sup>

Further specification of several of the Union's values may be found in its Charter of Fundamental Rights,<sup>48</sup> in the case law of the Court of Justice, and in secondary legislation such as the European Consensus on Development referred to in section 2 above.<sup>49</sup>

Whereas it is possible to demarcate the EU's values, it seems rather difficult to establish an unequivocal, detailed list of them; democracy, rule of law, and human rights arguably constitute the core of those values, which the EU must promote in the wider world, but other values such as free trade, protection of the environment (including fighting climate change), and animal welfare must also be taken into account.

*c) The Union's Means for Promoting its Values.* The explicit inclusion of the missionary principle in the TEU following the entry into force of the Lisbon Treaty marks a clear change vis-à-vis the situation prior to this time. This does not mean, however, that hitherto, the EU has not actively promoted its values as part of its development cooperation policy. Hence, from the early 1990s, the EU has included a so-called human rights clause in virtually all trade and cooperation agreements between itself and a third country.<sup>50</sup> These clauses require the

<sup>46</sup> The relevant part of Art. 3(5) TEU provides that the Union shall contribute to 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

<sup>47</sup> Emphasis added. Note that all the values listed in Art. 2 TEU (referring to the values on which the European Union is founded) are listed in Art. 21(1) TEU.

<sup>48</sup> Charter of Fundamental Rights of the European Union, OJEU C364/1 (2000).

<sup>49</sup> Cf. *supra* n. 26.

<sup>50</sup> See in particular 'Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries', COM(95)216 final and the Council Conclusions of 29 May 1995, reported in *EU Bulletin* No. 5 (1995) at point 1.2.3.

parties – that is, the EU and the third country or countries – to have due respect for human rights and democracy based on the rule of law.

When a human rights clause is inserted into an international agreement, it will, as a rule, be made ‘an essential element’ of it. This means that if one of the parties infringes the clause, the other party may terminate or suspend the operation of the agreement in whole or in part.<sup>51</sup> It is difficult to estimate what impact the inclusion of human rights clauses has had, but it is clear that the EU has actively used the possibility of, for example, cutting down on its development cooperation assistance where a developing country has committed a sufficiently serious infringement of the clause.<sup>52</sup>

The EU also seeks to further its values through the use of trade preferences – that is, the provision of favourable customs duties, which are only awarded to some selected countries. True enough, it follows from the WTO’s most favoured nation (MFN) principle that, where a member of the WTO offers a third country preferential treatment, this treatment must be extended to all WTO members. However, the WTO Agreement’s so-called enabling clause allows the Union to depart from the MFN principle and offer preferential treatment to developing countries provided that the criteria that the developing countries must meet do not discriminate between them.

On this basis, the EU has established a preferential customs system. As part of this system, the Union has created what is referred to in Regulation 732/2008<sup>53</sup> as a ‘special incentive arrangement’, or the GSP+ as it is normally called. Under the GSP+ arrangement, a group of so-called vulnerable developing countries are offered attractive customs duties on the condition that they ratify and effectively implement twenty-seven specified international conventions and accept regular monitoring and reviews of their implementation record with regard to these conventions. Among the twenty-seven conventions, we find the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Concerning the Minimum Age for Admission to Employment, the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Failure to comply with one or more of these conventions may lead to the EU fully or partly withdrawing the

<sup>51</sup> This follows from Art. 60 of the Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, 331.

<sup>52</sup> See, for instance, ‘Council decision of 27 September 2010 concerning the conclusion of consultations with the Republic of Niger under Art 96 of the ACP-EU Partnership Agreement’, OJEU L260/6 (2010).

<sup>53</sup> Regulation 732/2008 applying a scheme of generalized tariff preferences, OJEU L211/1 (2008).

preferential customs scheme vis-à-vis the developing country in question.<sup>54</sup> In other words, the GSP+ arrangement essentially means that those developing countries that implement the EU's values are rewarded with reduced customs duties when exporting to the Union.

Mention must also be made of a European Parliament and Council regulation providing the EU with financing for 'the promotion of democracy and human rights worldwide', as the measure's title explains.<sup>55</sup> Just over EUR 1 billion has been allocated towards financing activities under this instrument.<sup>56</sup> In practice, the financing instrument is closely related to the Union's development cooperation assistance, although it may equally be used for financial and technical cooperation with other (i.e., non-developing) third countries. A remarkable aspect of the instrument is that it may also be used to finance non-state actors. For instance, the EU may use it to support NGOs whose aim is to watch over human rights breaches in a dictatorship – something that is normally not well received by dictators themselves.

Finally, the fundamental principles of the EU, together with the objectives that are laid down in the Treaties regarding the Union's action on the international scene, form the framework for the Union's external policies. This framework applies to external policies falling under the CFSP, as well as to such policies that fall outside the CFSP. The Union's external action policies must therefore comply with these principles and pursue these objectives.

*d) Impact of the Missionary Principle.* The importance of the Lisbon Treaty's introduction of the missionary principle necessarily depends upon the impact this principle will have on the EU's actual policy. Or to put this in different terms, the question is whether the missionary principle is merely a paper tiger or whether there is real substance to it?

It is not difficult to find examples where, after the entry into force of the Lisbon Treaty, the EU explicitly states that, in its external relations, it seeks to further a number of key values. Thus, for instance, in the so-called Stockholm Programme, the European Council explicitly laid down that '[t]he Union should continue to promote European and international standards and the ratification of

<sup>54</sup> Cf. Regulation 732/2008, *supra* n. 53, Art. 15(2). For an example, see 'Implementing Regulation 143/2010 of the Council of 15 Feb. 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka', OJEU L45/1 (2010).

<sup>55</sup> 'Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide', OJEU L386/1 (2006). Sometimes merely called the 'financing instrument'.

<sup>56</sup> See further <[http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/latin\\_america/114172\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/latin_america/114172_en.htm)>, 5 Aug. 2011.

international conventions, in particular those developed under the auspices of the UN and the Council of Europe'.<sup>57</sup> Similarly, in a communication concerning 'A New Response to a Changing Neighbourhood', the Commission observed that 'The EU does not seek to impose a model or a ready-made recipe for political reform, *but it will insist* that each partner country's reform process reflect a clear commitment to universal values that form the basis of our renewed approach'.<sup>58</sup> And similarly in a communication regarding 'A dialogue for migration, mobility and security with the southern Mediterranean Countries', the Commission observed that '[t]he EU stands ready to continue supporting all its Southern neighbours who are willing to commit to democracy, human rights, good governance and rule of law, and to enter into Partnerships with those countries to achieve concrete progress for the people'.<sup>59</sup>

Whereas it is easy to find examples where the EU commits to generally promoting its values in the wider world, it is much more difficult to find examples where such commitment is expressly connected to the missionary principle laid down in the TEU. Among the few existing examples we find is the European Parliament's resolution in which it laid down its priorities for the March 2010 UN Human Rights Council. Here the European Parliament explicitly referred to Article 3(5) TEU while observing that 'respect for, and the promotion and safeguarding of, the universality of human rights is part of the European Union's ethical and legal *acquis* and one of the cornerstones of European unity and integrity'.<sup>60</sup> Likewise, when the European Parliament issued a resolution calling on the Pakistani Government to uphold democracy and human rights, it explicitly

<sup>57</sup> 'The Stockholm Programme – an open and secure Europe serving and protecting citizens', OJEU C115/1 (2010), para. 7.6. For another example, see 'Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters', SEC(2010) 426 final.

<sup>58</sup> 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A New Response to a Changing Neighbourhood', COM(2011) 303 final, emphasis added.

<sup>59</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A dialogue for migration, mobility and security with the southern Mediterranean Countries', COM(2011) 292 final.

<sup>60</sup> 'European Parliament resolution of 25 February 2010 on the 13th session of the United Nations Human Rights Council (2010/C 348 E/02)', OJEU C348 E/6 (2010). See likewise 'European Parliament resolution of 22 October 2009 on democracy building in the EU's external relations, (2010/C 265 E/02)', OJEU C265 E/3 (2010) – in particular, para. F, and 'European Parliament resolution of 16 December 2009 on restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, in respect of Zimbabwe and in view of the situation in Somalia, (2010/C 286 E/02)', OJEU C286 E/5 (2010), para. A. See also Case T-85/09, *Kadi*, judgment of 30 Sep. 2010, para. 115.

recalled that ‘Article 3(5) of the Treaty on European Union states that the promotion of democracy and respect for human rights and civil liberties are fundamental principles and aims of the EU and constitute common ground for its relations with third countries’.<sup>61</sup>

The fact that the EU only very rarely makes express reference to the missionary principle makes a strong case for the view that the principle’s impact is negligible. One should, however, be very cautious in simply dismissing the principle’s impact on this basis. Firstly, there are a considerable number of cases where the Union explicitly sets out to further its values abroad but does so without an explicit reference to the missionary principle in the TEU, and essentially, the Union applies the missionary principle in these cases. Secondly, at the time of writing the present article, the Lisbon Treaty has only been in force for about 1.5 years and this is, in any case, a very short period for the purposes of measuring the various Treaty provisions’ impact.

It follows that the present author finds that it is neither possible to establish that the missionary principle has made a real impact since the entry into force of the Lisbon Treaty nor possible to establish that the principle has not had any such impact.

### *5. The Complementarity Obligation*

Before the adoption of the Lisbon Treaty, Article 177 of the EC Treaty provided that ‘Community policy in the sphere of development cooperation . . . shall be complementary to the policies pursued by the Member States’.

It followed that, within the area of development cooperation, Member State policies took precedence over the EU’s policy, at least in theory. In practice, however, it is not clear whether this complementarity requirement has had any real impact.

Following the entry into force of the Lisbon Treaty, Article 208(1) TFEU now provides that ‘[t]he Union’s development cooperation policy and that of the Member States complement and reinforce each other’.

It follows that the Union’s and the Member States’ development cooperation policies are now mutually complementary, meaning that neither takes precedence over the other. Arguably, rather than constituting a substantive change, this merely codifies the practice followed prior to Lisbon.

<sup>61</sup> ‘European Parliament resolution of 20 May 2010 on religious freedom in Pakistan’, OJEU C161 E/147 (2011), para. A.

### 6. *Humanitarian Aid*

For many years, the EU has provided humanitarian aid (emergency relief) to third countries on the basis of Regulation 1257/96.<sup>62</sup> From a purely legal perspective, this regulation has been criticized in two respects.

First, it has been argued that the regulation cannot form the legal basis for providing humanitarian aid to countries that do not qualify as developing countries since it has been adopted on the basis of Article 179 of the EC Treaty concerning development assistance.<sup>63</sup> The argument goes that Article 179 of the EC Treaty only empowered the Union to adopt legislation aimed at helping developing countries. Irrespective of this, the regulation has also been used to provide humanitarian aid to countries that cannot be classified as developing countries.<sup>64</sup>

Second, it has been argued that Article 179 of the EC Treaty simply did not provide the required legal foundation for adopting measures in the field of humanitarian aid.<sup>65</sup> According to this argument, the regulation is *ultra vires*, meaning that it cannot form any basis for providing humanitarian aid.

With the Lisbon Treaty, the EU in Article 214 TFEU has been given explicit powers in the field of humanitarian aid. And the provision refers to ‘third countries’, thus encompassing both developing countries and countries that do not fall into the developing country category. This does not remedy the problems inherent in Regulation 1257/96, but it does mean that in the future, new Union legislation on humanitarian aid will not be met with the same legal criticism.

## IV Evaluating the Changes

The Lisbon Treaty has brought about a considerable number of changes to the EU’s legal foundations. Some of the most significant of these changes are to be found in the area of the EU’s external relations. *A priori*, one would therefore

<sup>62</sup> ‘Council Regulation No. 1257/96 of 20 June 1996 concerning humanitarian aid’, OJEC L163/1 (1996) (amended by Regulation No. 1882/2003 of the European Parliament and of the Council of 29 Sep. 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees that assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Art 251 of the EC Treaty, OJEU L284/1 (2003)).

<sup>63</sup> Cf. M. Broberg, ‘Undue Assistance? An Analysis of the Legal Basis of Regulation 1257/96 Concerning Humanitarian Aid’, *European Law Review* 34, no. 5 (2009): 769–778.

<sup>64</sup> Most recently, the European Union has provided EUR 10,000,000 in humanitarian assistance to Japan, cf. ECHO/JPN/BUD/2011/01000, <[http://ec.europa.eu/echo/files/funding/decisions/2011/japan\\_01000\\_en.pdf](http://ec.europa.eu/echo/files/funding/decisions/2011/japan_01000_en.pdf)>, 5 Aug. 2011.

<sup>65</sup> Cf. A. Dashwood, ‘External Relations Provisions of the Amsterdam Treaty’, in *Legal Issues of the Amsterdam Treaty*, ed. D. O’Keeffe & P. Twomey (Oxford: Hart Publishing, 1999), 201–224, at 223.

expect that the Lisbon Treaty has also led to appreciable changes with regard to the regulation of the Union's development cooperation policy. However, a very considerable part of those changes concerns the Union's *institutional structure* in the field of external relations, not the substance of the Union's development cooperation policy, which is the subject of the above examination.

Whereas the Lisbon Treaty has certainly brought about changes to the regulation of the EU's development cooperation policy, the majority of these changes are limited. However, there seems to be one exception to this, namely the explicit introduction of the missionary principle, combined with the strengthening of the principle of coherence.

It is still too early to establish whether or not the missionary principle and the strengthened principle of coherence will be able to make a substantive impact on the EU's development cooperation policy. Indeed, even where we find that through an array of policies the Union furthers its values in the developing countries, it will still be very difficult to establish to what extent this can be attributed to the changes introduced with the Lisbon Treaty or whether the Union would have acted in precisely the same way even if these changes had not been introduced. Nonetheless, if the changes prove capable of producing such substantive impact, it would seem likely that, together, they may have consequences in at least the three following respects:

First, the very fact that the Treaties now explicitly oblige the EU to promote its values in the wider world, together with the strengthening of the coherence principle, arguably entails that the Union has less leeway when framing its external policies, including its development policy. It simply means that today, the Union is under a formal obligation to frame these policies in such a way that they will further its values. This does not mean that the Union cannot abandon some of those measures that it applies today in order to further its values. For instance, it must be possible for the Union to give up its GSP+ scheme without being obliged to replace it by some other value-promoting arrangement – provided that, viewed as a whole, the Union's development cooperation policy continues to further these values actively and to an appreciable extent.

Second, prior to the entry into force of the Lisbon Treaty, not all of the EC Treaty's legal bases for entering into international agreements with developing countries necessarily also allowed the EU to actively further its own values by, for instance, introducing human rights clauses into these agreements.<sup>66</sup> In contrast, I would argue that today, the missionary principle and the coherence principle in combination must mean that the Union is now obliged to further democracy whenever it enters into new international agreements.

Third, there are reasons to expect that the explicit introduction of the missionary principle and the strengthening of the coherence principle will

<sup>66</sup> See in this respect Case C-268/94, *Portugal v. Council (India Agreement)* [1996], ECR I-6177.

increase awareness of European values in EU institutions and Member State administrations, thus giving these values a more prominent position on the agenda whenever new policies and new measures are negotiated.

Of the three points listed above, the last one may well turn out to be the most important in practice.

Two practical examples may illustrate the wide array of situations where the Lisbon changes could have practical effect. The first of such examples concerns the EU's handling of Uganda's present persecution of homosexuals. This persecution very clearly runs counter to some of the most basic human rights and so, arguably, the Union may (and should) use its full array of policies vis-à-vis Uganda to try to stop the persecution.

Another practical example would seem to be the EU's fisheries policy, wherein until now, the Union has been active in enabling the European fishing fleet to (almost literally) deplete important fishing resources off the coast of Africa. This has had wide-ranging adverse consequences not only on the aquatic environment but also on the livelihood of the people living in the various countries. Hence, if the Union were to pay due heed to the Lisbon Treaty changes, we may expect a substantive policy change in this respect.

## *AIMS*

The aim of the *Review* is to consider the external posture of the European Union in its relations with the rest of the world. Therefore the *Review* will focus on the political, legal and economic aspects of the Union's external relations. The *Review* will function as an interdisciplinary medium for the understanding and analysis of foreign affairs issues which are of relevance to the European Union and its Member States on the one hand and its international partners on the other. The *Review* will aim at meeting the needs of both the academic and the practitioner. In doing so the *Review* will provide a public forum for the discussion and development of European external policy interests and strategies, addressing issues from the points of view of political science and policy-making, law or economics. These issues should be discussed by authors drawn from around the world while maintaining a European focus.

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The editors will consider for publication unsolicited manuscripts in English as well as commissioned articles. Authors should ensure that their contributions will be apparent also to readers outside their specific expertise. Articles may deal with general policy questions as well as with more specialized topics. Articles will be subjected to a review procedure, and manuscripts will be edited, if necessary, to improve the effectiveness of communication. It is intended to establish and maintain a high standard in order to attain international recognition.

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