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FRAMEWORK FOR ECONOMIC DEVELOPMENT IN EU EXTERNAL RELATIONS

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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Framework for Economic Development in EU External Relations

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Abstract

This Working Paper is a collection of contributions presented during the Workshop "Framework for Economic Development in EU External Relations on 22nd and 23rd January 2010. The contributions explore various facets of what is known as economic development and what with time has incorporated many new aspects and developed links with other policy fields. Starting off with the traditional realm of the development policies – trade – the paper shifts to explore how the solely economic notion of development has been enhanced through the introduction of the concept of sustainable development, and how this concept was integrated into two policy areas – that of migration and human rights. Each of the contributors provides an in-depth analysis of a respective facet which build up a very complex picture of what economic development in EU external relations has become.

Keywords

External relations - development - economic development - trade – preferential rules of origin – partnership agreements – Free Trade Agreements – harmonisation - competition policy – CARIFORUM - sustainable development - MERCOSUR – migration – mobility – migration management – EU-MENA – Global Approach to Migration - human rights - human rights based approach to development

Acknowledgements

It has become a tradition that EUI researchers run a forum, known under the name RELEX Working Group. Every year it organizes (in addition to regular meetings) a workshop dedicated to issues remaining at the heart of the academic debate in a given year. The 22-23 January 2010 Workshop followed the launching by the RSCAS of the 2009 European Development Report (October 2009) and the reinvigorated debate on migration issues connected with the December 2009 Stockholm Program. The guiding principle of the 2010 Workshop was to maintain a bird's eye view on the debates on European development policy. Such approach enabled us to reconcile scattered voices and to propose a focused analysis. Endorsing the interdisciplinary standpoint allowed us to gather lawyers, political scientists, and economists to whom we owe the excellence of the presented papers.

This collection, divided into four sections, focuses on various aspects of development policy and intersections they make with other policy fields. Unfortunately, not all contributions found their way to this volume. We would like to take this opportunity and, nevertheless, acknowledge their value in the general scheme of the workshop.

We are hugely indebted to Pascal Vennesson (RSCAS) for his fascinating discussion on the effects of insecurity on development; effects which, against frequent claims, do not necessarily have to be negative. We would also like to thank Giorgia Giovannetti (RSCAS and University of Florence) and Marco Sanfilippo (University of Florence) for illuminating the content and findings of the 2009 European Development Report. Further, we would like to express our gratitude to Professor Alessandra Venturini (University of Florence) for bringing the voice of the world of economics in the debate. Finally, the great thanks goes to Maurizio Carbone of the University of Glasgow for an amazing performance as a discussant and 'stapling' together various aspects of development policy through the application of the notion of coherence.

Lastly, and by no means less importantly, we would like to express our gratitude to Professor Marise Cremona, for her indispensible support throughout the Workshop and the preparation of this edited collection.

Karolina Podstawa and Laura Puccio
RELEX WG Coordinators 2009/2010

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ECONOMIC DEVELOPMENT IN EU EXTERNAL RELATIONS

Introduction

Marise Cremona, Karolina Podstawa, Laura Puccio

When in the 1960s the World Bank drafted its development policy it reflected the then widespread belief that the term "development" represents a state's purely economic, state-driven and state-owned capacity building. Since that time, the recognition that development is a complex interaction of societal and economic variables has resulted in a greater emphasis on institution–building, human capital training, the importance of civil society, and the creation of rules and principles governing the interaction between institutions at different levels within the state – the rule of law, democracy and human rights have come to be regarded as indispensable for development. The need for a stable, secure environment in order to achieve these goals has led to theories of human security and increased emphasis on the nexus between security and development.

The need for a holistic approach towards development has also been acknowledged by the European Union. Its development policy, initially limited to aid and trade, has expanded into institutional-building, tackling the security-development nexus, migration and development, and dialogue on how to develop market regulation (including competition law and environment law) to promote sustainable development. Moreover, the EU is reconsidering the use of some trade instruments (such as rules of origin) with respect to developing countries, trying to devise more development-friendly rules. Three main factors contribute to this holistic approach to development:

First is the Union's emphasis on policy coherence. The need to take into account the development effects of different policies has been affirmed in various institutional communications on Policy Coherence for Development since 2005, as well as in the European Consensus on Development. It is enshrined in Article 208 (1) TFEU (formerly Article 178 TEC) , which requires the Union to take account of development cooperation objectives in its other policies. The general objectives of all Union external action under Article 21(2) TEU, which are also to be taken into account in the external aspects of the EU's other policies, include the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty,. However, the question remains whether the use of development policy to foster other external or internal policy objectives, including migration and security, is more a matter of subordination than synergy. The shift in EU rhetoric is obviously important, but we will need to look critically at practice over time in order to assess the extent to which development objectives have actually been furthered.

Second is the desire of the EU to export its own normative model of economic, social and political development (be it in competition law, environment policy or human rights and institutions) and to present itself as a reference point for developing countries in the promotion of growth and sustainable development.

Third, the growing interdependence of markets suggests a need for more dialogue on various issues (competition law, monetary policy, environmental policies).

However, doubts are often expressed as to the actual compatibility of those policies, their coherence, and finally how effective the EU is in promoting them.

The following working papers are the revised versions of papers presented during the EUI RELEX Working Group workshop "The Framework for Economic Development in EU External Policy". The papers propose the analysis of practical examples of the holistic ambitions of EU policy in relation to developing countries. The ultimate purpose is to determine the ways in which the EU has tried to create coherence among different policies, as in the cases of the development-security nexus and the migration-development nexus, as well as the EU's reconsideration of the trade and development nexus in recent years. The working paper as a whole focuses on the recent evolution of the EU's relations

with developing countries, the limits, primary concerns, and the manner in which development-friendly rules in such areas as migration or trade policy have been created. It will also take into consideration ways in which the EU exports its model of development, how it includes institutional-building and specific regulatory models in its policy initiatives.

The first two papers by Laura Puccio and Marco Botta deal with economic policy aspects of development. While Puccio focuses on traditional external relations instruments of the EU - trade policy instruments such as free trade agreements - the second paper opens the discussion on the export by the EU of a normative model of rules regulating domestic markets. The case study discussed is that of competition law.

The EU has built up its external relations with developing countries through the conclusion of trade agreements. The multiplication of free trade agreements (FTAs) and the resulting systemic issues such as market fragmentation and preference erosion has partly shifted the interest from tariffs to other regulatory issues. In this context, Puccio discusses the role of preferential rules of origin protocols and different strategies used by the EU to reform these technical trade rules in its external relations with its various trading partners. While the EU has included the Euro-Mediterranean countries in a process of substantial harmonisation of rules of origin, leading to the formation of a Pan-Euro-Mediterranean Origin System, it has maintained a rigorous policy of differentiation with other developing partners such as the African, Caribbean and Pacific (ACP) parties to the Cotonou Convention. The paper shows that the need for differentiation can uncover the two main limits of regional harmonisation of rules of origin. First of all, regional harmonisation did not lead to less restrictive rules of origin, and developing ACP countries facing difficulties in complying with the rules requested more liberal rules. Rules of origin in that context become a new instrument of differential treatment answering to the claims of preference erosion and low utilisation of preferential agreements by ACP countries. However, the paper shows that development friendly rules of origin were granted only in few selected areas, thereby failing to promote diversification of trade. The second limit of regional harmonisation is that without cumulation rules between the main trading partners of the developing country, the "Hub&Spoke" effect will persist. Puccio points to the example of Mexico whose main trade relations persist to be with the US even after concluding trade agreements with the EU and Japan. The significant vertical integration within NAFTA and the potential difficulty faced by Mexican companies in complying both with NAFTA and with EU-Mexico FTA rules of origin regimes was initially reflected in the granting of transitional rules of origin to facilitate Mexican exports in some sectors but this did not provide a sustainable solution.

In the second paper, Marco Botta addresses the question of the EU as a model for transition and emerging countries in drafting the rules and institution of their competition laws. Competition law is taken as an example of the new comprehensive approach to development, as it starts from the position that in order to create growing economies it is not sufficient to build infrastructure and an industrial sector; market institutions are also needed. Competition law is a fundamental market institution in so far as it provides the necessary access to markets for new entrants, thereby promoting lower prices for consumers and creating incentives for higher productivity and competitiveness. The paper starts by an overview of competition law clauses in some EU external relations agreements, in particular with members of the Stabilization and Association Agreements and the European Neighbourhood Policy. It sees how far incentives to properly implement competition laws change when there is a prospective of enlargement, and, therefore, when the adoption of the *'acquis communautaire'* will be compulsory, compared with the position where no accession to the EU is foreseen. However, the main focus of the paper is not on countries bound by the EU through an international agreement but on two Latin American emerging states, Brazil and Argentina. The lack of the "carrot" (such as enlargement or closer economic relations) for the adoption of the EU competition law model was the criterion for the choice of the two case studies. The differentiation between the two Argentinean and Brazilian models demonstrates also the limits to the EU model transplantation into an emerging country. Indeed, the paper shows how the Brazilian unorthodox way of implementing competition laws so as to adapt the model to the Brazilian political and legal cultural environment has been more successful than the Argentinean application *à la lettre* of the European model.

The third and fourth papers continue to examine a broader conception of economic development. They focus on the issue of sustainable development analysed both within the framework of the recent Economic Partnership Agreement (EPA) of the EU with the CARIFORUM States as well as in the external relations between the EU and MERCOSUR countries, where no formal free trade agreement has as yet been signed.

Ilze Dubava's contribution turns to the issue of what so-called 'WTO++' FTAs (i.e. FTAs designed not only to meet the WTO threshold for an FTA under Article XXIV GATT and Article V GATS, but which also include commitments on investment, intellectual property, and other regulatory policies) add to the concept of comprehensive agreements by examining how the CARIFORUM EPA regulates foreign direct investment (FDI) so as to foster sustainable development, understood broadly as the challenges brought by FDI to environmental and social local development. The paper investigates the legal provisions introduced in the new generation of EU FTAs and compares them to the definitions, objectives and principles present in public international law as well as legal provisions included in other international agreements and bilateral investment treaties (BITs). The author assesses positively the improvements that the CARIFORUM EPA brings to the balancing of economic and sustainable development concerns and sees the new legal provisions introduced both with respect to corporate social responsibility as well as the sustainable development related provisions within the investments chapter of the agreement as going beyond the new generation of international investment agreements and paving the way for new developments in the international legal framework for investments.

Fabiano De Andrade Correa also analyses sustainable development issues but takes both a step back and a step forward with respect to Ilze Dubava's paper which focused on the specific relation between sustainable development and foreign direct investment within an international agreement concluded by the EU. He takes a step back in order to give a broader overview of the role of regional integration in fostering sustainable development while at the same time analysing the EU both as a normative model and as a global advocate of sustainable development in its external relations. The paper uses the example of the EU, in both its internal and external policy, to show how regional integration can advance the sustainable development concept elaborated in international law. For the analysis of the role of the EU as a global advocate of sustainable development, the author takes the example of EU-MERCOSUR relations. The paper analyses a variety of instruments used by the EU in its relations with a group of partners not bound by partnership agreements. In particular, it looks at the Inter-Regional Framework Cooperation Agreement (IFCA), trade and technical and scientific cooperation, as well as political dialogue frameworks and political declarations. The paper concludes that the definition of sustainable development in the EU remains quite broad and close to the definition developed in public international law. The challenge both in internal policy and external relations is presented by the potential for conflict with other political interests and how they translate into the instruments used by the EU to export the concept of sustainable development.

The fifth and sixth papers in this collected working paper concern the nexus between migration and development, exploring how efficient the EU has been in its attempt to approach migration not only from a perspective of internal security but also from a development perspective.

In her contribution, Janine Silga traces the evolution of the nexus between migration and development. In particular, she looks at the political documents, communications and Council Conclusions so as to highlight an evolution in the conception of the linkages between migration and development in the origin country. At first, we see a focus on migration as an internal security threat, with development policy helping to curb migration pressures by promoting the development of origin countries (the 'root causes' approach); i.e. seeing the absence of local development as the main cause of migration flows and therefore development policy as an instrument to counter migration. The change in perspective comes from considering the contribution of migration to development in the origin country, i.e. how migration can become instrumental to local development in the origin country ('the co-development' approach). The objective is to reinforce the synergies between development and migration policy, in the context of increased emphasis on coherence in the policies of the Union. However, as Janine Silga emphasises in her conclusion, the political discourse still lacks implementation in the actual practice of migration management. The development approach to migration might have concrete policy tools in

development policy but still lacks an implementation in the legal framework shaping the internal migration policies of the EU and the Member States.

The paper by Tamirace Fakhoury focuses on the global approach to migration and its implementation in relations between the EU and the MENA countries. This contribution attempts to assess how effective the EU has been in transposing the political discourse of the global approach to migration (GAM) into actual policy changes. As Silga has also noted, the GAM's political discourse has shifted from a security-centred approach to a more balanced approach to migration. The GAM is the policy framework encompassing three pillars: management of legal migration, the fight against irregular immigration and the creation of positive synergies between migration and development. The author emphasises that inasmuch as the GAM functions as a very broad political discourse umbrella for the whole migration policy of the EU, it fails to take into account thematic and geographic specificities. The author looks at the flaws of the GAM approach from a political discourse point of view as well as in the instruments and methodology used to formulate and implement it.

The last but not the least important topic addressed in these papers is the approach of the EU to promoting human rights in its external relations. The traditional insertion of human rights in development-oriented actions of the EU had been through the use of conditionality, mirroring the idea that human rights could be introduced into a political and social context without local population participation. The recent evolution has been toward a more participatory approach to the promotion of human rights. Karolina Podstawa in her contribution, instead of focusing on the traditional conditionality issue, looks at this new conception of the development and human rights nexus and its integration into EU development policies. To do this, the author reviews the role of the UN Human Rights Based Approach for Development (HRBAD) in shaping the new methodological framework to approach the development - human rights nexus. She then links the HRBAD to EU policy and practice with respect to human rights and development aid. More precisely, the paper examines European Commission policy documents as well as the EU Treaties to identify the basis for the development - human rights nexus and how this reflects the policy frameworks and objectives of the UN HRBAD approach before looking at the practice to see whether the political discourse is matched in the implementation of EU development policy. The paper is critical of the absence of clear responsibility frameworks affecting the members of development community in both the theoretical design of the UN HRBAD and in the EU approach. Finally the paper concludes that a great deal has still to be done really to implement in EU development policy the shift from a conditionality approach to local ownership of development projects and a more participatory promotion of human rights.

As this brief description of the contributions to the collective Working Paper demonstrates, the focus of the papers, and of the EUI RELEX Working Group Workshop where they were first presented, was economic development, and it is against the objectives of economic development that other EU policies and objectives need to be balanced. Despite the efforts undertaken on the international level over the past twenty years, development practice has largely focused on economic improvement of states and their citizens rather than on a contribution to their wellbeing in a more holistic sense. And indeed, this is reflected by the European Union which, bound by international law and its evolution and with the ambition of being a role model, draws the link between development and other policies. Article 208(1) TFEU mandates a double-sided view of coherence: on the one hand (as Article 178 EC provided before) development objectives are to be taken into account by the EU in implementing its other policies; on the other hand, development cooperation is to be 'conducted in the framework' of the Union's general external principles and objectives. These principles and objectives include the promotion of human rights, but they also include the interests and security of the Union. Interestingly, though perhaps not unpredictably, the link is predominantly present in the policy discourse and not that much reflected in the instruments adopted; nor can we identify a coherent approach to all the policies discussed. In particular, the shift from using development policy as instrumental for other EU objectives (trade and investment promotion, to counter migration flows, for example) to a fully-fledged reinterpretation of other EU objectives in light of development concerns is yet to be fully undertaken. On the other hand, it cannot be claimed that the EU has not progressed towards its stated objectives – the contributions to this volume show that it is highly aware of the complex dependencies

between various policies. It recognises a symbiotic reliance between different policy branches (migration-development; trade-development; human rights-development etc), yet it seems that it is constrained by the general legal and operative framework of development policy *sensu largo* and has so far failed to find the right instruments to achieve its goals. We will be following closely the steps the European Union will take under the Treaty of Lisbon.

The conclusions that emerged during the workshop were reflected in the intervention of Maurizio Carbone, as an invited discussant from the University of Glasgow. We particularly want to thank him for his participation in the workshop and for the very valuable comments he gave to the contributors to this working paper.

ECONOMIC ASPECTS OF DEVELOPMENT

EU Preferential Rules of Origin Regimes in FTAs with Developing Countries: Differential Treatment and the Limits of Regional Harmonisation

Laura Puccio

Abstract

Preferential rules of origin are the rules defining production processes as well as value-added requirements to be achieved within a Free Trade Area in order to obtain preferential treatment. The economic literature has indicated that preferential rules of origin may either distort trade flows, or, because of their technicalities and their diversity across agreements, create barriers to the preferential market access forcing many producers to forgo preferential treatment and to pay duties. In the course of the last decade the EU has engaged in a regional harmonisation scheme of its rules of origin. However, many aspects of rules of origin regimes remain tools for EU trade relations to differentiate across negotiating partners, and in particular across developing countries. This paper proposes to analyse how and why the EU decided to harmonise preferential rules of origin and highlights the difference maintained after the harmonisation will have been completed. The paper tries to clarify what are the different policies and trade strategies chosen by the EU in its trade relations with developing countries when deciding the specificities of origin protocols.

1. Introduction

The promotion of bilateral and regional trade agreements has been at the core of the European Union commercial policy since the very beginning of its integration history. Being a customs union and disposing of trade policy as the main instrument of its external policy, the EC started very quickly to enter into a variety of bilateral trade agreements. In the 1960s--1970s, the EC had a vast web of association agreements with potential candidates for accession, with the Mediterranean countries, the EFTA countries as well as with African, Caribbean and Pacific countries (ACP). The various agreements were regularly updated to enlarge the scope of cooperation as well as to facilitate trade liberalisation. Amendments to facilitate trade flows also encompassed preferential rules of origin. Preferential rules of origin are the set of product specific rules,[1] general principles[2] as well as customs procedural rules, defined in the Preferential Trade Agreement (PTA), in order to establish the criteria a good must satisfy, in order to claim the origin of one of the PTA Members and therefore receive preferential treatment. Rules of origin are established so as to ensure that only goods from a given partner country will receive preferential treatment. This practice is important in Free Trade Agreements (FTA) and Generalised System of Preferences (GSP) as the parties to the agreement have

[1] Product specific rules are the rules that for a group of products, for a particular product or for a specific type of variety of a good define the criteria to obtain the origin under a specific agreement. Product specific rules are included normally (even though not always) in the origin rules annex or protocol classifying goods and products of goods following the international classification of goods (Harmonised Commodity Description and Coding System, also called HS classification). For example, Protocol 4 to the EEA agreement will contain the preferential rules of origin for the EEA and will specify inter alia specific requirements to obtain origin for musical instruments under chapter 92 of the HS classification; another rule will apply to the products of heading 7304, 7305 and 7306 ("tubes, pipes and hollow profiles of iron (other than cast iron) or steel"); a specific rule applies for "diodes and transistors and similar semi-conductors devices except wafers not yet cut into chips" part of heading 8541 of the HS classification and so on and so forth... (this examples are taken from the EEA agreement, EEA OJ 1997 L 21/12).

[2] The general principles include the definition of which processes of production are not considered sufficient to confer origin, the definition of territory from which operations and inputs to fulfil product specific rules may be considered to confer origin (cumulation rules) and other general rules that need to be complied with in order to obtain preferential origin (such as territoriality principle, direct transportation rule...). For more extensive explanation see below.

not harmonised their external trade practices and, therefore, without rules of origin, third countries' goods could be transhipped through the least restrictive border and profit from preferential treatment (duty-free access or lower duty than those provided for under Most-Favoured-Nation concessions) within the preferential area. This circumvention of customs duties is called by economists 'trade deflection'.[3] Rules of origin avoid such circumvention by defining the production processes or the value added which have to take place within the territory of a PTA Member in order to qualify for preferential treatment.

However, rules of origin tend to be extremely complicated. With the proliferation of FTAs using different rules of origin, these "neutral" customs rules end up fragmenting the markets and therefore not allowing producers to export duty-free under different trade agreements with the same input mix.[4] Acknowledging the difficulties experienced by companies in coping with the different origin protocols and the resulting low utilisation rates of preferential agreements, the EC started harmonising substantially rules of origin protocols in its Association Agreements with other European countries (the EFTA countries, the CEEC), taking the origin protocol annexed to the European Economic Area (EEA) agreement (1994) as a model, and thus creating the Pan-European System of Origin.[5] In 2003 the Pan-European system was extended to the Mediterranean Countries, participants to the Euro-Mediterranean Partnership (resulting from the Barcelona Process).[6] The Commission recently proposed also to replace all the harmonised protocols of the Pan-Euro-Mediterranean origin system by a single Convention.[7] The participants in the European Union's Stabilisation and Association Process would be included in the Convention.[8]

The Pan-European System provides a group of agreements[9] with almost identical set of rules and its harmonised origin protocols served as a reference for the amendments of all other rules of origin

[3] T. Jakob and G. Fiebiger: 'Preferential rules of origin – a conceptual outline', in *Intereconomics - Review of European Economic Policy*, May/June 2003, 138-146.

[4] By input mix, we intend the bundling of factors of production such as materials and intermediate products used for the production of a final good.

[5] The harmonised protocols are found in the following agreements: EEA OJ 1997 L 21/12, Czech Republic OJ 1996 L 343/1, Romania OJ 1997 L 54/1, Hungary OJ 1997 L 92/1, OJ 1997 L 111/1, Estonia OJ 1997 L 111/101, Latvia OJ 1997 L 134/1, Bulgaria OJ 1997 L 134/1, Lithuania OJ 1997 L 136/1, Slovakia OJ 1997 L 212/1, Switzerland OJ 1997 L 195/1, Iceland OJ 1997 L 195/1, Norway OJ 1997 L 195/201, Slovenia OJ 1999 L 51/3, Turkey on industrial goods: OJ 1999 L 212/21, Turkey on agricultural goods: Decision No 3/2006 of the EC-Turkey Association Council, of 19 December 2006, amending Protocol 3 to Decision No1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products, CE-TR 108/05, OJ 2006 L 110/1.

[6] Algeria OJ 2007 L 297, Tunisia OJ 2006 L 260, Morocco OJ 2005 L 336, Israel OJ 2006 L 20, Egypt OJ 2006 L 73, Jordan OJ 2006 L 209, Lebanon OJ 2006 L 143, it will also apply to the EC-PLO agreement following Decision 1/2009 of the EC-PLO Joint Committee of 24 June 2009 amending Protocol 3 to the Euro-Mediterranean Interim Association Agreement concerning the definition of the concept of originating products and methods of administrative cooperation OJ 2009 L 298, and should apply to the still under negotiation agreement with Syria.

[7] European Convention, 21 April 2010, Proposal for a Council Decision on the Signature of the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, COM(2010) 168 final; European Commission, 21 April 2010, Proposal for a Council Decision on the Conclusion of the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, COM(2010) 172 final.

[8] For the moment the Stabilization and Association Agreements provide for bilateral cumulation with the EU and a process has been started to establish a diagonal cumulation area including the EU, Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey (*see*, Commission notice, 2010 OJ C 225). The Single Convention would however extend the Pan-Euro-Mediterranean Cumulation to the participants in the European Union's Stabilization and Association Process (*see*, Article 1(3) of the Commission proposal, supra note 7).

[9] EEA OJ 2005 L 321, Switzerland OJ 2006 L 45, Iceland OJ 2006 L 131, Norway OJ 2006 L 117, Faroe Islands OJ 2006 L 110, Turkey on industrial goods: OJ 1999 L212/21, Turkey on agricultural goods: Decision No 3/2006 of the EC-Turkey Association Council, of 19 December 2006, amending Protocol 3 to Decision No1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products, CE-TR 108/05, Algeria OJ 2007 L 297, Tunisia OJ 2006 L 260, Morocco OJ 2005 L 336, Israel OJ 2006 L 20, Egypt OJ 2006 L 73, Jordan OJ 2006 L 209, Lebanon OJ 2006 L 143, it will also apply to the EC-PLO agreement following Decision 1/2009 of the EC-PLO Joint Committee of June 24, 2009 amending Protocol 3 to the Euro-Mediterranean Interim Association Agreement concerning the definition of

protocols, for the stipulation of new agreements, such as those with Mexico and Chile, as well as for the negotiations of future agreements (as the EU-South Korea FTA, in force from 2011, and the still ongoing negotiations with MERCOSUR). However, major differences were still maintained in comparison with these other agreements with regard to some product-specific rules and especially to accumulation (or cumulation) rules.[10] In the view of the above, this paper will try to answer the following questions: *What were the reasons for harmonisation of rules of origin in European Free Trade Agreements? Why was the Pan-European system extended to Mediterranean countries but not to other partners? What were the differences among the various origin protocols? What were the objectives of these differences? And finally what can we learn from the European experience in harmonising rules of origin?*

The main reason to modify cumulation rules and harmonise the product specific rules in Europe was, first of all, the Hub & Spokes effect created by the multiplication of FTAs in Europe.[11] The Hub & Spokes theory depicts a situation, in which a Hub country, at the centre of a web of bilateral trade agreements with many different and normally smaller countries (the Spokes), attracts investments at the detriment of the Spokes. The Hub & Spokes phenomenon has two main reasons: firstly, companies obtaining the origin of the Hub would be allowed to access all the Spokes market whereas they were not able do it (or it was deemed more difficult), when obtaining the origin of a Spoke; secondly the Hub market being bigger (often more industrialised than the Spokes), makes it easier for companies to get intermediate inputs necessary to meet the too strict product-specific origin rules.[12]

The pan-European system was, therefore, created to facilitate trade among the different partners[13] but the system maintained stringent requirements, obliging to source inputs from within the pan-European area, and was therefore not easing the conditions to source inputs from third countries. The rules for ACP were originally also designed to ensure that products were entirely originating from ACP countries, the intention was to attract industries that would delocalise the entire production process and avoid attracting only investments of low value-added at the assembly stage of production.[14] However, requirements were so stringent that most products could not obtain preferential treatment without asking for derogations from the rules.[15] The new rules for Economic Partnership Agreement[16]

(Contd.)

the concept of originating products and methods of administrative cooperation OJ 2009 L 298, and should apply to the still under negotiation agreement with Syria.

[10] Cumulation rules will be more carefully explained later in this paper, suffices to know that these are rules that clarify the concept of "originating materials" for the purpose of defining processes and value added within the FTA.

[11] J. Herin, 'Rules of origin and differences between tariff levels in EFTA and in the EC', (February 1986) Occasional Paper No. 13, Geneva: EFTA Secretariat Economic Affairs Department.

[12] *Idem*.

[13] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 19.

[14] N. A. Zaimis, *EC Rules of Origin*, (Chancery Law Publishing, 1992).

[15] On difficulties to comply with fisheries requirements: M. Carbone, 'Beyond purely commercial interests – The EU's fisheries policy and sustainable development in Africa', in G. Faber and J. Orbie (eds.), *Beyond Market Access for Economic Development – EU-Africa relations in transitions*, (Routledge, 2009), 336; J. H. J. Bourgeois, 'Rules of Origin – An Introduction', in E. Vermulst, P. Waer, J. Bourgeois (eds.), *Rules of Origin in International Trade – A Comparative Study*, (The University of Michigan Press, 1994), 2-3; C. Stevens and J. Kennan, 'Making Trade Preferences more effective', in B. Hoekman and Ç. Özden, *Trade Preferences and Differential Treatment of Developing Countries*, (Edward Elgar Publishing, 2006), 318.

On textile rules of origin: OECD, *Trade and Structural Adjustment – Embracing Globalisation*, (2005); L. Amedée Darga, 'The Impact of Preferential Rules of Origin on the Development of the Textile and Clothing Sectors in SADC', in R. Grynberg (ed.), *Rules of origin: Textile and Clothing Sector*, (Cameron May, 2004); C. Stevens and J. Kennan, 'Making Trade Preferences more effective', *op cit.*

[16] Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the Arrangements for Products Originating in certain States which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in Agreements establishing or leading to the Establishment of Economic Partnership Agreements, OJ 2007 L 348.

therefore depart slightly from the original logic and, as opposed to the Pan-European system, have been eased, at least in two sectors (fisheries and textile) so as to permit more sourcing of inputs from third countries.

This working paper argues that the harmonisation of rules of origin in EU FTA was not complete for two main reasons: (1) the ACP countries needed easier rules of origin to encourage their economic development and were more interested in this differential treatment than in receiving the same treatment as Mediterranean countries under the Pan-European System of Cumulation, (2) the EU, while maintaining differences in the use of cumulation rules and in the drafting of some particular product-specific rules, establishes a differentiation among its trade partners and a pyramid of preferences ranking the various preferential agreements. Furthermore the example of Mexico, in particular, shows how in reality for some of the partners the eventuality of a total harmonisation of rules of origin at the EU level would most probably not bring the desired increase in preferential exports, especially because it is difficult to comply both with the North American Free Trade Area (NAFTA) rules and with the EC rules of origin; the EC rules of origin are not compatible with the high integration of some Mexican industries with the American counterparts so as to satisfy NAFTA rules of origin.

This paper will, therefore, firstly present the creation of the Pan-European Rules of Origin and its enlargement to the Mediterranean area. Secondly, it will focus on the use of the Pan-European Rules of Origin as a model for other agreements and will highlight the differences maintained in the relations with various trade partners of the EU. Finally, the paper concludes more generally on the harmonisation of European preferential rules of origin system and considers the lessons to derive from the European experience with regard to the debate on multilateral harmonisation of preferential rules of origin within the WTO.

2. The Gradual Reform of European Rules of Origin:

2.1. The Regional Harmonisation Process and the Creation of the Pan-European System of Rules of Origin

In Europe, the European Community had established in 1972 and 1973 a bilateral relationship with the EFTA countries[17] each of them having different origin protocols.[18] After the end of the Cold War, the reopening towards the Central and Eastern European countries (the CEEC) was done through the conclusion of bilateral agreements, known as Europe Agreements.[19] These bilateral agreements provided only for bilateral cumulation rules between the EC and an FTA partner country.[20] The bilateral cumulation rules were the main reason behind the Hub&Spoke effect of EU early agreements.[21] Indeed, in smaller countries, such as the EFTA countries and the CEEC, industries have

[17] Austria, OJ 1972 L 300/2; Finland, OJ 1973 L 328/2; Iceland, OJ 1972 L 301/2; Norway, OJ 1973 L 171/2; Sweden, OJ 1972 L 300/97; Switzerland, OJ 1972 L 300/189.

[18] F. Graafsma & B. Driessen, 'EC's Wonderland: an overview of the pan-european harmonised origin protocols', *op cit*, 157-193.

[19] Czech Republic, OJ 1994 L 360; Hungary, OJ 1993 L 347; Poland, OJ 1993 L 348; Slovak Republic, OJ 1994 L 359.

[20] J. Herin, 'Rules of origin and differences between tariff levels in EFTA and in the EC', *op cit*, 'Modification of rules of origin in Europe: new cumulation rules', (1999) 3 *International Trade Law & Regulation* 5, 66-68; H-J Priess and R Pethke, 'The Pan-European Rules of Origin, the beginning of a new era of trade', *op cit*, 773-809; P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', (1994) *Journal of World Trade*, 65-82.

[21] J. Herin, 'Rules of origin and differences between tariff levels in EFTA and in the EC', *op cit.*

to rely on imported inputs and need to export so as to exploit economies of scale.[22] Because of the bilateral cumulation rule, the EFTA countries were obliged to rely on EC inputs so as to sell to the Community market. They could, therefore, not import inputs from other EFTA or CEEC, as those inputs were considered as non-originating under the bilateral agreement with the EC. The bilateral cumulation rule was giving producers an incentive to produce from the EC, where they could instead source inputs from all the EFTA and the CEEC.[23]

Herin[24] analysed in 1986 the effects that such arrangement was creating for the EFTA countries. He emphasised that complying with bilateral cumulation rules of origin was actually harming the EFTA countries. 25% of trade between the EFTA countries and the EC had to pay MFN duties because of non-compliance with the rules of origin.[25] The bilateral cumulation rules were indeed creating Hub & Spoke effects, such that producers were better off producing in the EC where they could source inputs from all the EFTA countries and reach a bigger consumer market.[26] Moreover, the cost of complying with rules of origin was reported to be well between 3 and 5% of the value of the goods.[27] Herin also reported that rules of origin were actually more restrictive than it would have been necessary to prevent trade deflection. Trade deflection results from differences in external tariff structure of the FTA members. However, Herin showed that the tariffs structure of the EC Common External Tariff and the tariffs applied by EFTA countries were not so dissimilar.[28] For the above-mentioned reasons, Herin proposed to modify cumulation rules, so as to reduce the Hub&Spoke effect, and to simplify or abolish certain product specific rules of origin, so as to reflect the new MFN tariff structure of the EC and EFTA countries.[29]

The issue raised by Herin's paper became an important matter in negotiations between the EFTA countries and the EC. The Copenhagen Council (21-22 June 1993) requested the Commission to study the effects of rules of origin in EU trade relations with the CEEC and EFTA countries and to submit appropriate proposals. The Commission issued a Communication on 30 November 1994 concerning the unification of rules of origin in preferential trade between the Community and the EFTA countries.[30] However, the main issue in the Communication was not that rules of origin were too restrictive toward the sourcing of third countries input. Even after Herin analysis of tariff structures, the importance of trade deflection and the desire to avoid circumvention of both tariff duties and other commercial practices (anti-dumping in particular) was still at the centre of the EU strategy.[31] Thus, the Commission paper did not put forward any proposal for revolutionary simplification or abolition of some product specific rules of origin. The paper focused instead on whether it was necessary to modify cumulation rules[32] and amend product specific rules following the EEA model so as to ensure

[22] Definition of economies of scale: When an industry is said to have increasing returns to scale, it means that an increase in production brings also about a decrease in the costs of production. In such industries, firms with larger market shares enjoy lower costs and can therefore price cheaper their goods.

[23] J. Herin, 'Rules of origin and differences between tariff levels in EFTA and in the EC', (February 1986) Occasional Paper No. 13, EFTA Secretariat Economic Affairs Department, Geneva.

[24] *Idem*.

[25] *Idem.*

[26] *Idem.*

[27] *Idem* .

[28] J. Herin, 'Rules of origin and differences between tariff levels in EFTA and in the EC', *op cit.*

[29] *Idem.*

[30] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final.

[31] *Idem*, p.7.

[32] *Idem* p.5-7.

less market fragmentation[33] and more market integration ***within*** the free trade zone.[34] The desire was to develop as much as possible the opportunities for division of labour between the EU, the EFTA and the CEEC and foster the sourcing of inputs from different partners in the free trade area so as to withstand the competition and penetration of low-cost inputs from outside Europe. We have to remember that the creation of this harmonised cumulation system in Europe takes place at the beginning of the 1990s. The Tokyo and Uruguay round had effectively reduced MFN tariffs so that the EC consumer market was starting to feel the pressure from outside competitors. Moreover in the 1980s, following the increase in East-Asian cheap imports in the EC, the EC started a series of anti-dumping procedures and modified its non-preferential rules of origin for particular products (some consumer electronic products, photocopiers, television…) so as to avoid circumvention of duties and penetration of the market by Asian firms.[35] It is in this context that harmonisation was done and therefore harmonisation did not bring about any important simplification in the substantive product specific rules so as to avoid further increase in third countries imports. If the main goal behind harmonisation was not simplification of substantive rules of origin, what was the main aim and what were the changes introduced?

2.2. The Pan-European System of Rules of Origin: Basic Framework

In 1996 and 1997, amendments to the rules of origin protocols of the EEA,[36] the Europe Agreements[37] and the EFTA countries[38] were introduced, the protocols were harmonised and the Pan-European system of cumulation established. In 1999 Slovenia[39] and Turkey entered into the Pan-European system of cumulation. In 1999 the amendments to the Turkish protocol were covering only some industrial goods[40] not part to the customs union; in 2006 the EC-Turkey Association Council included also the participation of Turkey in the Pan-European system for agricultural products.[41] In 2006 the system was also enlarged to the Faroe Islands.[42]

2.2.1 General rules

Goods are granted an originating status either when they are wholly obtained or when they have undergone sufficient working or processing according to the product specific rules listed in the origin protocol.

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[33] The Commission Communication acknowledges that the differences in the previously coexisting rules of origin systems was dividing "Europe into compartments", *idem* p.2.

[34] *Idem* p. 2-3.

[35] N. A. Zaimis, *EC Rules of Origin*, *op cit*, 113-117; F. Dehousse and P. Vincent, *Les Règles d'Origine de la Communauté Européenne*, (Bruylant Bruxelles, 1999), p. 93-97.

[36] OJ (1997) L 21/12.

[37] Czech Republic OJ (1996) L 343/1, Romania OJ (1997) L54/1, Hungary OJ (1997) 92/1, OJ (1997) L111/1, Estonia OJ (1997) L111/101, Latvia OJ (1997) L 134/1, Bulgaria OJ (1997) L 134/1, Lithuania OJ (1997) L 136/1, Slovakia OJ (1997) L212/1.

[38] Switzerland OJ (1997) L195/1, Iceland OJ (1997) L195/1, Norway OJ (1997) L195/201; even bilateral agreements with Iceland and Norway were maintained because the EEA does not cover some agricultural products.

[39] OJ (1999) L51/3.

[40] OJ (1999) L212/21.

41 Decision No 3/2006 of the EC-Turkey Association Council, of 19 December 2006, amending Protocol 3 to Decision No1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products, CE-TR 108/05.

[42] OJ (2006) L110/1.

The 'wholly obtained goods' category applies mainly to natural products from the beneficiary country and to goods made entirely from them.[43] When a good is produced with inputs from different countries, non-originating materials or components must be sufficiently processed in order to obtain origin. 'Sufficiently processed' means that goods are manufactured according to the product specific rules listed in the origin protocol. The product specific rules specify for each good, according to its chapter and/or heading of the Harmonised Commodity Description and Coding System (HS),[44] what are the processes or the local contents required to be considered as originating.

Originally, the bilateral agreements between the EC and the EFTA countries provided for a general Change of Classification rule. According to a change of classification rule, a good obtains the origin of a country, if a manufacturing process within that country is sufficient to induce a change in the positioning of the product within the HS classification in a way that is considered sufficient to call it a substantial transformation. The general rule in previous EC FTA agreements requested a change of heading, i.e. in order for a good to be originating all non-originating inputs had to be classified under a different HS heading than the heading of the final product. The product specific list presented the rules to be followed in case the change of heading was not considered sufficient in order to obtain origin. These product specific rules provided for different combinations of change of classification,[45] value content rules[46] and technical requirements.[47]

[43] Wholly obtained products are products that receive preferential treatment only if they are not imported and are 100% originating from the EU or a FTA partner country. The following is considered as wholly obtained products: (1) mineral products extracted from their soil or from the sea bed, (2) vegetable products harvested there, (3) live animals born and raised there, (4) products obtained by live animals, (5) products obtained by hunting or fishing conducted there and products from aquaculture including mariculture, where the fish is born and raised there, (6) products of sea fishing and other marine products taken from the sea outside the territorial waters by their vessels, (7) products made abroad their factory ships exclusively from products covered by point (6), (8) used articles collected there and fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste, (9) waste and scrap resulting from manufacturing operations conducted there, (10) products extracted from marine soil or subsoil outside their territorial waters provided they have sole rights to work that soil or subsoil, (11) goods produced there exclusively from products referred to in paragraph (1) and (9).

[44] The HS classify products under a 6-digit classification, ordering products in Chapters (first and second digit), Headings (third and fourth digit) and Sub-heading (fifth and sixth digit). For example: chapter 18 is the chapter for “cocoa and cocoa preparations”; within chapter 18, heading 1805 concerns “cocoa powder not containing added sugar or other sweetening matter”, while heading 1806 concerns “chocolate preparations and other preparations containing cocoa”; within heading 1806, subheading 1806 10 refers to “cocoa powder containing added sugar”, while subheading 1806 31 concerns “other preparations in blocs, slabs, or bar” different from those mentioned under subheading 1806 20...HS classification is implemented in EU law through the Combined Nomenclature, see: Commission Regulation (EU) No 861/2010 of 5 October 2010 amending Annex I to Council Regulation (EEC) No 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, [2010] OJ L 284/1.

[45] Change of classification is based on the HS Classification explained previously in footnote n°44.The change of classification requires that the final product belongs to a classification different from the inputs used in the manufacturing process. There are different types of change of classification, the most common is the change of heading, i.e. the final product is in a heading different from the heading of the inputs used in manufactures. Less common are the requirement of change of chapter and change of subheading. Example of a change of heading requirement: the rule for all heading of chapter 69 (ceramics products) requires a change of heading. Let us take for example the production of glazed ceramic paving under heading 6908, as unglazed ceramic paving are classified under a different heading (heading 6907 instead of 6908) then to obtain EU or the FTA partner’s origin it will be sufficient to import third countries unglazed ceramic paving and perform the glazing within the EC or the FTA partner’s territory. The final product will obtain origin because it will have complied with the change of heading requirement (from 6907 of unglazed ceramic paving to 6908 of glazed ceramic paving).

[46] Value added requirements in European Agreements impose a ceiling on the value of non-originating materials used in the production process. The percentage value of non-originating materials is calculated on the basis of the ex-work price, which is the price of the product at the moment it leaves the factory, accounting only for costs incurred during the manufacture of the product and is given by the sale price minus all charges incurred after the product as left factory, such as insurance, customs duties and freight costs that might be included in the sales price. For examples: musical instruments under chapter 92 obtain origin if non-originating materials do not exceed 40% of ex-work price.

[47] Technical requirement requires a specific operation to be performed within the EU or its FTA partner territory, for example for Refined Lead the rule of origin requires the manufacture by thermal refining from bullion lead. The operation of the specific process of thermal refining of the bullion lead is considered to be sufficient to obtain originating status.

The Pan-European rules give up the general Change of Heading requirement and set a specific origin requirement for each Chapter of the HS. The product-specific rules list gives both the rules for each chapter followed by exceptions for specific heading or specific products within a heading. Many chapter rules still require only a simple change of heading but many have also introduced value added requirements.[48] The EC-EFTA and EFTA-CEEC agreements contained also alternative rules of origin. [49] Some product-specific rules of origin provided for a combination of requirements to be fulfilled in order to obtain origin (for example a change of heading plus a local content requirement). However, for some products, alternative rules of origin were devised (normally local content requirement rules) that permitted products, which could not respect the combined requirements (normally a combination of change of classification and local content rule), to still qualify for origin and obtain the preferential treatment following a different rule. Obviously as the alternative rule drops one or more requirements to ask only compliance to a value added rule, it will normally require to respect a lower ceiling of non-originating materials value (i.e. achieve a higher local content percentage). This is done in order to maintain the equivalence in the restrictiveness of the two rules. However, it will still make a difference because it allows the industry to choose whether to source locally the inputs classified in the same heading as the product or to disregard the change of heading requirement and to import third-country inputs classified in the same heading of the product. The harmonisation process generalised and increased the use of alternative rules especially for chemical products.[50]

2.2.2. Flexibility introduced to the concept of 'originating materials' and 'originating products'

In order to become 'originating products' the manufacturing process must comply with product specific rules that requires some materials or processes considered as 'originating' according to the cumulation rules. Moreover, products that qualify under product specific rules must comply with the territoriality principle. We will first present the flexibility that in the course of harmonisation was introduced first for the requirements to define 'originating products' (flexibility to the territoriality principle and the '*de minimis*' or value tolerance rule) and then the different cumulation rules and how they impact the definition of 'originating materials'.

The relaxation of the Territoriality Principle

Preferential rules of origin are designed to ensure that only the products from the partner country are granted the preferential tariff, this is why European preferential rules of origin rely heavily upon the principle of territoriality. According to this principle[51] the product must fulfil the product-specific rules of origin without interruption within the territory of the beneficiary country or of the EU, i.e. if a good is exported to a third country for further processing and then re-imported into the beneficiary country and from there exported to the EC, it will automatically be considered as non-originating. The good exported will maintain origin if it can be demonstrated that either the good returned the same as it was when exported (no further processing occurred) or that it has not undergone operation beyond those necessary to ensure the preservation of the good while in a third country.[52] This principle is

[48] For example, musical instrument of chapter 92 as explained above in footnote 46.

[49] Example of an alternative rule of origin: the normal rule required for baby carriages under heading 8715 is that (a) all materials used should be classified in a heading different than heading 8715 and (b) the value of non-originating materials should not exceed 40% of the ex-work price of the product. The alternative rule drops the change of heading requirement but imposes that the value of non-originating materials should not exceed 30% of the ex-works price.

[50] S. Inama, 'Pan-European Rules of Origin and the Establishment of the Euro-Mediterranean Free Trade Zone', *op cit*, 203.

[51] Article 11 Protocol 4 of EEA, article 12 Protocol 4 of the Harmonised Protocols.

[52] F. Graafsma & B. Driessen, 'EC's Wonderland: an overview of the Pan-European harmonised origin protocols', *op cit*, 172-173.

complemented by a requirement of direct transportation according to which the good must be exported from the origin to the beneficiary country. Exceptions to the latter principle are provided for in case of transit and exposition in commercial fairs.[53]

In 1999, a new amendment to article 12 of the harmonised protocols (and article 11 of the EEA) was introduced.[54] Article 12(3) (Article 11(3) for the EEA) introduced flexibility in the territoriality principle allowing some processing abroad: the product can maintain EC or partner origin when re-imported, if the materials from the EC or the partner country have undergone processing beyond *de minimis* operation[55] in the EC or partner country before being exported for further processing. However the re-imported product must be obtained by processing the originally exported materials and the value of the processing done outside the Community or the partner country shall not go beyond 10% of the ex-work price of the final product.

Value tolerance or de minimis rule

Even if the product does not respect the rules foreseen in the product specific rules of origin list, it may still obtain preference status if the non-originating materials used are below the ceiling set by the *de minimis* clause. The *de minimis* clause was first introduced in the EC-EFTA/EEA agreement to facilitate trade. The clause allows for derogation to the rules of origin and for the use of non-originating inputs up to 10% of the ex-work price of the product.[56] This clause was not initially part of the protocols with CEEC.[57]

However, in the case of value added criteria, the *de minimis* cannot be used to source more non-originating materials than the actual ceiling of non-originating materials foreseen by a value-added rule.

Cumulation rules

The most important innovation of the Pan-European rules of origin is the modification of cumulation rules. Cumulation systems define both the geographic area from which one can source 'originating materials' and establish the way to account for 'originating materials'. There are different types of cumulation rules, differing according to the number of Members in the cumulation zone (bilateral cumulation versus multilateral cumulation, such as diagonal cumulation or full cumulation). The Members of the cumulation area gives the geographic area from which to source 'originating materials'. Accumulation systems also differ in the way of defining the origin of the final product and materials used: in partial cumulation, such as bilateral and diagonal cumulation systems, intermediate products are considered as originating materials only if they respect the product specific rules of origin, whereas in full cumulation system, as we shall see, this is not necessary as the assessment of the final product origin takes into account all materials and parts used to produce the intermediate product separately. We already discussed earlier the bilateral cumulation, which allows accumulation only between the two countries member of the bilateral free trade agreement (FTA). We will here first

[53] Article 13 and 14 of the Harmonised Protocols and article 12 and 13 of Protocol 4 of the EEA agreement.

[54] F. Graafsma & B. Driessen, 'EC's Wonderland: an overview of the Pan-European harmonised origin protocols', *op cit*, 173.

[55] *"De minimis"* operation (also referred in the protocols as to insufficient working or processing) mainly comprises simple assembly or preserving operations (the list can be found in Article 7 of the Harmonised Protocols).

[56] Article 6(2) of the Harmonised Protocols and article 5(2) of Protocol 4 of the EEA agreement.

[57] S. Inama, 'Pan-European Rules of Origin and the Establishment of the Euro-Mediterranean Free Trade Zone', in M. Maresceau and Erwan Lannon, *The EU's Enlargement and Mediterranean Strategies – A Comparative Analysis*, (Palgrave Publishers Ltd, 2001), 203.

explain in detail how the diagonal cumulation works and then explain the full cumulation granted to EEA Members and its implication for non-members.

Diagonal accumulation allows for inter-Free Trade Area Cumulation, thus bridging legally different preferential trade agreements,[58] allowing the sourcing of inputs in all the countries part to the cumulation area. The Members of the cumulation zone must have completed bilateral agreements with each other and are bound by *identical sets of rules of origin*. To define whether an input from a partner country is originating for cumulation purposes, it must qualify as such under the rules of origin foreseen in the agreement.

Cumulation rules introduce an exception to the territoriality principle. They facilitate the acquisition of origin by allowing products from different countries to be used in the production of a good, as if they were originating in the country of final production. Moreover they allow for some limited exceptions to the acquisition of origin "without interruption". Let us consider a good that is sufficiently processed in one Member of the cumulation zone and then exported for further processing in another Member of the cumulation area. If the processing in that second country does not go beyond "*de minimis"* operation, the product will still obtain originating status either from the Community or the partner country depending on which country has given the highest value added to the product.

However for diagonal cumulation, all inputs from the cumulation zone must have obtained origin according to the product-specific rules before being used for cumulation purposes in further processing. This is the main difference between diagonal and full cumulation. In full cumulation systems the partners are considered as one single territory for the purpose of origin determination. In the latter system of cumulation the product from the partner country must not have obtained origin according to the rules set in the agreement. The calculation of the origin of the final product will simply take into account all materials and operations undertaken both for the production of the final as well as of the intermediate product: it will add up all the non-originating materials and all materials originating from the cumulation area.[59]

Full cumulation was already applied in EFTA between 1960 and 1972.[60] Full cumulation allows for greater flexibility in the use of non-originating materials.[61] To make EFTA rules compatible to rules in EC-EFTA countries bilateral FTA, full cumulation was abandoned[62] and diagonal cumulation was introduced. However as the EEA proposed the introduction of full cumulation, the Swiss refusal to join the EEA[63] made the three systems (EEA, EFTA and EC-Swiss bilateral FTA) incompatible, with the following consequences: (1) for EEA countries some of the Swiss goods became classified as third countries, (2) for other EEA countries finishing production in Switzerland meant breaking the territoriality principle, (3) EEA materials could not qualify as originating for cumulation purposes under EC-Swiss FTA or EFTA convention and finally (4) the three systems were actually requiring different export documents.[64]

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[58] H.-J. Priess and R. Pethke, 'The Pan-European Rules of Origin, the beginning of a new era of trade', *op cit*, 773-809.

[59] For an example of difference between diagonal cumulation and full cumulation, see: F. Graafsma and B. Driessen, 'EC's Wonderland: an overview of the pan-European harmonised origin protocols', *op cit*, 177-179; P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', (1994) *Journal of World Trade*, 70.

[60] *Idem*, 69.

[61] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final.

[62] P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', *op cit* , 69.

[63] P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', *op cit*, 71-73.

[64] P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', *op cit*, p. 71-73.

The Pan-European system had to solve all these problems. The choice made was to use the EEA protocol as a model for all harmonised protocols. However the granting of full cumulation was limited to the EEA. As the Commission wrote in its communication, full cumulation is granted only to the EEA members to differentiate it because of the higher level of integration involved.[65] So the Pan-European system of cumulation provides actually for an asymmetric system,[66] in which non-EEA members had to recognise as originating products EEA origin obtained with full cumulation (article 2(1)(c) of the harmonised protocols), while other members to the Pan-European system had to use diagonal cumulation rules as provided for in article 3 and 4 of the harmonised protocols.

No-drawback clause

Drawback clauses foresee the refund of duties on imports used for further processing and re-exporting. Drawback clauses were inserted in the old Europe Agreements with the CEEC. This was so because the CEEC had higher tariffs rates.[67] The higher tariffs rate meant that the CEEC had a comparative disadvantage vis-à-vis the Community to attract investments. The duty-free access to third countries inputs granted by the drawback clause was thus extremely beneficial to the CEEC in order to attract FDI. Even though the Commission recognised the positive impact of the drawback clause for developing manufacturing within the CEEC,[68] the main underlying aim of the harmonisation process for the EC was to increase trade within Europe and especially to increase the local sourcing of inputs, [69] thus the harmonised protocols all contained no-drawback clauses.[70]

2.2.3. Some examples of sectoral rules

We will take few examples of sectoral product-specific rules of origin to show how these rules work and may influence industries to source inputs from within the free trade zone. These examples will also stress that the aim of harmonisation was not simplification of the substantive rules in order to make them more liberal.

Fisheries

Fishes are a part of the wholly obtained products. When a fish is caught in international waters its origin is given by the origin of the vessel. To define the origin of the vessel the Community resorted from the very start to a very long list of requirements. This was done because the EC considered that the sole requirements of registration and of sailing the flag of the country could not be sufficient, as regulations were pretty different and very relaxed in some countries[71].

[65] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final, 5.

[66] P. G. Nell, 'Rules of origin – Problems and solutions to the Swiss non-participation in the European Economic Area', *op cit*, 77.

[67] H-J Priess and R Pethke, 'The Pan-European Rules of Origin, the beginning of a new era of trade', *op cit*, 794.

[68] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final, 4.

[69] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final.

[70] Prohibition of drawback is contained in Article 15 of the Harmonised Protocols.

[71] S. Inama, *Rules of Origin in International Trade*, (Cambridge University Press, 2009), 396.

The EC origin protocols contained the following requirements:

1. Requirement of registration in the EC or the partner country
2. Requirement of sailing the flag of the EC or the partner country
3. Requirements, concerning the ownership of the vessel or corporate organisation of the company: normally the vessels should be owned at least up to the 50% threshold by nationals of the EC or of the partner country. If this is not the case, the company owning the vessel must have: its head office in the EC or the partner State and the managers, the chairman of the board of directors or of the supervisory board and the majority of the members of the boards must have the EC or the partner nationality. In the case of a partnership, at least half of the capital must belong to those States or to public bodies or nationals of that State.
4. Requirement concerning the nationality of the officers of the ship: officers must be national of the EC or of the partner States
5. Requirement concerning the nationality of the crew of the ship: 75% of the crew members must be national of the EC or the partner State

This long table of requirements was certainly made to protect as much as possible the European fishery market, by impeding vessels leased from a third party or other vessels somehow related to third parties to enjoy the benefits of the fishery sector under the FTA.

The *Faroe Case*[72] shows how difficult it may be for smaller countries to comply with the strict criteria set by the EC to determine the origin of vessels.

Sufficient working or processed operations: the case of the electronics industry

As we said earlier, sufficient working or processing operations will require the completion of certain product specific rules. In the case of machinery and electronics this is always a combination of several criteria (often a change of classification and value added).

The Pan-European system does not simplify those rules even when the MFN applied tariff is giving duty free access to that particular good. Let us take the example of diodes and transistors under the classification heading 8541, these products are normally duty free under MFN.[73] The rule for diodes and transistors under the heading 8541 is the following one: (1) the main rule provides for a change of the heading and a value added criteria such that the value of all non-originating materials does not exceed 40% of the ex-works price of the product (2) the alternative rule provides for the value of the non-originating materials not to exceed 25% of ex-works price. For economists a rule that requires 80-70% local content is definitely a restrictive rule of origin; the alternative rule in the example above basically requires a 75% local content rule.

As the product can be imported freely under MFN, why then insert a double requirement rule of origin in the FTA origin protocols? Let us take again the example of diodes and transistors under the heading 8541. Those products are important inputs for the production of other electronic goods such as integrated electronic circuits of heading 8542. The main rule of origin for integrated electronic circuits requires that (1) non-originating materials used shall not exceed 40% of the ex-work price of the product and (2) within the above-mentioned ceiling, non-originating product from heading 8541 and 8542 shall not exceed 10% of the ex-work price of the product. The alternative rule requires that non-originating material does not exceed 30% of the ex-work price of the product. In the main rule there is a restriction to the use of imported goods from the heading 8541 and 8542, among those goods there

[72] Joined cases C-153/94 and C-204/94, The Queen v. Commissioners of Customs and Excise, ex parte Faroe Seafood Co. Ltd, judgement of 14 May 1996.

[73] EC Nomenclature as revised in the Commission Regulation (EC) No 1214/2007 of September 2007, amending Annex 1 to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

are also diodes and transistors from heading 8541. The rule of origin for diodes mentioned above is restrictive in order to ensure that only originating diodes are used, when incorporated as an input in another product (for example an integrated electronic circuits). The combination of this two rules of origin (the one for integrated electronic circuits under 8542 and the one for diodes and transistors under heading 8541) can impose constraints in the use of third countries and clearly aim at ensuring that producers of final goods (in that particular example producers of integrated electronic circuits) use mainly inputs sourced within the cumulation area. This is particularly true in the context of diagonal cumulation, where every intermediate good must satisfy the origin criteria so as to qualify as originating good for further processing in a partner country.

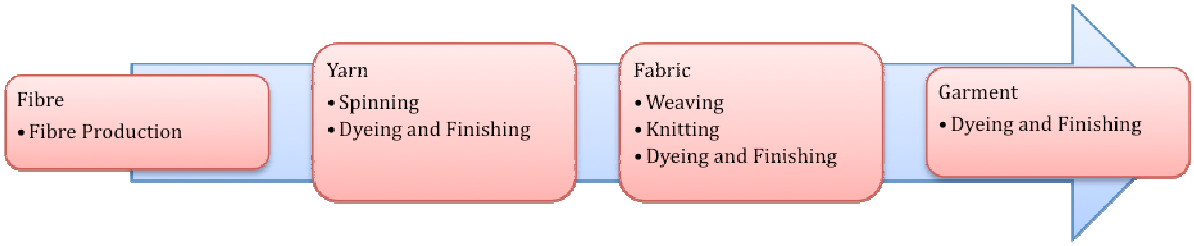
The above-mentioned example is quite specific but it would not be difficult to find other examples for other headings of electronic products and machinery. The 1994 Commission Communication concerning the unification of rules of origin in preferential trade between the Community, the Central and Eastern European Countries and the EFTA Countries was totally transparent vis-à-vis the underlying intentions of the use of diagonal cumulation and harmonisation of the preferential rules origin in European FTA. The first concern of the Commission was to promote a stronger division of labour and develop the sourcing possibilities within Europe.[74] The second concern was the rise in the South East Asian imports in the consumer electronics industry and in the automotive industry and an emerging interest in shifting sourcing of inputs from the South East Asian to European markets.[75]

Textiles

Rules of origin in the textile sector are characterised in the EU, as well as in the US, by requiring specific processes to be conducted into the country of origin. The textile and garment industry is easily divided in different production stages, this permits easily to de-localise certain processing operations. The main interest in devising rules of origin for the textile sector was to avoid big impacts from liberalisation on the profits and market shares of domestic industries.

The four main processes in the textile industry are: the preparation of fibres, the spinning of fibres into yarn, the woven of yarn into fabrics and the sewing and cutting of fabrics into garments. Rules of origin in the textile industry will require the producer to start production at a certain stage of this value chain.

Figure 1: The Textile and Apparel Industry Value Chain



[74] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final, 12-16.

[75] *Idem.*

The EU follows the so-called double transformation rule (or manufacture from yarn or fabric-forward rule). Therefore for garment to acquire origin, producers have to weave yarn into fabrics and sew fabrics.

In the textile industry, rules were already pretty similar across the agreements; the main difference was due to the introduction of the new cumulation rules, which allowed for division of labour and stages of production across the cumulation area. Cumulation rules are here very important in the relaxation of the strict rules of origin. The entire industry was not totally in favour of the cumulation changes as some countries had already an industry covering all the stages of the production processes.[76] However clothing manufacturers and finishers were particularly interested in further integration.[77]

2.2.4 Conclusion on the Pan-European harmonisation process

The Commission initiated in the 1990's a process of harmonisation of the origin protocols annexed to the FTA with EFTA and CEEC. The main goal of the process was effective institution of multilateral cumulation rules (full cumulation for EEA members and diagonal cumulation for the others) to avoid Hub&Spoke effects of the bilateral FTA and to allow more fluid and integrated commercial relations across all the European partners with whom the EU had concluded a FTA. The adoption of identical origin protocols was the condition *sine qua non* for the institution of multilateral cumulation rules. However the harmonisation did not change the level of restrictiveness of product specific rules of origin.

2.3 The "Enlargement" of the Pan-European System of Rules of Origin to the Mediterranean

The Pan-European System was meant to fully harmonise origin protocols in bilateral agreements with the CEEC as well as with the EFTA countries. Non-candidate Mediterranean Countries were at first not part to this harmonisation process. The EC did, however, partly extend some of the features of the new system already when amending the old protocols (attached to the agreements concluded in the 1970's)[78] and signing the new Euro-Mediterranean Association Agreement after the Barcelona Declaration of 1995. In 1998, Euro-Mediterranean Association Agreements entered into force with Tunisia, Morocco, Israel, Jordan, Lebanon, the Palestinian Authority and Egypt,[79] followed in 2005 by the agreement with Algeria.[80] The entry into force of the agreement with Syria[81] is still pending, awaiting Syria's signature. However, Mediterranean Countries were interested in obtaining similar advantages than the CEEC. The new Euro-Mediterranean Agreements were used as a basis to the introduction of the Pan-Euro-Mediterranean Cumulation System and the "Pan-Euro-Mediterranean"

[76] European Commission, Communication from the Commission to the Council concerning the Unification of Rules of Origin in Preferential Trade between the Community and the Central and East European Countries and the EFTA States, SEC(94) 1897 final, 12-13.

[77] *Idem*, 13.

[78] Agreement establishing an Association between the European Economic Community and Israel, 1975 OJ 1975 L 136; Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, OJ 1978 L 263; Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, OJ 1978 L 264; Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt, OJ 1978 L 266; Cooperation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan, OJ 1978 L 268; Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, OJ 1978 L 269; Cooperation Agreement between the European Economic Community and the Lebanese Republic, OJ 1978 L 267.

[79] Palestinian Authority of the West Bank and Gaza Strip, OJ 1978 L 187; Tunisia, OJ 1998 L 97; Morocco, OJ 2000 L 70; Israel, OJ 2000 L 147.

[80] Algeria, OJ 2005 L 265.

[81] DG Trade Website (accessed in February 2011): http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/syria/; http://eeas.europa.eu/syria/docs/index_en.htm.

protocols endorsed at the Euro-Med Trade Ministerial Meeting on 7 July 2003. Amendments to origin protocols were introduced in October 2005 launching a cumulation system involving the EU-25, Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, the Palestinian Authority of the West-Bank and Gaza Strip, EEA/EFTA countries, Faroe Islands and Turkey.[82]

Before the Pan-Euro-Mediterranean Cumulation System, Euro-Mediterranean Association Agreements kept in place differences with respect to the harmonised system and differed a lot among themselves.[83] The general tolerance rule of 10% of the ex-works price of the product was included only in the agreements with Egypt, Jordan, Lebanon and Israel, and with the Palestinian Authority. No *de minimis* was added in the agreements with Morocco, Tunisia and Algeria. Moreover Morocco, Tunisia and Algeria were granted full cumulation; only diagonal cumulation was given between Morocco, Tunisia, Algeria, Egypt and Lebanon, while all agreements in general provided at least for bilateral cumulation. A no-drawback clause was not included in the agreements, considering the higher external tariff barriers imposed by Mediterranean countries with respect to the then EC common external tariff.[84]

2.3.1 Differences in product-specific rules between Harmonised Protocols and the former Euro-Mediterranean Protocols

The three graphs (Figure 2, 3 and 4) below show the differences between the product specific lists of the Morocco Association Agreement and of the harmonised protocols. Figure 2 depicts the differences in substantive rules whereas Figure 3 shows the additional alternative rules introduced in the harmonised protocols. Figure 4 summarises the differences. Product specific rules are not less restrictive in general. There are indeed more than 60 additional alternative rules added; those rules were added in the harmonised protocols mainly for the European chemical industry so as to enable importation of third country raw materials. Some Mediterranean countries had important chemical industries: chemicals accounted in 1997 for 18.1% share in manufacturing value added and 9.3% of total employment in Egypt,[85] in Jordan[86] 17.2% share in manufacturing value added and 11.5% employment, and in 1999 chemicals totalled 15% share in manufacturing value added and 6.6% in terms of employment in Morocco.[87,88] However their share of export in that industry remained low with the exception of Jordan (34.9% of EC imports from Jordan belong to the chemicals sector): 9,9% of EC imports from Egypt and 7% of EC imports from Morocco.[89] Therefore, alternative rules were probably not the main reasons behind the desire of Mediterranean countries to join the Pan-European System.

[82] Implemented by: EEA, OJ 2005 L 321; Faroe Islands, OJ 2006 L 110; Norway, OJ 2006 L 117; Iceland, OJ 2006 L 131; Switzerland, OJ 2006 L 45; Algeria, OJ 2007 L 297; Tunisia, OJ 2006 L 260; Morocco, OJ 2005L 336; Israel, OJ 2006 L 20; Egypt, OJ 2006 L 73; Jordan, OJ 2006 L 209; Lebanon, OJ 2006 L 143; Palestinian Authority of the West Bank and the Gaza Strip, OJ 2009L 298; it will also be applied in the future to the negotiated agreement with Syria, once it will be signed by Syria.

[83] S. Inama, 'Pan-European Rules of Origin and the Establishment of the Euro-Mediterranean Free Trade Zone', *op cit*, 199-217.

[84] *Idem.*

[85] Second sector in terms of value added (after agricultural products) and third sector in terms of employment (after textiles and apparel and agricultural products).

[86] Second sector both in terms of value added and employment (after agricultural products).

[87] Third sector in terms of value added share (after agricultural products and textile) and fourth sector in terms of employment (after textile, agricultural products and minerals).

[88] Data from UNIDO Industrial Statistics Database, quoted in P. Augier, M. Gasiorek and C. Lai-Tong, 'Rules of Origin and the EU-Med Partnership: the Case of Textiles', (2004) 9 *World Economy* 27, p. 1445.

[89] DG Trade data, 2008.

Figure 2: Differences in Product Specific Rules per Groups of Products

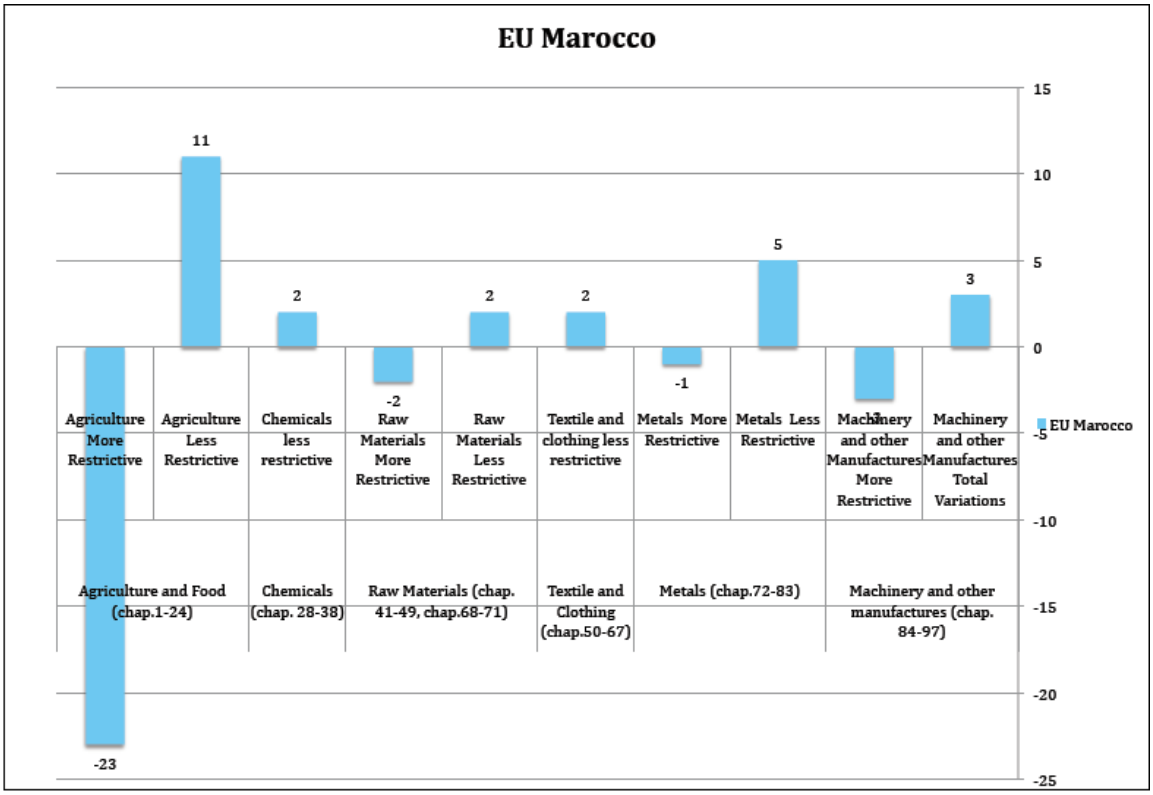


Figure 3: Additional Alternative Rules per Group of Products

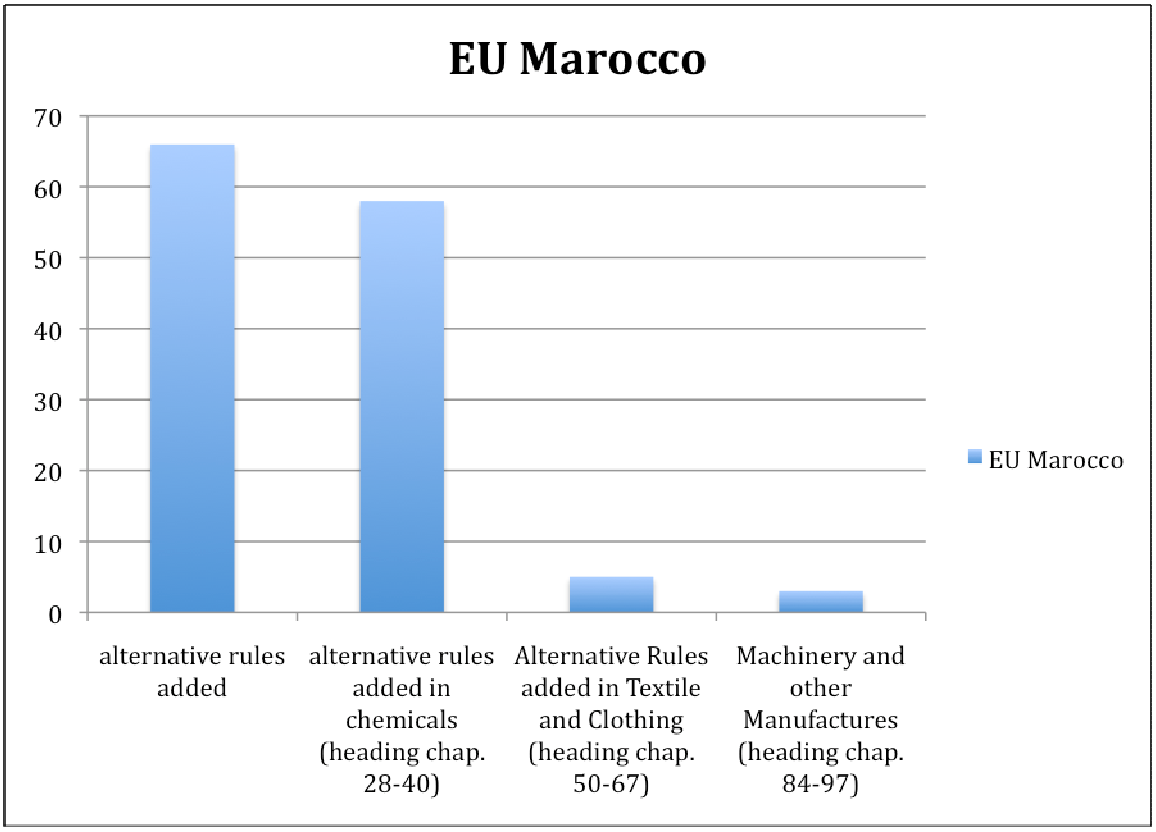
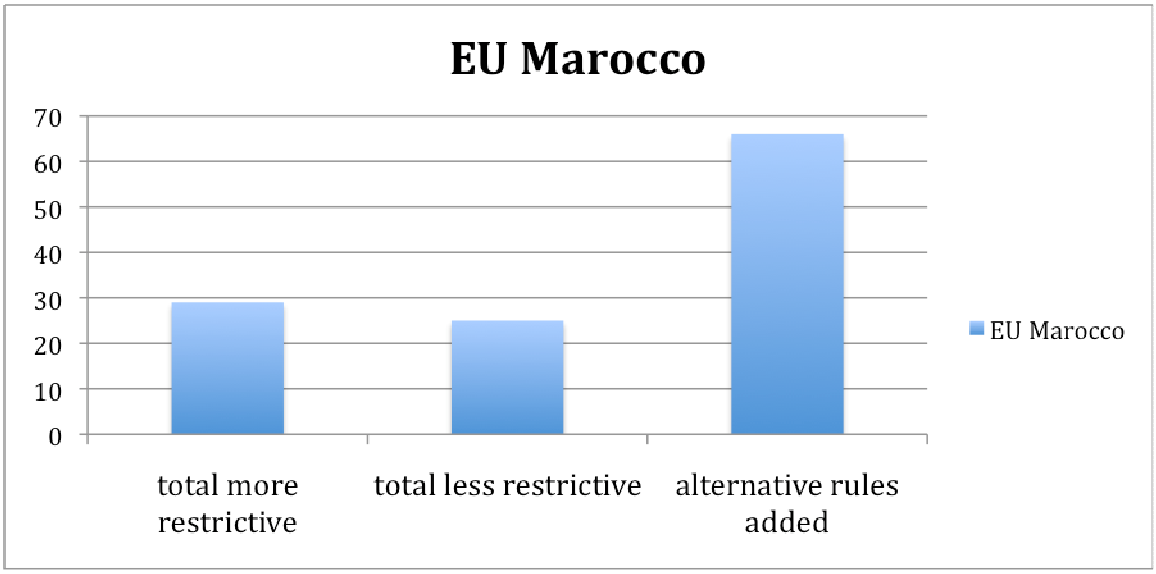


Figure 4: Overall Changes



It is, however, more likely that what Mediterranean countries sought by entering into the Pan-European system were the advantages given by cumulation rules. With the EU Enlargement process with the CEEC, Mediterranean countries started competing with the CEEC for FDI from the EU. The competition between Mediterranean countries and the CEEC comes from their location advantage mainly. Indeed most authors do not find very strong similarities in their trade pattern to the EU: Mediterranean countries mainly focused on petroleum products and lower value added manufactures (mainly textile).[90] Still there has been a development also toward machinery and electronic equipments. In particular a study on the impact of enlargement on the commercial policy of Mediterranean countries shows that there are some important similarities between Morocco and Tunisia and some CEEC (Czech Republic and Poland): for example it finds that 68% and 65% of the industries in which Tunisia has a comparative advantage are in competition with Morocco and Czech Republic equivalent industries, while Morocco has 70% and 45% of its exports in industries where respectively Tunisia and the Czech Republic have comparative advantage.[91] Lower percentages are given for the similarities with Poland.[92] However with the opening of trade relations with the CEEC, the CEEC share in EU trade significantly increased whereas the Mediterranean share was lagging behind. From 1990 to 2001, the share of extra EU exports to the CEEC jumped from 6,2% to almost 14,1% and the share of EU imports from CEEC increased from 5,4 to 11,4%, while the share of extra-EU exports to the Mediterranean went down from 12.4% to 10.3% and the share of extra-EU imports went down from 10.1% to 8.9%.[93] Moreover the share of FDI outflows to CEEC countries in total extra-EU outflows had increased from 11.9 in 1992 to 27.1% in 1996, while the share of FDI outflows to Mediterranean countries remained very low (for Maghreb countries from 0.2 in 1992 to 1.3 in 1996 and for Mashrek countries from 0.1 in 1992 to 0.3 in 1996).[94] The attraction of FDI from the EU to the CEEC was most probably the result of attractive markets for intra-industry trade, which has an

[90] R. Verrier, 'L'Impact de l'Elargissement de l'Union Européenne', in A. Berramdane and G. Feuer (eds), *Le Partenariat euro-méditerranéen – à l'heure du cinquième élargissement de l'Union Européenne*, (Editions Karthala, 2005), 209-210 ; S. Sideri, *Euro-Mediterranean Partnership Initiative and the EU Enlargement – Problems, Alternatives and Policy Response*, (YEAR, ISPI – Studi&Ricerche), 93.

[91] *Idem*, 211-212.

[92] *Idem*, 212.

[93] *Idem*, 206.

[94] A. Tovias, 'Normative and Economic Implications for Mediterranean Countries of the 2004 European Union Enlargement', (2005) 6 *Journal of World Trade* 39, 1149.

important role in trade relations between the various CEEC and the EU[95]. As we saw in the preceding discussion on the Pan-European system of origin, cumulation rules have certainly had an impact in the increase of intra-industry trade with the CEEC. Even though intra-industry shares in EC-Mediterranean countries were relatively low if compared with the CEEC shares,[96] it was already particularly important for the development of exchange within the electronic and machinery equipment sector, the automobile sector and the textile sector.[97] A study by Augier, Gąsiorek and Lai-Tong on the textile and clothing sector in Mediterranean countries finds that the absence of diagonal cumulation was restricting trade up to 70-80%.[98] Another study analysing the impact of rules of origin at the aggregate level finds that the rules confirm the negative impact of rules of origin on North African trade and asks for harmonisation.[99] Most probably it was also in the interest of some EC Member States to enlarge the benefits of the cumulation system to Mediterranean countries. A study on outward processing trade shows the development of EC production offshore to the CEEC and North African countries.[100] It also reports that in France 80% of direct imports from North Africa and Southern and Eastern Europe qualifies as a form of subcontracting.[101] For countries like France, Maghreb countries have a better location advantage then the CEEC and closer cultural and historical ties.

2.3.2 The Pan-Euro-Mediterranean Cumulation System

The Pan-Euro-Mediterranean Cumulation System introduced diagonal cumulation, functioning as the diagonal cumulation under the Pan-European system explained above but simply enlarged to the bigger Mediterranean area. The asymmetric system introduced by the EEA full cumulation is still maintained . The EEA origin still grants origin in all members of the Pan-Euro-Med and for the use of cumulation among them all (art. 2 (1) harmonised protocol).[102] Full cumulation between EC, Tunisia, Morocco and Algeria has been maintained also after the harmonisation, however the full cumulation does not grant originating status outside these countries. Outside those four members, diagonal cumulation under the Pan-Euro-Med cumulation system will have to apply (art. 3 of the amended protocol for Morocco).

The Commission gives the following example in its Handbook to exporter:[103]

> - *Example of the EEA full cumulation*
>
> 100% cotton yarn of Indian origin is imported into Portugal where it is manufactured into cotton fabric. That fabric retains its non-originating status in Portugal as the origin rule for fabric demands manufacture from fibre. The non-originating fabric is exported from Portugal to Norway where it is manufactured into garments. In Norway the finished garments obtain preferential origin status because the processing carried out in Portugal is added to the processing carried out in Norway to produce originating garments. The double transformation requirement (i.e. from yarn to fabric to garment) has been fulfilled in the EEA so the final

[95] R. Verrier, 'L'Impact de l'Elargissement de l'Union Européenne', *op cit*, 215.

[96] *Idem*, 213 and 216.

[97] *Idem*, 217.

[98] P. Augier, M. Gasiorek and C. Lai-Tong, 'Rules of origin and the EU-Med Partnership: the Case of Textiles', *op cit.*

[99] *Assessing the Economic Effects of Rules of Origin on North African Countries*, United Nations Economic Commission for Africa, ECA-NA/RABAT/TRADE/06/2, June 2006.

[100] G. Gereffi and O. Memedovic, The Global Apparel Value Chain: what prospects for upgrading by developing countries?, (UNIDO, Vienna 2003), 24-26.

[101] *Idem*, 25.

[102] For relevant documents – see note 81.

[103] European Commission, A User's Handbook to the Rules of Preferential Origin used in the trade between the European Community, other European countries and the countries participating to the Euro-Med partnership, 14-15.

> product obtains the EEA origin and - since this cumulation is recognized by the Pan-Euro-Med partner countries – the product can be exported within the zone under preferences.
>
> - *Example of the full cumulation with Tunisia, Morocco and Algeria*
>
> Chinese yarn is imported into Tunisia where it is manufactured into fabric. The fabric retains its Chinese origin as the origin rules for fabric demands manufacture from fibre. The non- originating fabric is exported from Tunisia to Morocco where it is manufactured into garments. In Morocco, the finished garments obtain preferential origin status because the processing carried out in Morocco is added to the processing carried out in Tunisia to produce originating garments. The double transformation requirement – like in the example above – has been fulfilled in the territory of the countries benefiting from full cumulation. The final product obtains Moroccan origin and can be exported to the Community. However, since the full cumulation between the EC, Tunisia, Morocco and Algeria is not recognised by the Pan-Euro-Med partner countries – the product cannot be re-exported within the zone under preferences.

The application of the Pan-Euro-Mediterranean cumulation system is subject to two main conditions: (1) the partner countries must have concluded a bilateral FTA agreement (2) the origin protocol of these bilateral FTA must be identical. This conditions are contained in articles 3 and 4 of the new Euro-Mediterranean origin protocols, respectively providing for the rules on cumulation in the European Community and cumulation in the partner country. Articles 3(5) and 4(5) state that:

> The cumulation provided for in this article may be applied only provided that: (a) a preferential trade agreement in accordance with article XXIV of the General Agreement on Tariffs and Trade (GATT) is applicable between the countries involved in the acquisition of the originating status and the country of destination; (b) materials and products have acquired originating status by the application of rules of origin identical to those given in this Protocol; and (c) notices indicating the fulfilment of the necessary requirements to apply cumulation have been published in the *Official Journal of the European Union (C) series* and in [the partner country] according to its own procedure.

Inama,[104] encouraged Mediterranean countries, joining the Pan-European cumulation system, to create FTA among themselves with less restrictive rules of origin than the harmonised set of rules. He was arguing this in order to promote greater intra-regional trade and also to make sure that Mediterranean countries could comply with those rules. It was also suggested to avoid the Hub&Spoke effect of the old bilateral FTA with the EC. However under the Pan-Euro-Mediterranean system of cumulation, the protocols need to be "*identical*" according to article 3(5) and article 4(5) so as to profit from cumulation. Easier rules of origin in Mediterranean regional schemes would therefore not be recognised under the Pan-Euro-Mediterranean Cumulation System.

The system introduced by the above-explained conditions (the conclusion of FTA between all Members with identical set of rules of origin) has been called "variable geometry". It permits the immediate application of the cumulation system between countries that have already met the requirements (have already a functioning FTA with identical rules of origin). This practically means that a partner does not need to conclude all the agreements before actually obtaining the benefits of the cumulation system, the cumulation system will only be temporarily limited to those countries with whom an FTA has already been concluded, while waiting for the completion of the other agreements. If the partner does not have any other functioning FTA, it will not benefit from the diagonal cumulation but will still be granted bilateral cumulation with the EC. This *"variable geometry"* principle was most probably inserted not to interrupt the already functioning cumulation in Europe. It may also have the aim of creating incentives to accelerate the conclusion of various agreements. Figure (5) shows the state of play of the negotiation of various agreements. There are two partners that stand out, Syria and the Palestinian Authority. Syria still hasn't signed its Euro-Mediterranean Agreement so it is hasn't started the process of harmonisation of FTA origin protocols with other

[104] S. Inama, 'Pan-European Rules of Origin and the Establishment of the Euro-Mediterranean Free Trade Zone', *op cit*, 212-213.

Member of the Euro-Mediterranean cumulation zone. The amendments to the protocol of the Interim Association Agreement with the Palestinian Authority has been applied but as the Palestinian Authority has not concluded agreements besides the one with the EU, goods from the West Bank and Gaza strip enjoy only bilateral cumulation.

Figure 5: Amended Protocols for Pan-Euro-Med Cumulation and Negotiation of FTA: State of Play[105]

Date of application of the protocols on rules of origin providing for diagonal cumulation in the pan-euro-med zone

	EU	DZ	CH (EFTA)	EG	FO	IL	IS (EFTA)	JO	LB	LI (EFTA)	MA	NO (EFTA)	PS	SY	TN	TR
EU		1.11.2007	1.1.2006	1.3.2006	1.12.2005	1.1.2006	1.1.2006	1.7.2006		1.1.2006	1.12.2005	1.1.2006			1.8.2006	(1)
DZ	1.11.2007															
CH(EFTA)	1.1.2006			1.8.2007	1.1.2006	1.7.2005	1.8.2005	17.7.2007	1.1.2007	1.8.2005	1.3.2005	1.8.2005			1.6.2005	1.9.2007
EG	1.3.2006		1.8.2007				1.8.2007	6.7.2006		1.8.2007	6.7.2006	1.8.2007			6.7.2006	1.3.2007
FO	1.12.2005		1.1.2006				1.11.2005			1.1.2006		1.12.2005				
IL	1.1.2006		1.7.2005				1.7.2005	9.2.2006		1.7.2005		1.7.2005				1.3.2006
IS(EFTA)	1.1.2006		1.8.2005	1.8.2007	1.11.2005	1.7.2005		17.7.2007	1.1.2007	1.8.2005	1.3.2005	1.8.2005			1.3.2006	1.9.2007
JO	1.7.2006		17.7.2007	6.7.2006		9.2.2006	17.7.2007			17.7.2007	6.7.2006	17.7.2007			6.7.2006	
LB			1.1.2007				1.1.2007			1.1.2007		1.1.2007				
LI(EFTA)	1.1.2006		1.8.2005	1.8.2007	1.1.2006	1.7.2005	1.8.2005	17.7.2007	1.1.2007		1.3.2005	1.8.2005			1.6.2005	1.9.2007
MA	1.12.2005		1.3.2005	6.7.2006			1.3.2005	6.7.2006		1.3.2005		1.3.2005			6.7.2006	1.1.2006
NO(EFTA)	1.1.2006		1.8.2005	1.8.2007	1.12.2005	1.7.2005	1.8.2005	17.7.2007	1.1.2007	1.8.2005	1.3.2005				1.8.2005	1.9.2007
PS																
SY																1.1.2007
TN	1.8.2006		1.6.2005	6.7.2006			1.3.2006	6.7.2006		1.6.2005	6.7.2006	1.8.2005				1.7.2005
TR	(1)		1.9.2007	1.3.2007		1.3.2006	1.9.2007			1.9.2007	1.1.2006	1.9.2007		1.1.2007	1.7.2005	

(1) For goods covered by the EC-Turkey customs union, the date of application is 27 July 2006.
For agricultural products, the date of application is 1 January 2007.
For coal and steel products, the date of application is 1 March 2009.

2.3.3. Harmonisation and Differentiation

As mentioned earlier, the full cumulation between Tunisia, Morocco and Algeria is still in force for the regional trade with the EU but it is not recognised for preferential trade with other Members of the Pan-Euro-Mediterranean system. Similarly, with the only exception of the EU agreement with Israel, a partial drawback clause that could be invoked only on a bilateral trade basis (in preferential trade between the EU and the partner) was included in the Mediterranean partner's origin protocols (article 15(7)).[106] This partial drawback could not be requested if the product acquired origin following diagonal cumulation with other Pan-Euro-Mediterranean countries and was not recognised by the

[105] Commission notice concerning the date of application of the protocols on rules of origin providing for diagonal cumulation between the Community, Algeria, Egypt, Faroe Islands, Iceland, Israel, Jordan, Lebanon, Morocco, Norway, Switzerland (including Liechtenstein), Syria, Tunisia, Turkey and West Bank and Gaza Strip, OJ 2009 C 219/19.

[106] Algeria OJ 2007 L 297, Tunisia OJ 2006 L260, Morocco OJ 2005 L336, Egypt OJ 2006 L73, Jordan OJ 2006 L209, Lebanon OJ 2006 L143, it will also apply to the EC-PLO agreement following Decision 1/2009 of the EC-PLO Joint Committee of 24 June 2009 amending Protocol 3 to the Euro-Mediterranean Interim Association Agreement concerning the definition of the concept of originating products and methods of administrative cooperation OJ 2009 L 298.

other Members. These partial drawback clauses were remnants of the old Euro-Mediterranean origin protocols to take into account of the higher external barriers of some Mediterranean countries.[107] They should have expired at the end of 2009 but have been extended until 2012.[108]

2.3.4. Conclusion on the Pan-Euro-Mediterranean System

The new Euro-Mediterranean protocols permit Mediterranean partners to participate in the pan-European cumulation system. The main conditions for allowing diagonal cumulation with other Members to the Pan-European cumulation was that the trade Partner had to conclude FTA agreements with identical rules of origin with the other members of the Pan-European cumulation system. In bilateral trade with the EC, Mediterranean countries were allowed to maintain some of the advantages of the old Euro-Mediterranean origin protocols, such as partial drawbacks or the full cumulation for Maghreb countries. These particular rules cannot be used if diagonal cumulation is involved. Either the producer of a good decides to ask for partial drawback or achieve origin, say of Tunisia, through full cumulation with Maghreb countries, in which case it will have preferential access only with the EC, or alternatively the same producer may decide to follow the harmonised rules within the origin protocol and obtain the origin of Tunisia for its manufactured good using diagonal cumulation, obtaining preferential access to the wider territory of the Euro-Mediterranean partners that concluded an agreement with Tunisia.

3. The Alignment of Other Agreements in the Pan-European system

3.1. Alignment and Differentiation: The Persistence of Differences in EC Preferential Rules of Origin Regimes

The Pan-Euro-Mediterranean Cumulation System was not extended to other EC FTA partners. The Pan-European protocols were used as the main model to design all subsequent FTA origin protocols of the EU (such as EC-Mexico FTA,[109] EC-Chile[110] and the Trade and Development Cooperation Agreement with South Africa).[111] Lomé IV[112] also introduced changes in the presentation of rules of origin protocols for the ACP countries and rules were similar to the Pan-European protocols. That

[107] Palestinian Authority of the West Bank and Gaza Strip, OJ 1997 L 187; Tunisia, OJ 1998 L 97; Morocco, OJ 2000 L 70; Israel, OJ 2000 L 147.

[108] Decision 1/2010 of the EU-Algeria Association Council, OJ 2010 L 248; Decision 1/2010 of the EU-Egypt Association Council OJ 2010 L 249; Decision 1/2010 of the EU-Jordan Association Council, OJ 2010 L 253; Decision 1/2010 of the EU-Morocco Association Council, OJ 2010 L 253. European Commission, *Proposal for a Council Decision on the position to be taken by the European Union within the Association Council established by the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part, as regards the amendments of Article 15(7) of Protocol 4 to that Agreement, concerning the concept of 'originating products' and methods of administrative cooperation*, COM(2010)157 final; European Commission, *Proposal for a Council Decision on the position to be taken by the European Union within the Joint-Council created by the Euro-Mediterranean Interim Agreement on Trade and Cooperation between the European Community, of the one part, and the Palestinian Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and Gaza Strip, of the other part, as regards the amendments of Article 15(7) of Protocol 4 to that Agreement, concerning the concept of 'originating products' and methods of administrative cooperation*, COM(2010)166 final.

[109] Annex III to Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000, OJ 2000L 245.

[110] Annex III to the Agreement establishing an Association between the European Community and its Members, on the one part, and the Republic of Chile, of the other part, OJ 2002 L 352.

[111] Protocol 1 to the Agreement on Trade Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other, OJ 1999 L311.

[112] Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, OJ 1991 L 229.

basic model has been maintained in the negotiation with EPAs.[113] However major differences with the European harmonised system have been introduced. Those differences show how eventually the EU prefers to use rules of origin as a differentiating tool across its partner countries. Differences also exemplify the different interests that exist across countries in their bilateral relations.

It is clear from the table below (figure 6) that the main way to differentiate across protocols is first of all through the general *de minimis rule* and cumulation rules. The EPA regime allows greater flexibility than the EEA especially through the *de minimis* clause. In terms of cumulation, the EPAs do not receive similar cumulation to the Pan-Euro-Med system, however, they receive multilateral cumulation covering, from a purely geographical perspective, a larger area. We will analyse in more detail those new cumulation rules, however, as stated by Brenton,[114] cumulation rules are useful only if there is a cheap supplier in the area; for intermediate industrial products very often the sole supplier in the cumulation area remains the EC. Because of this limitation of cumulation rules, the most important advantage for the ACP will still be the introduction of easier product-specific rules, allowing for third countries cheaper inputs. Relaxation of product specific rules might be a very interesting way of giving an efficient competitive advantage to these countries. This is true only if the country concerned profits from the greater flexibility granted to import some intermediate products from the most efficient supplier in the world and develop competitive and efficient further manufacturing productions. This means that the ACP will have to take advantage of this greater flexibility of origin rules and have to strategically liberalise imports of inputs that they can use in further processing operations. This, as we shall see later on, has been the case of Mauritius textile industry, which will most probably profit from the new rules of origin for textile and apparel products. Moreover this could be the occasion for new FDI in these countries not only from the EC but also from other countries. As analysed previously, product-specific rules were not simplified in the Pan-Euro-Med system. The main advantage of the Pan-Euro-Mediterranean cumulation system was clearly the cumulation rules to develop intra-industry trade, however ACP countries do not have for European firms the same location advantage that the CEEC and the Mediterranean countries have. Therefore the priority for the ACP was to be able to source more effectively third countries inputs. Finally we shall notice that rules for the EC-Chile and the EC-Mexico (MEUFTA) have the minimum EEA *de minimis* with bilateral cumulation only. However, as we shall see later on, they still received a transitional drawback clause and some other temporary advantages, moreover there are serious doubts on the advantages that total harmonisation with other agreements of the EU would bring.

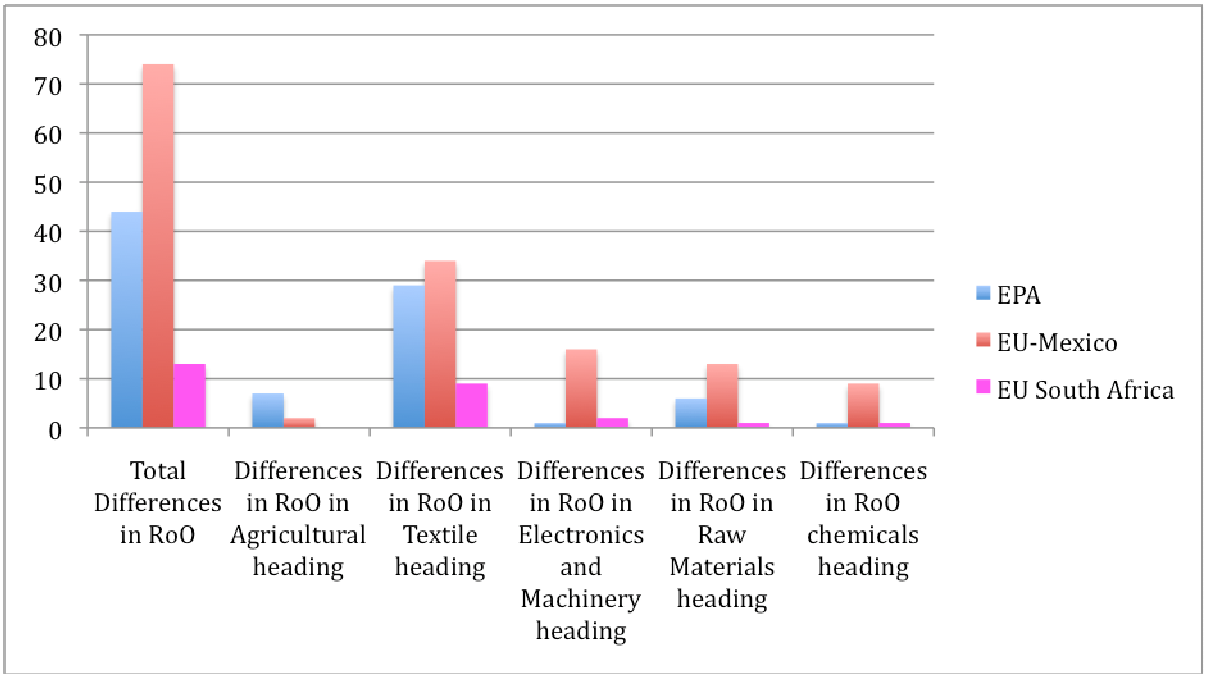
[113] Council Regulation (EC) 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean, Pacific (ACP) Group of States provided for in agreements establishing or leading to the establishment of Economic Partnership Agreements, OJ 2007 L 348.

[114] P. Brenton and M. Manchin, 'Making EU Trade Agreements work: the role of rules of origin', in B. Hoekman and Ç. Özden (eds.), *Trade Preferences and Differential Treatment of Developing Countries*, (Edward Elgar Publishing, 2006), 284.

Figure 6: Comparing Cumulation Rules, *"de minimis"*, and "Originating" Vessels Requirements

	De Minimis	Bilateral Cumulation	Diagonal Cumulation	Full Cumlation	Originating Vessels
EEA	10%	-	Yes, with other EFTA countries not part of EEA, Mediterranean countries and Turkey	YES	5 requirements
MEUFTA	10%	YES	NO	NO	5 requirements
EU-Chile	10%	YES	NO	NO	5 requirements
TDCA	10%	YES	Yes (ACP)	YES (with SACU)	5 requirements (after liberalisation 3 requirements)
EPA	15%	-	YES	YES (with OTC and EU) YES with S-A (only for SACU) YES (neighbouring developing countries under special conditions)	3 requirements

Figure 7: Differences in Product Specific Rules Comparing EPA, TDCA and MEUFTA to the Harmonised Protocols



Differences in product specific rules (as shown by Figure 7 above), comparing the EPA, the TDCA and the MEUFTA to the harmonised protocols, are not so diffused especially if one considers the total number of product-specific rules in origin protocols. The chief differences between the EPA and the harmonised European Protocols are mainly the simplified rules granted for fisheries and for the textile sector. Differences in the EPAs consist generally in providing for easier rules. Differences with the other agreements are more mixed and it is difficult to appraise them.

We shall now look more in detail at the differences giving particular attention to the EPA and also briefly the particular features of the MEUFTA.

3.2. The Use of Differentiation to Achieve Development Friendly Rules in EPAs for the ACP Countries

To maintain relations with their ex-colonies, EC members started a number of trade agreements with the ACP countries. It started first with the Yaundé Conventions I[115] and II,[116] in 1963 and 1969, respectively with 18 and 20 francophone African countries, and a separate agreement in 1969 with Kenya, Uganda and Tanzania (Arusha agreements).[117] Those agreements were merged in 1975 in the First Lomé Convention, which comprised 46 countries in Africa, in the Caribbean and in the Pacific (ACP).[118] The Convention lasted for five years and was then renewed by the second Lomé Convention in 1979 (which covered the period 1980-1985),[119] the third Lomé Convention in 1984 (for the period 1985-1990)[120] and finally by the fourth Lomé Convention in 1989 (for the 10 years period from 1990 till 2000).[121] In 2000 a process of redefinition of the partnership started with the Cotonou Agreement.[122] The Cotonou Agreement paved the way to the negotiation of the Economic Partnership Agreements whose main aim was to create a reciprocal trade liberalisation scheme in conformity with article XXIV of the General Agreement on Tariffs and Trade (GATT). Indeed if the Yaundé Convention did provide for reciprocal liberalisation (although the Community had to liberalise faster than the African countries), however the liberalisation on the African side did not occur and with the Lomé Conventions a period of non-reciprocal trade preferences was granted to the ACP. Non-reciprocal FTAs are prohibited under article XXIV GATT and the Lomé Convention did not fall under the Enabling clause, which allows unilateral non-reciprocal trade concessions to Least Developed Countries. Therefore the long still-ongoing negotiation process tried to define arrangements to reciprocally liberalise trade.

The long debate that started on rules of origin for the new Economic Partnership Agreements took place due to two main reasons. (1) The first reason was that the EC tried to obtain support for the reciprocal arrangements through the relaxation of some rules of origin and the definition of new cumulation rules. (2) The second reason comprised in the mixed and deceiving results obtained by the Lomé agreement: ACP countries' share of EU imports declined from 7% to 3% since 1975[123] and as shown by figure (1) below the ACP trade remained totally undiversified notwithstanding the decades of infant industry policies. Figure (2) instead shows that very few ACP imports to the EU actually use preference and one of the main reasons for that has been that rules of origin in some important sectors for ACP countries were too restrictive and too costly to be met by ACP producers (this was the case for fisheries and textile).

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[115] Convention of Association between the EEC and the African States and Malgache associated to the Community, also known as Convention of Yaoundé of 1963, OJ 1964 L 093.

[116] Convention of Association between EEC and the African States and Malgache associated to the Community, also known as Youndé Convention II of 1969, OJ 1970 L 282.

[117] Agreement establishing an association between the European Economic Community and the United Republic of Tanzania, Republic of Uganda and the Republic of Kenya, also known as Arusha Agreement of 1969, OJ 1970 L 282.

[118] ACP-CEE Convention de Lomé de 1975, OJ 1976 L 25.

[119] Second ACP-EEC Convention, signed in Lomé on 31 October 1979, OJ 1980 L347.

[120] Third ACP-EEC Convention, signed in Lomé on 8 December 1984, OJ 1986 L 86.

[121] Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, OJ 1991 L 229, as amended by the Agreement amending the Fourth ACP-EEC Convention of Lomé, signed in Mauritius on 4 November 1995, OJ 1998 L 156.

[122] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317.

[123] L. Michel, 'Economic Partnership Agreements: drivers for development', (European Commission, 2008), 8.

Figure 8: Undiversified Exports of ACP countries to the EU[124]

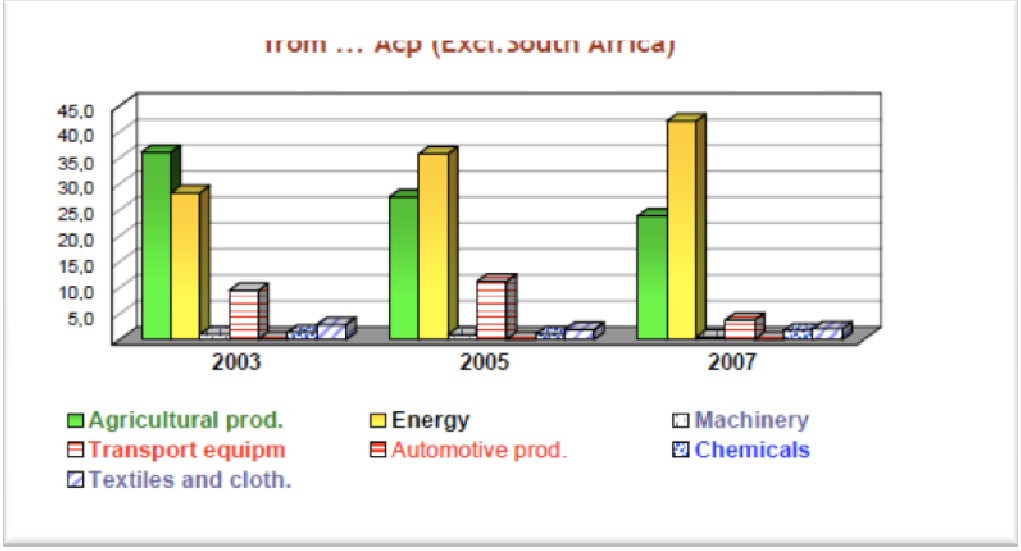
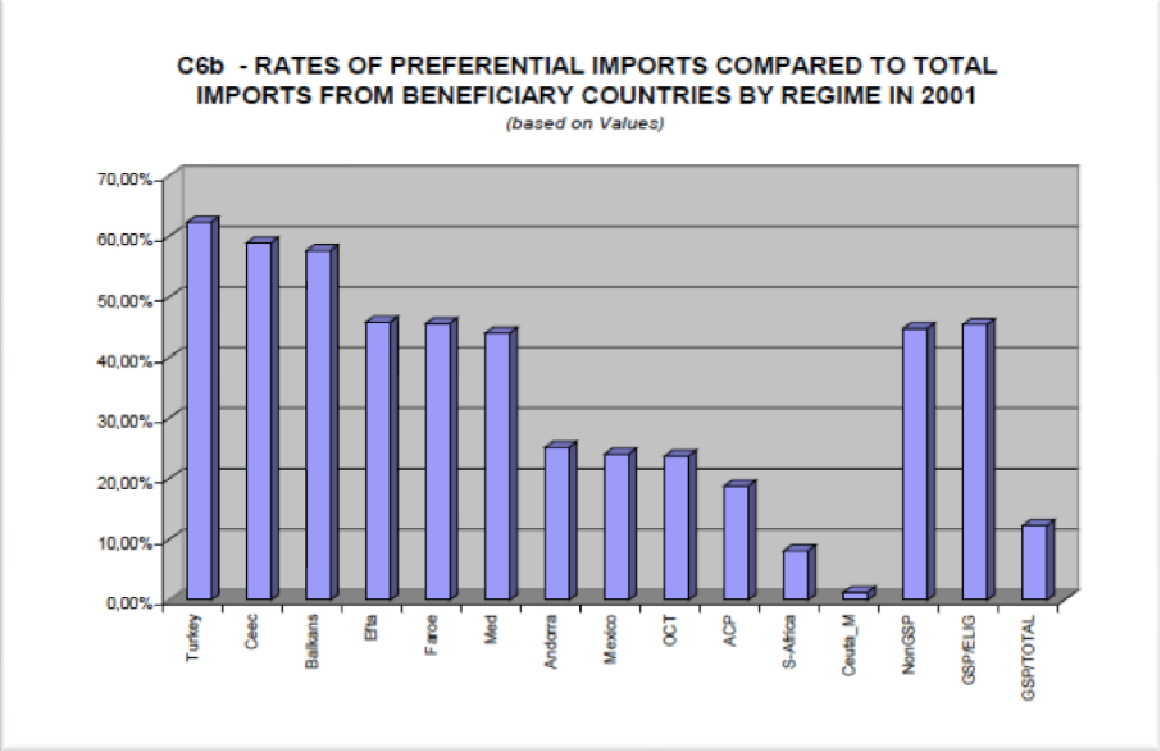


Figure 9: Rates of Preferential Imports Compared to Total Imports from Beneficiary Countries[125]



Therefore, there has been a major rethinking of the role of rules of origin within the EPA. Some concessions were made already in the Annex V to the Cotonou Convention, the main concessions

[124] Data from DG Trade website 2009 on ACP (excl. South Africa).

[125] European Commission, Green Paper on the future of Rules of origin in preferential trade arrangements, COM(2003)787 final.

were made for the *de minimis* rule (allowing 15% of non-originating materials) and for cumulation rules.[126] Revised cumulation rules were considered as key to increase trade integration of ACP countries, but cumulation were specifically designed for increasing interaction with ACP neighbours and South-South trade integration. Thus the Pan-Euro-Mediterranean cumulation was not extended to the ACP. However, even if cumulation and *de minimis* rules differed, product-specific rules of the Cotonou agreements remained very restrictive and were but with one exception the exact copy of the Pan-European rules of origin. This rules annexed to the Cotonou agreement were only applicable to the preparatory period referred in article 37 of the Cotonou agreement and expired in December 2007.[127] As in December 2007 negotiations on EPA were not concluded, a unilateral document was written to replace the market access regulations contained in annex V to the Cotonou Agreement. This unilateral document, Council Regulation (EC) No 1528/2007,[128] provides for the necessary regulations while waiting for the completion of negotiations on interim EPAs. This regulation provides for interesting deviations from the Cotonou *status quo*. Specifically, differential treatment has been granted this time also through easier product specific rules of origin for fisheries and textile products. We will have a quick overview of these two sectoral rules and of the ACP cumulation rules to see how the ACP rules of origin protocol differ from the Pan-Euro-Mediterranean system and follow different objectives.

3.2.1. Fisheries

The table below (figure 10) compares the requirements in the EEA[129] and EPA for defining 'originating vessels'.[130] In reality, the first two criteria are the same. The EPA proposes a simplified third requirement, abandoning the necessity of the majority of the members of the Board of Directors and Supervisory Board to be nationals of the EC or of the partner country. Finally, the EPA rule drops the requirement concerning the nationality of vessels' captain and crew.

[126] Protocol 1 to the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317.

[127] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317.

[128] Council Regulation (EC) 1528/2007, OJ 2007 L 348.

[129] Article 4(2) of Protocol 4 to the EEA, OJ 2005 L 321.

[130] Article 3(2) to Annex II of Council Regulation (EC) 1528/2007, OJ 2007 L 348.

Figure 10: Table Comparing Requirements for "Originating" Vessels

	Originating Vessels
EPA	(1) Registered in a Member State (MS) of the Community or an ACP State (2) Sail the flag of a MS or ACP (3) Either (a) is at least 50% owned by nationals of ACP or MS or (b) is owned by companies that have their head office and their main business in the ACP or in a MS and 50% owned at least by the ACP State, public entities of that State or nationals of that country or MS
EEA	(1) Registered in a Member State (MS) of the Community or in an EFTA State (2) Sail the flag of a MS or of an EFTA State (3) Either (a) is at least 50% owned by nationals of an EFTA State or of a MS or (b) is owned by companies that have their head office in one of these States, of which the managers, Chairman of the Board of Directors or of the Supervisory Board and the majority of the members of such boards are nationals of the EC or of an EFTA State and of which, in addition, in the case of partnerships or limited companies at least 50% of the capital belong to those States, public entities of that State or nationals of that said State. (4) Of which master and officers are nationals of the EC or of an EFTA State (5) Of which at least 75% of the crew are nationals of the EC or an EFTA State

Zaimis considered that the ACP rules under Lomé had been adapted to the developing conditions of the ACP countries.[131] However, he also recognised that many ACP countries did not have the financial means to respect the criteria on ownership or on leasing and chartering and, as he suggests, that can well be an indirect way of the Community to encourage the ACP to conclude such lease with the Community or the OCT.[132] J.H.J. Bourgeois also formulates a similar argument.[133] C. Stevens and J. Kennan[134] report the example of canned tuna in Mauritius. Canned tuna is the third most important merchandise export for Mauritius. They find cost of production higher than under normal conditions due to the stringent rules of origin requirements, even if Mauritius had obtained a derogation to purchase fish outside its territorial waters when the local catch was too low. Moreover islands in the Pacific (such as Fiji) have too small territorial waters for their fishery sector and thus rely heavily on catch outside their territorial waters. Furthermore the fishery sector of the Pacific Islands is strongly integrated with other Asian countries.

[131] Zaimis, EC rules of Origin, op cit, 186-187.

[132] *Idem,* 191-192.

[133] J. H. J. Bourgeois, 'Rules of origin: an introduction', *op cit*, 2-3.

[134] C. Stevens and J. Kennan, 'Making Trade Preference more effective', *op cit*.

To grant even more flexibility, producers of fish, HS 0304, 0305 and 0306, may use non-originating materials up to 15% of the ex-works price.

Figure 11: Product Specific Rules of Origin for Fish Meat

0304	Fish fillets and other fish meat (whether or not minced), fresh, chilled of frozen	Manufacture in which the value of any materials of Chapter 3 used does not exceed 15 % of the ex-works price of the product
0305	Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process; flours, meals and pellets of fish, fit for human consumption	Manufacture in which the value of any materials of Chapter 3 used does not exceed 15 % of the ex-works price of the product
ex 0306	Crustaceans, whether in shell or not, dried, salted or in brine; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine; flours, meals and pellets of crustaceans, fit for human consumption	Manufacture in which the value of any materials of Chapter 3 used does not exceed 15 % of the ex-works price of the product
ex 0307	Molluscs, whether in shell or not, dried, salted or in brine; aquatic invertebrates other than crustaceans and molluscs, dried, salted or in brine; flours, meals and pellets of crustaceans, fit for human consumption	Manufacture in which the value of any materials of Chapter 3 used does not exceed 15 % of the ex-works price of the product

Some flexibility on heading 1604 and 1605 (processed fish) has been given to all the ACP. Traditionally, the rule of origin for processed fish required all fish to be wholly obtained. Now non-originating fish may be used up to 15% of the ex-works price.[135]

Figure 12: Product Specific Rules of Origin for Processed Fish

1604 and 1605	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs; Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved	Manufacture in which the value of any materials of Chapter 3 used does not exceed 15 % of the ex-works price of the product

Further flexibility has been granted ***only*** to Pacific countries for processed fish under heading 1604 and 1605.[136] This provision permits to consider fish caught by vessels of other States as originating

[135] Council Regulation (EC) 1528/2007, OJ 2007 L 348.

[136] Article 4(3) and 4(4) of Annex II to Council Regulation (EC) 1528/2007, *op cit*.

products.[137] This easier rule has been granted only to the Pacific islands, maybe because their share of EU trade does only represent 0.06%,[138] which means very limited effect on EU fishery industry. Moreover the grant of this additional flexibility is subject to a special procedure. The country shall notify the Commission specifying the development benefits for the fisheries sector in that State and shall include information on the species concerned, the products manufactured and the quantities of non-originating materials involved. Only non-originating materials that have landed in the port of the Pacific ACP can be considered under this special derogation. The EC received already on 25 March 2008 a notification from Papua New Guinea regarding products of canned tuna, crabs, shrimps, prawns, lobsters and other molluscs and crustaceans which are caught by vessels registered in and flying the flag of Philippines, South Korea, Japan, China, US, Micronesia, Indonesia, Palau, Kribati, Solomon Islands, Marshall Islands, Tuvalu, Fiji, the EU and Vanuatu. Obviously processing in Papua New Guinea must go beyond *de minimis.*[139]

3.2.2 Textile and Apparel Industry

The second sector where interesting developments can be observed is the textile sector under the EPA. The new EPA rules make a huge step forward and provide for a single transformation for garment instead of the double transformation required in the Pan-European System of Cumulation. Producers in ACP may source fabric directly from abroad and still obtain originating status.

The same change is proposed for the earlier stage of production (i.e. the fabric stage). The traditional rules would have asked double-transformation, so production from fibres spun into yarn and then yarn woven to obtain fabrics. The single transformation allows ACP to import yarn from abroad and the only operation required is to weave yarn to obtain the fabric.

The table below (figure 13) shows the different rules from double transformation to single transformation, in particular the example of woven fabrics of cotton and the apparel obtained by sewing (first rule for apparel under chapter 61). The second rule for apparel under chapter 61 (concerning all other apparel not obtained by sewing together two or more pieces of knitted or crocheted fabrics), shows how, when the EPA rule requires a double transformation, a triple transformation will be asked under the EEA, the EC-Mexico, or the EC-South Africa. Thus, for obtaining the EEA origin, producers will have to operate spinning of the yarn, weaving yarn into fabrics and sewing the fabrics. If the producer wants to obtain origin under the FTA then he will have to buy originating yarn as an input. Instead an ACP producer will have to accomplish double transformation for the same product and will therefore be able to source yarn from third country producers.

[137] Council Regulation (EC) 1528/2007, *op cit.*

[138] Data is taken from the fact sheet on the Interim Economic Partnership Agreements *The Pacific: Fiji and Papua Guinea*, DG Trade, January 2009.

[139] HM Revenue & Customs, Customs Information Paper (08) 26.

Figure 13: The Single versus Double Transformation Requirements: Some Examples[140]

HS and Description	**Double Transformation and some example of exceptions**	**Single Transformation and some example of exceptions**
5208-5212 Woven Fabrics of cotton	(1) *Manufacture from: coir yarn, natural fibres, man-made staple of fibres not otherwise carded or combed or otherwise prepared for spinning, chemical materials or textile pulp or paper* (2) printing accompanied by at least two preparatory or finishing operations or finishing operations (such as sourcing, bleaching, mercerising, heat setting, raising, calendaring, shrink resistance processing, permanent finishing, decatising, impregnating, mending and burling) where the value of the unprinted farbic used does not exceed 47,5% of the ex-works price of the product	(1) *Manufacture from yarn* (2) Printing accompanied by at least two preparatory or finishing operations or finishing operations (such as sourcing, bleaching, mercerising, heat setting, raising, calendaring, shrink resistance processing, permanent finishing, decatising, impregnating, mending and burling) where the value of the unprinted farbic used does not exceed 47,5% of the ex-works price of the product
Chapter 61 Articles of Apparel and Clothing accessories **(a) Obtained by sewing together or otherwise assembling, two or more pieces of knitted or crocheted fabric which have been either cut to form or obtained directly to form** **(b) Other**	(a) *Manufacture from yarn* (b) Manufacture from: natural fibres, man-made staple of fibres not otherwise carded or combed or otherwise prepared for spinning, chemical materials or textile pulp	(a) *Manufacture from fabric* (b) Manufacture from yarn

[140] Council Regulation (EC) 1528/2007, *op cit*; Protocol 4 of the European Economic Area, *op cit.*

How can the simplification of these rules benefit at least some countries among the ACP countries? Most African countries had problems complying with the double transformation requirement and this was forcing them to rely on derogations from rules of origin. If derogation were not renewed export would dramatically fall. Lesotho is a clear example of this problem as presented within the OECD study. [141] The study shows that Lesotho developed a clothing industry thanks to investments from Asian investors. But fundamentally Lesotho manufactures just cut, make and trim the garment, all inputs are sourced from abroad, making it impossible for the manufacture to comply with the double transformation requirement.[142] The low export of Lesotho to the EU is due to the end of the derogation on the rules of origin for clothing under the Lomé Convention in 1996; this had provoked a drastic fall of the already low level of exports to the EU, falling from a value of 15 million dollars to 1 million dollars worth exports.[143] Most of Lesotho's exports continue to go to the US (95% of Lesotho's exports), mainly because it obtained derogation on rules of origin for clothing, allowing lesser-developed countries to use Asian suppliers. The possibility of manufacturing from fabrics would be then fundamental for Lesotho textile industry so as to continue attracting Asian investors and increase its exports with the EC.

Do these countries not have fibres, yarn and fabrics production to allow them to comply with the double transformation that is advocated by the European textile industry? In the SADC countries, the main suppliers of fibre remain Zimbabwe, South Africa (the main producer of synthetic fibre) and Zambia (that has become the eighth exporter of yarn to the EC).[144] However, Darga finds that regional yarn and fabrics' production makes up of less than half of the consumption of regional garment industry.[145] Because of the shortage in yarn and fabrics production, the SADC countries have problem in complying with rules of origin. It is true that the large majority of fibres (especially cotton) is exported and the same goes for yarn, however this probably comes from the fact that it is more convenient for these countries to export it and profit from cheap yarn and fibres coming from East Asia to further develop the regional garment industry.

3.2.3 Tolerance Rules in Agreements with ACP

A general *de minimis* rule appears in Lomé III for the first time allowing non-originating materials up to only 5% of the ex-works price.[146] Lomé IV increased this value to 10%[147] and the allowed "*de minimis*" achieved 15% under EPA rules.[148] This higher *de minimis* could be used as an advantage for the sourcing of third countries input also in other sectors where the product specific rules are not different from those introduced in the European harmonised protocols.

3.2.4 Cumulation Rules from Lomé to EPA

The rule on cumulation was introduced in article 6 of protocol I of the Convention of Lomé IV.[149] Rules of origin were known to be particularly strict and, as Zaimis suggests, cumulation rules were

[141] OECD, Trade and Structural Adjustment – Embracing Globalisation, (2005).

[142] C. Stevens and J. Kennan, "Making Trade Preferences more effective", *op cit*, 318.

[143] L. Amedée Darga, 'The impact of Preferential Rules of Origin on the Development of the Textile and Clothing Sectors in SADC',*op cit*, 136.

[144] *Idem*, 128, 136.

[145]*Idem*, 129.

[146] Article 3(2) of Protocol 1 of Lomé III, *op cit.*

[147] Article 5 of Protocol 1 to the Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, OJ 1991 L 229

[148] Article 4(2) of Annex II to Council Regulation (EC) 1528/2007, *op cit.*

[149] Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, *op cit.*

probably introduced to help ACP countries meet the requirements.[150] As pointed out by F. Dehousse, very few ACP countries were able to reach the requirements on their own because of the low value-added of products resulting from the lower costs of labour and the smaller local supplier markets.[151] However, the Lomé cumulation rules did not have the desired effects of facilitating the acquisition of origin for preferential treatment.

The Lomé IV Convention allowed a full cumulation among the ACP countries.[152] When production was undertaken in one or more ACP countries, the good would have obtained the origin of the last country in which operation took place provided it exceeded "*de minimis"* operations (article 7 of protocol I, Convention of Lomé IV).[153] It was then possible to add the added value from the different ACP countries, but in order to obtain origin, operations had to still go beyond the simple assembly, packaging or other minimum operations. In order to profit fully from this advantage, regional integration between the ACP and vertical fragmentation of the production process at the regional level would have been fundamental. However, regional integration, in particular in Africa, has not provided for the required increase in regional trade and most of the countries participating in regional trade agreements produce the same exports and exhibit similar undiversified trade structures so that full cumulation remained of little use. This was one of the main reasons for the Cotonou Convention to focus on regional integration.[154]

The Lomé Convention allowed also for diagonal accumulation with the EC (article 6(2) and (3) of protocol I, Convention of Lomé IV).[155] Inputs obtained by the Community or the OCT had to be subject to further processing in the ACP country**.** The specific rule of origin could be obtained collectively by cumulating the various operations undertaken in the EC, in the OCT or in the ACP. The processing in the ACP country didn't need to satisfy the rules of origin requirements, as long as the overall addition of processes in the EC, OCT and ACP countries satisfied the rule.[156]

However, this diagonal cumulation was not reciprocal, i.e. only inputs from the Community could be integrated within final products of an ACP country, whereas ACP inputs could not be used by EC producers as if they were originating within the EC. Moreover, inputs obtained by the Community should have been subject to substantial transformation in the ACP country.[157] This strange asymmetric cumulation rule could have been adopted so as to promote final goods production in the ACP countries instead of intermediate input production. In practice, however, it simply did not encourage the use of inputs from the ACP.[158] Moreover, the producer desiring to set its production within the ACP country was probably facing three problems: (1) difficulty in getting inputs from other ACP countries, (2) high shipping costs to supply the EU and other countries with cheap manufacturing costs offering a better investment location (Mediterranean countries, central and eastern European countries), as well as (3) difficulty in shipping goods across the borders between ACP countries (and therefore difficulty in using a single ACP country in order to supply all the ACP markets),[159] while a single ACP is too small

[150] N. A. Zaimis, EC rules of origin, op cit, 187.

[151] F. Dehousse and P. Vincent, *Les Règles d'Origine de la Communauté Européenne*, (Bruylant Bruxelles, 1999), 136-137.

[152] Article 6(1) of Protocol 1 to the Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, OJ 1991 L 229.

[153] Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, OJ 1991 L 229.

[154] Articles 28, 29, 30, 35, and 37 of the Cotonou Agreement all mention the regional integration process among the ACP countries. See: Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Members, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317.

[155] Fourth ACP-EEC Convention, *op cit.*

[156] N. A. Zaimis, *EC rules of origin*, (Chancery Law Publishing, 1992), pp. 187-188.

[157] F. Dehousse and P. Vincent, *op cit*.

[158] F. Dehousse and P. Vincent, *op cit.*

[159] If you consider African countries, aside the fact that they are very small markets, they lack communication infrastructure between them (especially roads), shipping costs are high and other ACP countries (Pacifique or Caribbean) are too far and have other trading partners.

a market to be considered interesting from a business perspective. So those cumulation rules did not encourage either the creation of FDI or the increased use of the ACP inputs, as the diagonal cumulation was valid only for EC intermediate goods used by the ACP. Therefore, the producers preferred to stay within the EC and from the EC supply all the countries linked to the EC through preferential agreements, including all ACP (Hub and Spoke effect). Cumulation rules were considered therefore one of the main reasons for diverting investments from the ACP (Spokes) to the EC (Host). Because of the aforementioned reasons, cumulation rules were renegotiated and modified under the EPA.

The first two cumulation rules (the one with other ACP and the one with the Community and OCT) don't seem to have changed a lot since Lomé IV, however this time they provide for full cumulation[160] between the ACP, the EC and the OCT (art. 6 (1), (2) and (3) of Annex II of Council Regulation N°1528/2007).[161] However, with respect to the equivalent rules in the Cotonou (article 2 (2) and article 6 (1) and (2) of Annex V to the Cotonou agreement)[162], the rules in the EPA contain a list of exceptions to this cumulation. The cumulation will apply to the list of products contained in Appendix 10 and 11 only after 1 January 2015 and 1 January 2010 respectively (article 2(3) and article 6(4) of Annex II of Council Regulation N°1528/2007).[163] Appendix 10 consists of some products from chapter 17 (sugar) and chocolate products with important weight of sugar, other cocoa based products, preparations with a basis of coffee and tea. Appendix 11 concerns rice.[164]

The EPA rules of origin provide also for cumulation with South Africa and with neighbouring developing countries that are not member of the ACP group. We shall analyse the cumulation rules with South Africa later on, for the moment we will focus on the rule for neighbouring developing countries.

Paragraph 13 of article 6 provides for cumulation with neighbouring developing countries.[165] The text provides for diagonal cumulation, according to which products obtain originating status in one of the neighbouring developing countries. These goods must be subject to further working and processing in the ACP even though the working carried out there does not by itself qualify for sufficient transformation. However, working and processing must go beyond *de minimis* operation. The list of neighbouring countries concerned is given in Appendix 9 to Annex II of Council Regulation N°1528/2007.[166] Accordingly, for Africa the neighbouring countries are Algeria, Egypt, Libya, Morocco and Tunisia. For the Caribbean the neighbouring states are Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Venezuela. This cumulation applies only under specific conditions. The ACP States, the Community and other countries concerned must have concluded an agreement on the administrative procedure. It does not apply to tuna products classified under chapter 03 and chapter 16 of the Harmonised System; neither to rice products of heading 1006.[167] The rules of origin attached to the Cotonou agreement were far more stringent with respect to this cumulation.[168] Especially for textiles, rules were different. First of all, for products under chapter 50 to 63 (textiles and apparel) the working or processing in the ACP State not only had to go beyond *de minimis*, it had to at least provoke a change of heading. Moreover, for some textile and apparel

[160] S. Inama, Rules of Origin in International Trade, op cit, 218.

[161] Annex II of Council Regulation (EC) 1528/2007, OJ 2007 L 348.

[162] Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Members, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317.

[163] Annex II of Council Regulation (EC) 1528/2007, *op cit*

[164] *Idem.*

[165] Annex II of Council Regulation (EC) 1528/2007, OJ 2007 L 348.

[166] *Idem.*

[167] *Idem.*

[168] Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Members, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317

products, contained in Annex IX to Protocol I within Annex V to the Cotonou Agreement, specific rules (mainly value added or specific operations) had to be fulfilled.[169] Finally, cumulation could not be applied for textile products in Annex X to the rules of origin Protocol of Cotonou.[170]

3.2.5 Small Conclusion on the EPA

The initial idea of harmonisation in the context of Cotonou was to use similar rules than those contained in the harmonised protocols while granting more flexibility to ACP simply through different cumulation rules and "*de minimis*" rule. The necessity to go beyond the harmonised protocols model and allow even greater flexibility comes from the fact that the ACP countries required some compensation for reciprocal liberalisation in EPA negotiation. Therefore, the EPA rules contain more liberal and development-friendly rules of origin requirement in some key sectors for the ACP such as fisheries and textiles. However, as simplification of rules of origin has been kept in only these two sectors, rules of origin are not really used to provide further incentives toward diversification of the ACP economy.

Differentiation and overlapping FTA: the case of EC-South Africa and EC-Mexico FTA

The ACP have received differential treatment taking into account the development objective of the ACP partnership with the EU. In other cases differences in product specific rules from the Pan-Euro-Mediterranean Model are scarcer. The main difference is cumulation rules. As for the ACP, these partners are not part of the Euro-Mediterranean diagonal cumulation, and they either are only subject to bilateral cumulation with the EC (for example, EC-Mexico or EC-Chile) or they are granted some diagonal or full cumulation to take into account their regional groupings (solving the possible issues derived from the overlap between North-South FTA and South-South integration). The latter is the case of South Africa that receives multilateral cumulation rules with ACP, SADC and SACU members to acknowledge the role of South Africa for stronger South-South Integration. Finally EC-Mexico and EC-Chile were successful in obtaining transitional easier product specific rules so as to adapt their industries to the rules of origin requirements. Especially for Mexico these were most probably important to overcome the incompatibility of the rules of origin requirements under NAFTA and under EC-Mexico FTA. Being no FTA between the EC, Canada and the US, there is no diagonal cumulation solving the problem of interaction between NAFTA and EC-Mexico. However the transitional rules granted probably have not solved the problem faced by the Mexican industry, i.e. to decide which rules of origin (NAFTA or EC) to respect and therefore which inputs (American/Canadian or EC) to use in its production.

We will quickly introduce the relationship between the EC-South Africa FTA and the new EPA and the problem that still remain because of product-specific difference used in their respective protocols and after we will focus on the EC-Mexican FTA and the application of transitional rules of origin.

3.3.1 South Africa and its cumulation with ACP, SADC and SACU

The South African Development Community (SADC) is maybe the only African regional agreement, which has manifested some level of intra-regional trade. However, this trade is prevalently depended on the participation of South Africa. Therefore, cumulation with South Africa becomes fundamental, in order to promote regional integration. South Africa has, therefore, signed Cotonou. However, because of its development level, the EC has concluded a separate agreement with South Africa on

[169] *Idem.*

[170] *Idem.*

trade matters (the Trade and Development Cooperation Agreement of 2002).[171] The EPA[172], however, provides for diagonal cumulation between South Africa and the ACP countries and full cumulation for the members (including South Africa) of the South African Customs Union (SACU).[173]

The diagonal cumulation with the ACP has some specific requirements. Products must have obtained the originating status in South Africa before being shipped to an ACP country. As South African materials, they may be used in operation and working processes in the ACP without requiring sufficient processing, however operations must go beyond *de minimis*. For the final product to be considered as originating in the ACP, the value added from operations or processing done in the ACP must exceed the value added in South Africa otherwise the product maintains the South-African origin. Moreover, this cumulation cannot not be applied to fishery products under Appendix 8 until liberalisation of the fishery sector will have been realised between the EC and South Africa. The cumulation rule shall also not apply to products in Appendix 7 (motor vehicles, some parts and engines, aluminium, various agricultural products…) and will apply to products in Appendixes 10 and 11 from, respectively, 1 October 2015 and 1 January 2010. This long list of exceptions[174] makes the diagonal cumulation rule very difficult.

Even though cumulation rule does apply to textiles, the main reason for South Africa to desire to be considered fully under the EPA regime could be the easier rules of origin for textile and clothing under the EPA as it accounts to the main difference between the product specific rules of origin for South Africa and those for the ACP. South Africa is not so much interested in getting single transformation requirements for clothing, however it does not want to have a competitive disadvantage vis-à-vis other SADC countries.[175]

Most probably for similar competitiveness reasons, South Africa had asked the EU for similar concessions as in case of the EPAs provisions on fisheries. As soon as the tariff concessions on fisheries are granted, South Africa will also benefit from easier criteria to define originating vessels. The new rule will contain a more liberal requirement for nationals share in the crew of the vessels: according to the new rule, the percentage of the EC and South African nationals in the vessels' crew needed will fall from 75% to 50%.[176] This requirement will then be similar to the criteria that were used in the Fourth Lomé Convention but will still remain less liberal than the criteria granted to the ACP under the EPA.

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[171] Protocol 1 to the Agreement on Trade Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other, OJ 1999 L 311.

[172] Annex II of Council Regulation (EC) 1528/2007, OJ 2007 L 348.

[173] As a customs union it is normal for the SACU to be considered as a single territory.

[174] These requirements do not apply to the full cumulation – they concern the diagonal cumulation only.

[175] F. Flatters reports a discussion proposal within SADC to introduce single transformation requirements for textile rules of origin. The main proponent of such a rule was Mauritius. Mauritius is always cited as a success story because it succeeded to get out of poverty (it was one of the poorer country countries in the world) and to become an "upper middle income country". This was done thanks to a flourishing tourism industry but also through the development of a competitive clothing industry. Two-thirds of Mauritius clothing exports is exported to the EC.[175]. It is the main exporter of textiles to the EU within the SADC. As pointed out by Flatters,[175] the success of Mauritius garment industry has beenwas based on the low import duties for raw materials, so as to import inputs and export processed products. However, this strategy renders Mauritius dependent on its imports of cheap yarn and fabric from Asia of cheap yarn and fabric. With this industrial structure, it is normal for Mauritius to be the main advocate of single transformation as rule of origin for the textile sector. Its main opponent at that time was apparently South Africa. South Africa because of UN sanctions during Apartheid had developed import substitution strategy and remained since then a significantly closed economy. For this reason, South Africa had supported the adoption of the double transformation in the SADC; moreover Moreover, as double transformation was required in the past agreements with the EU, it was easier to apply it also in the SADC context. However, now that the other SADC countries enjoy the benefits from the single transformation rule in their agreement with the EU, South Africa will surely loose competitiveness within the region. See: F. Flatters, "'SADC Rules of Origin in Textiles and Garments: Barriers to Regional Trade and Globalisation'", in R. Grynberg, *Rules of origin: Textile and Clothing Sector*, (Cameron May, 2004).

[176] Article 2(4) of Protocol 1 to the Agreement on Trade Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other, [1999] OJ 1999 L 311.

3.3.2. The case of Mexico: adapting to the EC-Mexico rules of origin

The EC negotiated a free trade area with Mexico, which came into force on 1 July 2000.[177] In the last decade, Mexico has diversified its FTA deals: aside from the agreement with the EC, it concluded FTAs *inter alia* with the EFTA countries and Japan. The main aim of the Mexican government was to diversify its export markets and at the same time to increase FDI within the country and transform Mexico in a manufacturing hub exporting to the big consumer markets: the NAFTA, EU and Japan.[178] Yet, this desire is definitely contingent on respecting rules of origin in all different agreements. Constructing a network of FTA could be very profitable for firms with economies to scale for whom one single manufacture sites to deliver the major consumer markets would be a great advantage. However, because of incompatible rules of origin the market remains fragmented and investors have to choose whether to respect the NAFTA or the EU rules of origin when choosing their input mix.[179]

The table (Figure 14) below shows that Mexico was indeed not able to diversify its trade partners; in 2008 the US still represented 56.1% of Mexico's imports and 73.2% of its exports (a percentage high even to be explained through "Natural trading partners" theory[180]). This might be because of the high integration of the Mexican and American industry to meet rules of origin requirement in NAFTA. In the seven-year period from 1999-2005, 63.6% of FDI to Mexico was from the US.[181] The study by the UNIDO on outward processing trade shows the growing importance of Mexico as US main partner in the establishment of a vertical division of labor in the apparel sector.[182] The higher integration with the US in some sectors demanding compliance with the NAFTA rules of origin does probably also imply greater difficulty in meeting strict rules of origin requirements under other FTA such as the EC-Mexico FTA. Thus integrating with US industries in order to serve the NAFTA market might also mean foregoing other preferential concessions in other markets (EC, EFTA, Japan).

In terms of utilization rate of preferential agreement with the EC (see figure 15 and 16), Mexico has a lower rate (73.97%) compared to other EC partners and substantially lower than the utilization rate within the NAFTA (beyond 90%). But this might be simply the case because since the creation of the NAFTA most of Mexican trade was done with its northern American partners. Therefore, companies are well trained to cope with the NAFTA rules of origin, whereas the European system might be still new to them. Knowledge of the various systems might also impair the diversification of trade. The two systems work with different calculation methods of the value added criteria. In the NAFTA value added criteria are different depending on the rule and sector. Moreover, Mexico enjoys a clear location advantage within the NAFTA, whereas it does not have such an advantage in its relations with the EC (or also Japan). The rules of origin attached to the EU-Mexico FTA[183] have been drafted partially taking into account these difficulties. The European model of rules of origin has been adapted with

[177] Decision 2/2000 of the EC-Mexico Joint Council on provisional application of the Partnership Agreement, OJ 2000 L 157

[178] M. Busse 'The Hub and Spoke Approach of EU Trade Policy', (July/August 2000), 35 *Intereconomics – Review of European Economic Policy* 4, pp. 153-154; M. Angeles Villareal, July 2010, 'Mexico's Free Trade Agreements', CRS Report for the Congress, Congressional Research Service, R40784.

[179] I fully agree with M. Busse who writes: 'Complicated rules of origin, which define how much local content is required before a good is considered Mexican and thus eligible for preferential access to the EU and NAFTA, entangle investors in red tape and will deter many from setting up shop in Mexico.' in M. Busse 'The Hub and Spoke Approach of EU Trade Policy', (July/August 2000), 35 *Intereconomics – Review of European Economic Policy* 4, p. 153-154.

[180] "Natural Trading Partners" claims that natural trading partners already traded a lot before joining a preferential trade agreement (for example because of geographical proximity) and therefore trade diversion is negligeable. Arvind Panagarya refutes and criticise this theory in his article "The regionalism debate: an overview"; see: A. Panagarya, June 1999, 'The Regionalism Debate: an Overview', 22 *The World Economy* 4.

[181] B. J. Condon, 'The EU-Mexico FTA', in S. Lester and B. Mercurio, *Bilateral and Regional trade agreements – Case studies*, (Cambridge University Press, 2009), p. 14.

[182] G. Gereffi and O. Memedovic, *op cit*, 18-20.

[183] Appendix II to Decision 2/2000 of the EC-Mexico Joint Council on provisional application of the Partnership Agreement, OJ 2000 L 157.

transitional rules in key sectors (under Appendix II (a)).[184] Quotas on the alternative rules for textiles have been imposed on EC exports to Mexico so as to limit the impact on the Mexican economy. We will describe briefly some of these rules in the automobile sector, the textile sector and the chemical industry.

Figure 14: Mexico's Trade with Major Partner[185]

	MEXICO's Trade with US, EU and Japan (2008)			
	IMPORTS		**EXPORTS**	
	Value (Mio.Eur.)	**%**	**Value (Mio.Eur.)**	**%**
US	113,334.20	56.10	134,797.40	73.20
EU	24,311.60	12.00	12,576.30	6.80
Japan	7,440.50	3.70	2,363.60	1.30

Figure 15: Preference Utilization Rates[186]

	Preferences (EU-only) utilization rate (%, actual/potential value)		
Country Name	**2005**	**2006**	**06/07Latest**
Chile	87.68	83.82	83.82
Mexico	62.68	73.97	73.97
Morocco	84.47	86.16	86.16
South Africa	78.69	76.43	76.43

[184] Appendix II(a) to Decision 2/2000 of the EC-Mexico Joint Council on provisional application of the Partnership Agreement, [2000] OJ L 157.

[185] Data from DG Trade statistics on Mexico, 22 September 2009.

[186] Data from the World Bank: http://info.worldbank.org/etools/wti2008/docs/Indicators.htm (accessed in December 2009).

Figure 16: Preference Utilization Rates of Mexico under EC and US PTA[187]

	Mexico	
	Preferences (US-only) utilization rate (%, actual/potential value)	Preferences (EU-only) utilization rate (%, actual/potential value)
2005	94.31	62.68
2006	95.16	73.97
06/07 latest	95.16	73.97

In order to allow the Mexican industry to slowly adapt to the new rules of origin under the EC-Mexico FTA, some transitional rules were introduced in some key sectors to ease Mexican export or contain EC-export. We will shortly have a look at two examples below.

Automobiles

The EC introduced in the agreement with Mexico phase-in rules of origin. One of these examples was the automobile sector. For example, for motor cars (under heading 8703) parties applied a more favorable rule of origin allowing for non-originating materials up to 55% of the ex-work price until 2002, from 2003 till 2004 the threshold for non-originating products was set at 50% of the ex-work price and from 2005 the ceiling for non-originating materials achieved its normal level of 40% of the ex-works price.[188] Moreover the Community granted some of these easier transitional rules exclusively to Mexico within a certain quota. This is the case for motor vehicles under headings 8701 (tractors), 8702 (motor vehicle of ten persons or more) and 8704 (motor vehicles for the transport of goods). The threshold for non-originating materials under the latter headings within a quota of 2500 units was 55% until 2002, 50% from 2003 until 2006 and achieved the regular threshold of 40% from 2007.[189]

Textiles

On some textiles and apparel headings,[190] the origin protocol imposes a quota on the use by EU exporters to Mexico of the alternative rule of origin. The alternative rule of origin simplifies the requirement for printed textiles stating that: fabrics obtained by "*printing accompanied by at least two preparatory or finishing operations or finishing operations (such as sourcing, bleaching, mercerising, heat setting, raising, calendaring, shrink resistance processing, permanent finishing, decatising, impregnating, mending, and burling) where the value of the unprinted fabric used does not exceed 47,5% of the ex-works price"*. The system of quotas has been introduced first through an auction system. The auction was granted according to the "*least winning price*" price principle. Winning offers were those corresponding to the highest price bid until exhaustion of the quota. The actual price

[187] *Idem.*

[188] See: Note 12 of Appendix II(a), Annex III to Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000.

[189] *Idem.*

[190] For printed fabrics of chapters 52, 54, 55 and of tariff headings 5801, 5806 and 5811 see: Appendix II to Decision 2/2000 of the EC-Mexico Joint Council on provisional application of the Partnership Agreement, OJ 2000 L 157.

paid by exporters was the least winning price.[191] The system has been modified in 2002 and quotas will be assigned on *"first come first served"* bases so as to increase the utilisation rates.[192]

Drawback

A temporary drawback clause was allowed for two years after the entry into force of the agreement.[193] It is interesting to notice that while the EC granted a temporary drawback clause to Mexico, Mexico was simultaneously required by its NAFTA partners to give the same tariff treatment to non-originating products incorporated into finished products for export to the US and Canada.[194] This was probably done because the conclusion of the various FTAs (and especially the one with the EU) was considered as a non-indifferent decrease of Mexican external tariffs and as potentially increasing trade deflection in NAFTA.

4. Conclusions: Harmonization of Rules of Origin in Europe

Even though the EU has started a process of regional harmonization, this process remains partial vis-à-vis most of its partners. Total harmonization has been until now granted only to the European and Mediterranean partners. While some differences are contained in product specific rules of origin, the main differences lie in the cumulation rules and the absence of relaxation of the territoriality principle. However, partial harmonization was not only chosen to differentiate between different groups of partners. For the ACP countries, the Cotonou Agreement contained product specific rules almost identical to the harmonized protocols rules. Those rules were considered too restrictive. Therefore, the ACP countries asked for a *differential treatment* and the insertion of more liberal rules for fisheries and textiles. Moreover, the Pan-Euro-Mediterranean cumulation was mainly thought to attract investments in the CEEC and Mediterranean countries in order to increase vertical integration of the industries and develop the sourcing of European inputs. This might be desirable for the CEEC and Mediterranean because of their location advantage, it was less interesting for the ACP countries as their main desire is to import third countries cheaper inputs. For Mexico, the main interest was to diversify its export and import market. Failure to do so until now, is due most probably to the incredible integration with NAFTA countries, which makes it more difficult for Mexican companies to comply with the rules of origin requirements contained in the EU-Mexico FTA. From that point of view, transitional rules of origin were probably not the right solution to solve the problem of adapting to the new EC-Mexico rules of origin regimes as transitional rules of origin still do not take into account possible issues derived from the overlapping of two FTA without diagonal cumulation binding them (as it is the case for NAFTA and the EC-Mexico FTA).

The main conclusions to draw from the EC harmonisation process of rules of origin are twofold. First the Pan-European experiment as well as the counterexample of Mexico, NAFTA and the EC-Mexico FTA show that what really matters for more uniform and predictable origin determination are multilateral cumulation rules. Regional harmonisation fails to take into account the overlapping FTA (such as in the Mexican case), however, international harmonisation of preferential rules of origin without multilateral cumulation rules would fail to solve the Hub&Spokes problem. From the Mediterranean example, one concludes that multilateral cumulation has been introduced only upon

[191] Communication to traders, Implementation of the rules of origin under the EC-Mexico Agreement, OJ 2000 C 187/3.

[192] Decision of the Council implementing Decision 1/2007 of the EU Mexico Joint Committee of 14 June 2007 relating to Annex III to Decision 2/2000 of the EU-Mexico Joint Council of 23, March 2000, OJ 2007 L 279/15.

[193] Article 14 of Annex III to Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000.

[194] Goodrich, Riquelme y Asociados, 'Benefits for investors under the Mexico-European Union Free Trade Agreement', 2004.

compliance of two main requirements: (1) all partners involved had to enter into the FTA amongst each other, (2) all the FTAs have identical rules of origin. The first requirement is to guard the reciprocity character of the FTA and limits the extent to which a fully-fledged harmonisation process such as the Pan-Euro-Mediterranean system is feasible at the international level. Finally, the ACP example shows that harmonisation rarely solves the issue of restrictiveness of rules of origin. The EPA grants more liberal rules of origin in few sectors deviating from the European harmonised protocols model.

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Does the EU Competition Law Model Satisfy the Needs of the Emerging Economies?

Lessons from the Countries without a "Carrot"

Marco Botta

Abstract

The paper discusses the institutional aspects of transplantation of the EU competition model to emerging economies which has taken place during the last two decades within the enlargement and the European Neighbourhood Policy (ENPI). The model which was designed to satisfy the needs of developed economies characterized by well functioning markets has been implemented by both the States under enlargement and the ENP conditions as well as other third countries. The paper relies on the experience of two emerging economies – Brazil and Argentina - which did not have any "carrot" of EU membership or closer economic relations with the EU, to adopt the EU competition model. The case studies showed that the non-orthodox institutional model established in Brazil, where an independent NCA enforces the competition law together with two bodies connected to the executive branch, proved to be more successful than the Argentinean model. The latter, which referred directly to the EU institutional model, opted for a fully independent Competition Tribunal. This institution, however, has never been established in this country. In particular, the Brazilian institutional model proved to be more successful in terms of competition advocacy of the NCA vis-à-vis other State bodies. A lesson, in the view of the discussed experiences should also be learnt when considering adoption of the EU competition model by the EU partner countries.

1. Spreading of Competition Law in Emerging Economies

The last twenty years recorded a radical change in emerging economies' approach to economic development. After decades of strong State intervention in the economy through State-owned companies, subsidies and the imposition of high import barriers to protect local infant industries, since the beginning of the 1990s the majority of emerging economies have been introducing free market institutions.[1] For instance, under the pressure of international donors, such as the World Bank and the IMF, and with the theoretical support of the so called "Washington consensus",[2] several emerging

[1] This approach to the economic development of the emerging economy was defined as the import-substitution model. Intellectually, the imports substitution model was backed by the Statist school of thinking. The most important figure in this economic school was Raúl Prebisch, the famous Argentinean economist who was director of the UN Economic Commission for Latin America for a number of years. The Statist economists based their work on the idea of unequal conditions of trade between developed and developing nations. The latter exported a limited number of agricultural commodities which were subject to fluctuations of the market, while they remained dependant on the import of industrially manufactured goods. The import-substitution model was the solution to this inequality, due to the fact that it allowed the development of a national industry in developing countries, which in the long term would be able to export its manufactured products abroad. Only at that point the trade conditions between developed and developing countries would be fair and, thus, the import-substitution model would no longer be necessary.

In relation to the work of Prebisch see, for instance: R. Prebisch, 'Five Stages in My Thinking on Development'.In G. M. Meier and D. Seers (eds), *Pioneers in Development* (Oxford University Press, 1984), at 176-177.

The text of the paper is available at:

http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000178830_98101901520025 (20.03.2010).

[2] In 1990 John Williamson elaborated ten principles that the emerging economies should follow in order to achieve their economic development. These principles represented a complete turn in comparison to the Statist school. According to Williamson, the governments of the developing countries should introduce: 1) Fiscal discipline in State's budget. 2) Reduction of public expenditures. 3) Increase of taxes. 4) Interest rates should be determined by the market rather than by State agencies. 5) The exchange rate should be determined by the market. 6) the liberalization of imports . 7) Elimination of the barriers to FDIs. 8) Privatization of inefficient State-owned companies. 9) Deregulation of markets. 10) Safeguarding of property rights.

economies initiated privatization of their State-owned companies, abolition of trade barriers and liberalization of a number of economic sectors which had been previously exclusively managed by State monopolies. This change aimed at reducing the budget deficit of these countries and fostering their economic development by encouraging the in-flow of foreign direct investments (FDIs).

The liberalization of FDIs in the emerging economies did not simply had as its goal an increase in the employment rate in the recipient countries, but also an increase in the degree of competition among companies operating in these markets. Trade and investment liberalization, in fact, encouraged new entrants on emerging economies' markets. According to the UNCTAD Investment Report 1997, the in-flow of FDIs may be expected to improve the quality of products commercialized in a recipient country and to lower their prices, thus strengthening the level of competition with local operators.[3] Local operators usually react to the new challenge by adopting similar management and production techniques to a new entrant, thus increasing their productivity.[4] Finally, prices would not be determined anymore by the State, but rather by the invisible hand of the market to the benefit of final consumers.

The introduction of the concept of competition among the market players has been one of the most radical changes in ideas behind economic development of emerging economies during the last twenty years. However, as we will see in the subsequent part of this analysis, the introduction of this new concept did not always go smoothly. In fact, local operators usually resist the idea of entering in competition, preferring the previous "quiet life" where their survival in the market was ensured by contacts with other competitors and with State's officials. Due to resistance of local operators to accept the rules of the market competition, measures of trade and investment liberalization are not per se sufficient to foster the competition among market players. Market players usually prefer to continue the previous collusive behaviours, with the objective to exclude new entrants from the market. For instance, the former State owned Telecom company, even after it was privatized, may refuse to grant access to its networks to its new competitors. Given the lack of their own network, the competitors need to, in fact, offer their services through interconnection with the network of an incumbent telecom. Due to these reasons, the idea that liberalization of FDIs and trade policies in developing countries has to be complemented by an effective competition policy is widely accepted. The competition policy becomes "*primus inter partes"* amongst policy instruments used to monitor the level of competition in the market.[5]

Competition law is usually enforced by a public agency - a national competition authority (NCA). This institution has three instruments at its disposal to ensure the smooth functioning of the competition on the market. On the one hand, it can sanction forms of abuse of dominant position by dominant operators on the market, and it can also sanction cartels and other collusive behaviours among the competitors (e.g. behaviours aiming at fixing prices, quantities of production, sharing the market). In addition, the NCA can also rely on a third instrument, namely the control of economic concentrations. Unlike the control of anticompetitive agreements and the abuse of dominance, merger control is usually an *ex-ante* form of review. When one company acquires the control of another, or it establishes a joint venture with another company on a long-term basis, the transaction is considered to be a concentration, which must be notified to the NCA. The NCA will evaluate the concentration in the light of its expected impact on the relevant market. If it considers that the transaction may harm the level of competition in the long term, it will either impose a measure to ameliorate the negative effects of the transaction or, in extreme cases, it will prohibit the transaction from taking place.

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J. Williamson, 'What Washington Consensus Means by Policy Reform', in J. Williamson, *Latin American Adjustment. How Much Has Happened?* (Institute for the Internal Economics, 1990), Chapter 2. The text of the paper is available at: http://www.petersoninstitute.org/publications/papers/print.cfm?doc=pub&ResearchID=486 (20 March 2010).

[3] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1997, Transnational Corporations, Market Structure and Competition Policy*, (New York and Geneva, 1997) at 150. An electronic version of the paper is available at http://www.unctad.org/en/docs/wir97ove.pdf (20 March 2010).

[4] *Ibid*, 154.

[5] *Ibid*, 211.

During the last fifteen years, new competition law regimes have "bloomed" around the world.[6] In Latin and Central America, Eastern Europe, South East Asia and some African States competition law has been perceived as one of the policies necessary to establish a market-oriented economy.[7] According to Whish, 'more than 100 countries now have competition law'.[8] Moreover, a number of developing countries are currently in the process of introducing this kind of legislation. One well-known example is the case of China, which adopted its first Anti-Monopoly Law in August 2007, coming into force on 1st August 2008.[9] However, during the recent years there have also been other cases of introduction or reform of national competition law in smaller developing countries. For instance, Uruguay adopted its first competition law in July 2007.[10]

2. Exporting the EU Competition Model to the CEEC, SEE and ENP Countries

Since the Treaty of Rome, the EU competition law has sanctioned anti-competitive agreements. It is characterized by the preference for the concept of abuse of dominance, rather than the US concept of monopolization.[11] The EU competition law has been deeply reformed during the last decade. In 2004, the EC Regulation 139/2004 reformed the previous system of merger control provided by the EC Regulation 4069/89. The new system of merger control shifted the test of review of notified concentrations from the previous strengthening of dominant position to the new substantial lessening of competition.[12] In addition, the EC Regulation 1/2003 eliminated the previous notification system of the agreements to the European Commission to check their compatibility with the competition rules, hence focusing the interest of the Commission on the detection of cartel cases.[13] Furthermore, the

[6] M. W. Nicholson, 'An Antitrust Law Index for Empirical Analysis of International Competition Policy'. (2008) 1, *Journal of Competition Law and Economics* 21, 1-21.

[7] R. Lande., 'Creating Competition Policy for Transition Economies', (1997-1998) 23 *Brooklyn Journal of International Law*, 341.

[8] R. Whish, *Competition Law* (Oxford University Press, 6th edn, 2009), 801.

[9] Anti-monopoly Law of the People's Republic of China. Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 30th August 2007. An English translation of the legislation is available at www.leggicinesi.it/view_doc.asp?docID=344 (20 March 2010).

For comment concerning the new Chinese Anti-Monopoly Law, see: M. Furse., 'Competition Law Choice in China', (2007) 2*World Competition* 30, 323-340.

[10] D. Hargain, 'Nueva Ley de la Competencia en Uruguay', (2007) 23 *Boletin Latinoamericano de Competencia*, 100-109.

[11] Article 2 of the US Sherman Act prohibits any attempt to monopolize the trade or commerce among the US States. Art. 82 EC (now Art. 102 Treaty on the Functioning of the European Union, TFEU), on the other hand, sanctions the forms of abuse of dominant position. The ECJ case law has identified a number of cases in which a company is found dominant in the relevant market (e.g. to own important IP rights, like a patent). In relation to the market share of the company, the ECJ has often stated that there is presumption of dominance once a company has 40% market share of a relevant market. This represents a lower threshold in comparison to Art. 2 Sherman Act, where an anti-competitive conduct can be sanctioned only if the company tries to monopolize (i.e. to acquire 100% market share) a relevant market.

[12] The substantial lessening of competition (SLS) test is provided for in the USA by the Clayton Act, adopted in 1914, codified in 15 U.S.C. 18, Section 7. The Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (replacing the Reg. 4064/89/EC), OJ 2004 L 24/1, introduces the SLS test in Art. 2(2). However, it points out that a substantial lessening of competition takes places 'in particular as a result of the creation or strengthening of a dominant position'.

The Regulation 139/2004 introduced the SLS test in order to catch the economic concentrations which caused anti-competitive concerns, but which did not result in a strengthened dominant position. However, due to reasons of legal certainty, Art. 2 of the Reg. 139/2004 pointed out that a concentration which causes strengthening of a dominant position is also sanctioned under the SLS test.

[13] The Reg. 1/2003 radically reformed the enforcement of the EU competition law. Under the previous Reg. 17/62 every vertical or horizontal agreement which had an impact on the intra-Community trade should be notified to the European Commission in order to be exempted because deemed compatible with Article 81(1) EC, or to receive an exemption under Article 81(3) CE. In view of increase of the notifications expected with the enlargement by the CEECs, the Reg. 1/2003 abandoned the notification system, granting to the companies the task to self-evaluate the compatibility of the agreement with Article 81 CE.

Regulation 1/2003 allowed the decentralization of the enforcement process, by requiring the EU Member States to introduce a competition law system parallel to the Community one.[14] Art. 35 of the Regulation 1/2003 required Member States to designate a competition authority in charge of enforcing the competition law. This institution could be either an administrative or a judicial body. Though Art. 35 of the Regulation 1/2003 granted a margin of discretion to Member States in relation to the institutional design of the NCA, the latter have been usually established as administrative bodies, fully independent from the executive branch. Finally, within the EU, the Community competition law is complemented by State aid rules, which aim at detecting the subsidies granted by the Member States to national companies which could distort competition among market participants operating within the Community market.

As mentioned at the beginning of the previous section, competition law has been transplanted to emerging economies under the influence of international donors. The European Commission, in particular, has promoted its competition law model during the 1990s among the Central and Eastern European Countries (CEECs) within the framework of the enlargement process,[15] and more recently among the candidates and the potential EU candidates in South East Europe (SEE)[16] and its neighbours within the European Neighbouring Policy (ENP).[17]

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[14] Article 35 of the Reg. 1/2003 required the Member States to establish a NCA, which could enforce the national competition law, as well as Article 81 and 82 EC. The NCAs should notify the Commission of their enforcement activities under Article 81 and 82 EC, and a forum of discussion among the NCA, the European Competition Network (ECN), was also established.

In relation to the ECN see: F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' (2009) 05, *EUI Working Paper*, Max Weber Program.

[15] In relation to the introduction of competition law in CEECs see: M. Oiaja , The competition law of Central and Eastern Europe (Sweet & Maxwell, 1999); D. Gerardin and D Henry., 'Competition Law in the New Member States - Where Do We Come From? Where Do We Go?' In D. Gerardin, D. Henry (eds.) Modernisation and enlargement: two major challenges for EC Competition law (Intersentia, 2005).

[16] Since the European Council of Thessaloniki in 2003 the EU has clearly offered a membership perspective to the SEE countries. At the moment, the EU has granted the candidate status to Croatia, Rep. of Macedonia and Turkey. However, the negotiations have been opened and almost completed only with Croatia. On the other hand, Montenegro, Albania and very recently Serbia (in December 2009) have submitted their application for the EU membership, that the EU is considering at the moment. Finally, Kosovo and Bosnia-Herzegovina are also considered potential candidate, even though their membership perspective seems more far at the moment due to the weakness of the State institutions of these countries.

For an overview of the latest developments concerning the integration of SEE into the EU see:

European Commission, Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2009-2010. Published on 14.10.2009. COM (2009) 533. The Communication is available at:

http://ec.europa.eu/enlargement/pdf/key_documents/2009/strategy_paper_2009_en.pdf (20 March 2010).

[17] The ENP is a policy developed by the European Commission since 2003, when the enlargement of the CEECs was almost completed and the Commission had to define whether the enlargement process would be endless or whether it should have some geographic limitations. The ENP was addressed to the Mediterranean countries formerly involved in the Barcelona Process, to Caucasus countries, as well as to countries in Eastern Europe like Moldova and Ukraine. The EU offered to these countries the possibility to establish an enhanced cooperation provided they implemented the *acquis communautaire*, but not the membership perspective. Therefore, the SEE countries and Turkey were excluded from the ENP, while Russia opted for keeping a bilateral partnership with the EU. Under the ENP the development funds previously addressed to these different groups of countries have been unified under the European Neighbourhood and Partnership Instrument (ENPI). A peculiarity of the ENP is its cross-pillar nature, in fact it aims at promoting both the economic integration of the neighbours into the Community market through the adoption of the EU *acquis communautaire*, as well as the promotion of security and fight against terrorism, and democracy and human rights in the ENP countries. The key objectives of the ENP are, in fact, the promotion of prosperity, freedom and security. A second peculiarity of the ENP is related to its soft law approach. The European Commission, in fact, has developed the ENP on the basis of Action Plans concluded with single ENP countries, which defined the objectives that these countries should attain within a certain period of time, if they aimed at strengthening their partnership with the EU. According to some commentators, the European Commission followed this soft law approach due to the cross-pillar nature of this policy. In fact, if the EU had opted for the conclusion of new bilateral agreements with these countries it would have needed the ratification of all the Member States for every agreement concluded.

For an overview of the basic features of the ENP and in relation to the soft law approach followed by the European Commission in designing the ENP see: M. Cremona, 'The European Neighbourhood Policy as a Framework for Modernization' in F. Maiani, R. Petrov, E. Mouliarova (eds.), *European Integration without EU Membership Perspective:*

The obligation for the SEE countries to introduce the EU competition law was included in the Stabilization and Association Agreements (SAA) concluded by the EU with the SEE countries after wars which troubled this region during the 1990s.[18] For instance, the Republic of Macedonia in 2001 signed a SAA, which entered into force in 2004.[19] Under Art. 68 of the SAA the Rep. of Macedonia was required '…to ensure that its laws will be gradually brought in line with those of the Community'. In particular, Art. 69 of the SAA provided the obligation for the Rep. of Macedonia to introduce a legislation which sanctioned anti-competitive agreements, forms of abuse of dominance and public aids which could distort competition among economic operators. These rules represented a clear transposition of Articles 81, 82 and 87 EC (now Articles 101, 102 and 107 in the Treaty on the Functioning of the European Union, TFEU) into the legal framework of Rep. of Macedonia.[20] The SAA did not provide any legally binding obligation for the Rep. of Macedonia to introduce a system of merger control. On the other hand, it established an annual mutual system of notification between the EU and the Rep. of Macedonia of aid schemes granted by the public authorities to the local companies. In addition, it stated that for a transitory period of four years the Rep. of Macedonia was considered an area where the standard of living was particularly low, and thus every aid granted by the public authorities would be considered compatible with the EU State aids rules under Art. 87(3)(a) EC, now Art. 107(3)(a) TFEU.[21]

The Rep. of Macedonia implemented the obligations stemming from the SAA in 2005, when a competition law was adopted.[22] The legislation implemented the EU competition law, including a system of merger control,[23] and established an independent NCA in charge of enforcing the law.[24] Furthermore, the NCA was also entrusted to review the State aid schemes adopted by the public authorities in the Rep. of Macedonia.[25]

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Models, Experiences, Perspectives (EUI Working Paper, Max Weber Program, MWP 2009/10). B. Van Vooren, 'The Hybrid Legal Nature of the European Neighbourhood Policy' in F. Maiani, R. Petrov, E. Mouliarova (eds.), *European Integration without EU Membership Perspective: Models, Experiences, Perspectives* (EUI Working Paper, Max Weber Program, MWP 2009/10), 17-27.

[18] The SAAs were negotiated after the Zagreb summit in November 2000. It gathered the representatives of the EU Member States and of the SEE countries. The final declaration expressed the EU's wish to offer in the long term a membership perspective to the SEE countries. The negotiation of SAA on a bilateral basis and the establishment of regional project of cooperation among the SEE countries were identified as tools for achievement of this long term goal.

The final declaration of the Zagreb summit is available at:

http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm (20 March 2010).

[19] Council of the European Union, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, OJ 2004 L 84, 20 March.2004. The text of the SAA is available at:

http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf (20 March 2010).

[20] Consolidated Version of the Treaty on the Functioning of the European Union. OJ 2009 C-115/49; entered into force on [1] December 2009.

[21] S*upra*, SAA Rep. Macedonia, Art. 69(3)(b).

[22] Law on the Protection of Competition of the Republic of Macedonia. An English translation of the law is available at: http://www.kzk.gov.mk/images/LawOnProtectionOfCompetition.pdf (20 March 2010).

Some provisions of the 2005 competition act were amended in 2006 and in 2007. An English translation of the laws amending the 2005 competition act are available at:

http://www.kzk.gov.mk/images/Law%20Amending%20the%20Law%20on%20Protection%20of%20Competition.pdf (20.03.2010).

http://www.kzk.gov.mk/images/Law%20Amending%20the%20Law%20on%20Protection%20of%20Competition%20%28Official%20Gazette%20of%20Republic%20of%20Macedonia%20no.22-07%29.pdf (15 January 2010).

[23] *Ibid*, chapter 3 of the 2005 Macedonian Competition Act.

[24] *Ibid*, Art. 24.

[25] The Law on State Aid adopted in March 2003 introduced a monitoring system of State aids. Under the legislation the State aid schemes should be notified to a State Aid Commission, composed by three members appointed by the Government. The

An example of an EU neighbour which has progressively introduced a competition law system inspired by the one of the EU is Ukraine. Ukraine concluded a Partnership and Cooperation Agreement (PCA) with the EU in 1994.[26] Under Art. 51 of the PCA, 'the Parties recognize that an important condition for strengthening the economic links between Ukraine and the Community is the approximation of Ukraine's existing and future legislation to that of the Community. Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community…including rules on competition…' The first competition law of Ukraine was adopted even before the conclusion of the PCA. The Law "On Limiting Monopolisation and Preventing Unfair Competition in Entrepreneurial Activity", in fact, dates back to 1992, and in 1993 the Antimonopoly Committee of Ukraine was established.[27] However, during the 1990s, the Ukrainian competition law was quite distant from the EU standards. The legislation aimed primarily to identify forms of unfair competition. It still reflected a "*dirigiste*" approach to competition law, intended to prevent the enjoyment of a monopoly position by the companies recently privatized, rather than to supervise the smooth functioning of the competition among the market players.[28] This situation has gradually changed during the last decade, in line with the progressive rapprochement between Ukraine and the Western Europe. In March 2002 a new competition law, inspired by the EU model of competition law, was adopted.[29] After the Orange Revolution (November 2004-January 2005) Ukraine has accelerated the adoption of the EU *acquis.* A "National Program for the Approximation of Ukrainian Legislation to the Legislation of the European Union" was introduced. It provided for the establishment of the European Integration Committee within the Ukrainian Parliament to check the compatibility of the new legislation proposed by the Government with the EU *acquis.*[30] According to Meloni, during the last years 'Ukraine has engaged in a very complex process of legislative approximation in order to comply with the engagement taken in this direction with the Union…'[31] Such process of approximation progressed quickly in the area of competition law, due to the presence of the EU conditionality and the lack of internal opposition to the adoption of rules inspired by the EU competition law.[32] On the other hand, such approximation moved slower in the area of the State aids

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latter would analyze the notification in accordance with the principles included in Art. 87 EC and with the block exemption regulations issued by the European Commission in the field of State aid. However, in 2006, the law of 2003 was amended. In order to avoid duplications and to strengthen the autonomy of the review, the Competition Commission became in charge of enforcing the State Aid Law of 2003.

Law on State Aids of the Rep. of Macedonia 24/03, published on the Official Journal on 04 April 2003. An English translation of the legislation is available at: http://www.kzk.gov.mk/images/Vestiimages/455/DOWNLOAD.PDF (20.03.2010).

Law on Amending and Supplementing the Law on State Aid 70/06, adopted on 6 June 2006. An English translation of the legislation is available at: http://www.kzk.gov.mk/images/Vestiimages/460/DOWNLOAD.PDF (20 March 2010).

[26] Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine. Signed in Luxembourg on 14 June 1994. OJ 1994 L 49, 19.2.1998, 3–46.

The text of the PCA is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0219%2802%29:EN:NOT (20 March 2010).

[27] http://amc.gov.ua/amc/control/en/publish/article?art_id=44794&cat_id=42402 (20.03.2010).

[28] OECD Secretariat, *Ukraine - Peer Review of Competition Law and Policy.* Presented at the OECD Global Competition Forum in Paris on 21-22.02.2008. The text of the report is available at: http://www.oecd.org/dataoecd/44/26/41165857.pdf (20 March 2010).

[29] *Ibid*, 10.

[30] V. Muraviov, 'The Impact of the EU Acquis and Values on the International Legal Order of Ukraine' in F. Maiani, R. Petrov, E. Mouliarova (eds.), *European Integration without EU Membership Perspective: Models, Experiences, Perspectives* (EUI Working Paper, Max Weber Program, MWP 2009/10), 34.

[31] G. Meloni, *Wider Europe: the Influence of the EU on Neighbouring Countries. The Case of Russia and Ukraine.* PhD thesis defended in the Social and Political Sciences Department of the European University Institute in December 2007, unpublished, at 293.

[32] *Ibid.*

control, due to the Government's concern that it would constrain to its ability to distribute subsidies in certain economic sectors.[33]

The Rep. of Macedonia and Ukraine represent two examples of different reasons why the partner countries of the EU have implemented the EU competition model. On the one hand, the SEE countries like the Rep. of Macedonia have a clear membership perspective, which requires them to implement the *acquis*. On the other hand, despite the Ukrainian wish to join the EU on a long term basis, the ENP countries do not have the "membership carrot". The incentive to implement the *acquis* in the field of competition law is, therefore, different. It is connected with the idea mentioned at the beginning of this paper to introduce free market institutions, which could strengthen the economic cooperation with the EU, and in particular to attract FDIs.

3. Objectives and Structure of the Paper

The EU competition model has been designed since the 1950s for a group of developed economies, characterized by well functioning markets, with the aim of strengthening their economic and trade links. However, during the last twenty years this model has been exported to a number of emerging economies within the enlargement and the neighbouring policy. The model has been transplanted into these emerging economies without taking in consideration the specificities of these countries.

According to a number of authors, emerging economies are usually characterized by a lower internal demand for a number of products; which allows a lower number of operators to stay profitably in the market.[34] This leads to higher degree of market concentration in a number of relevant markets in comparison to the developed economies. This market structure leads more easily a company to become dominant in such concentrated markets and it facilitates collusive behaviours among the market players. In addition, emerging economies, unlike the developed countries, are often characterized by a large number of operators active in the informal economy. Though the latter escape from the official statistics analyzed by the NCA, they can exercise a competitive pressure on the operators, active in the formal economy. From a policy perspective, these two peculiarities would call, for instance, for a more lenient attitude *vis-à-vis* the finding of dominance in the market. Nevertheless, several emerging economies have transplanted the EU concept of dominance elaborated by the case law of the European Court of Justice (ECJ) without discussing whether such legal concept could fit with their economic needs. For instance, both the Rep. of Macedonia and Ukraine have introduced in their competition law a 'presumption of dominance' when the company enjoys at least 40% market

[33] *Ibid.*

[34] In 2003, Michal Gal published an interesting book concerning the market features of "small economies". In her book, Gal did not define precisely the meaning of "small economy"; she stated that "the definition of a small economy is arbitrary in the sense that there is no magic number that distinguishes a small economy from a large one". However, in general, the author defined as small economies countries with a small or dispersed population (e.g. Israel and Australia) or countries with a limited geographical areas, such as small islands (e.g. Liechtenstein and Malta). According to Gal, these countries share a similar market structure, characterized by a high degree of market concentration in the majority of the industrial sectors, high entry barriers and below minimum efficient scale (MES) levels of production.. MES is the level of production at which enterprises may minimize their average unit costs of production. In these small economies where internal demand is limited, only a certain number of enterprises may achieve MES, and thus they may profitably stay in the market. As a consequence, in small economies a high degree of market concentration in some sectors is often seen. Moreover, the impossibility for firms to achieve the minimum economies of scale necessary to remain in the market creates entry barriers to new competitors. In summary, the limited internal demand in a small economy restricts the number of competitors which may operate in the same market; this market structure leads to oligopolies, which may in the long term cause abuses of dominance or collusive practices. The approach followed by Gal in relation to small economies has been later generalized to the emerging economies by other authors. They argue that emerging economies, due to their low internal GDP per capita, and thus due to low internal consumption, are characterized by more concentrated market structures than the developed economies. This hypothesis is well grounded, but it cannot be generalized to every economic sector. In fact, in a number of relevant markets the international trade can replace the local demand. Therefore, a case by case analysis is always necessary.

M.S. Gal, Competition Policy for Small Market Economies (Harvard University Press, 2003).

share.[35] Such rebuttable presumption transposes in the competition act the ECJ case law on this matter.[36] However, it does not take in consideration the possibility that the NCAs of these countries might need a broader discretion to identify the cases of dominance, due to the higher degree of market concentration which can be recorded in some relevant markets in comparison to the EU Member States, and due to the existence of an informal economy.

Beside the different structure of emerging economies' markets, the latter are deeply affected by a lack of competition culture. As mentioned in the previous section, even when the text of the competition law is transposed into the national legal system, the local operators may find it difficult to accept the idea of competing, rather than colluding with each other. Similarly, State's officers may also remain unfamiliar with the concept of the competition law, usually adopted under a project sponsored by an international donor. Therefore, competition law is usually transplanted into a "hostile environment", due to the legacy of strong State intervention in the economy and to the propensity towards collusive behaviours among the market players. This context has an impact on the quality of enforcement of this legislation. Even though *de iure* the competition law is correctly introduced within the legal system of an emerging economy, it often remains *de facto* unenforced. In particular, within such environment the newly established NCA runs the risk to remain an isolated institution, which lacks human and financial resources to carry out its enforcement tasks. In addition, due to its independence from the executive branch, the NCA risks becoming an "isolated" institution, not capable to educate other State's bodies to the benefit of competition.

The situation described above characterizes the majority of the CEEC, SEE and the EU neighbouring countries, where the EU model of competition law has been exported during the last two decades. However, a real debate concerning the adequacy of the EU competition model for the emerging economies where it has been exported has never taken place. This paper aims at providing a contribution to this debate. The paper will focus on institutional issues mentioned above, linked with the independence of the NCA and the lack of competition culture in the emerging economies, rather than assessing the adequacy of EU competition substantial law for the market structure of the emerging economies.

An evaluation of the EU competition model in the countries where it has been directly exported through the enlargement and the ENP is difficult to undertake, due to the fact that these countries have all followed a similar path. This paper analyzes this issue from an alternative perspective: rather than looking at the countries where the EU competition model has been directly exported, it will look at the experience of two emerging economies which have not been forced to adopt the EU competition model due to the carrot of the membership/enhanced partnership with the EU, but which have taken the EU institutional competition law model as a reference point. The paper will use Brazil and Argentina as cases' study. These countries are good examples of emerging economies which introduced a competition law system in 1994 and in 1999 respectively. Similarly to the EU Member States and the EU neighbours, at the beginning of the 1990s Argentina and Brazil exited from decades of strong State intervention in the economy, and they both introduced a competition law as an instrument to establish a market-oriented economy. However, they opted for diverging models of competition law from an institutional point of view. In fact, while Argentina opted for the establishment of a fully independent Competition Tribunal, Brazil opted for a non-orthodox system of competition law enforcement. The Brazilian non-orthodox system was characterized by three NCAs, one fully independent and two being parts of the executive branch.

[35] Under Art. 13(3),(4) of the 2005 Macedonian Competition Act, 'It shall be presumed that an undertaking has a dominant position, if it participates on the relevant market with more than 40%, unless the undertaking proves the opposite. It shall be presumed that two or more undertakings have dominant position on the market if they have a joint participation on the relevant market of more than 60%.'

Similarly, Art.12(2) of the Ukrainian Competition Act of 2002 establishes a rebuttable presumption of dominance when a firm owns 35% market share.

[36] In AKZO III the ECJ held that a company is dominant in the market when it owns 40% market share. Case 62/86, AKZO Chemie BV v Commission [1991] ECR I-03359.

In the following sections the Brazilian and Argentinean experience of enforcement of a competition law regime will be compared, focussing in particular on institutional peculiarities of two systems. In final conclusions, lessons for emerging economies where the EU competition model has been exported will be elaborated in the light of the Brazilian and Argentinean experience.

4. The Non-Orthodox Institutional Competition Law Elaborated in Brazil

4.1. The Adoption of the Law 8884/94 and Early Years of its Enforcement

Brazil adopted its first competition law in 1962; the Law 4.137/62. The law established a *Conselho Administrativo de Defensa Econômica* (CADE, Administrative Council of Economic Law)[37] under the Ministry of Justice, in charge of investigating cases of cartels and abuses of dominant position. In practice, this institution was not active until the beginning of the 1990s. This was due to the fact that Brazil was characterized by a system of imports substitution. Furthermore, the price of the majority of goods was agreed by the local producers with the Commission of Provision and Prices, rather than as a result of free competition among the entrepreneurs.[38]

After the end of the dictatorship regime and the adoption of the new Constitution in 1988 there were attempts in Brazil to conduct reforms of the economy. However, during the first half of the 1990s the reforms in Brazil were conducted in an inconsistent manner.[39] This was indeed true as far as the reform of the competition law regime was concerned. A number of new statutes were passed in this area of law by the Brazilian Congress at the beginning of the 1990s. However, some of this legislation still followed the old approach, which saw competition law as a regulatory power of the State to control the functioning of the economy. One example which showed the ambiguous approach followed by the Brazilian legislators *vis-à-vis* competition law was passed in 1991. The Law 8158/91 established the *Secretaria Nacional de Direito Econômico* (National Secretariat of Economic Law).[40] The *Secretaria*, part of the Ministry of Justice, had the task to assist CADE in the investigation of anti-competitive practices sanctioned by the Law 4.137/62.[41] According to Franceschini, though the members of CADE had always been politically appointed, this new institution enjoyed a certain degree of autonomy within the Ministry of Justice from its inception.[42] The *Secretaria* was thus intended to be a new ministerial oversight over the CADE. In particular, the *Secretaria* could decide its enforcement priorities by deciding in which sector it would focus its resources to conduct investigations concerning the infringement of the Law 4137/62.

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[37] Law 4.137, adopted on 10 September 1962. Art 8 The text of the law is available at http://www.cade.gov.br/legislacao/4137lei.asp (20.03.2010).

[38] C. Monteiro Considera., P. Correa, 'The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy', (2001) *International Antitrust Law and Policy*, 533-568.

[39] Following the restoration of democracy in the country, for more than ten years a number of economic plans was adopted by Brasília with the objective of halting hyperinflation. However, none of them proved to be successful. These plans were usually characterized by a different mix of restrictive monetary policies and price freezes. Nevertheless, within these plans the Government did not pursue any fiscal reform in order to reduce the public deficit, due to the lack of support from public opinion. The plans were known by the name of the Minister of Economy who supported them: the three Delfim Plans (1979, 1981,1983), the Cruzado Plan in 1986, the Bresser Plan (1987) the Beans and Rice Plan in 1988, the Summer Plan in 1989, the Collor Plans I and II in 1990-1991 and the Marcílio Plan in 1991-1992.

L.C. Bresser Pereira, Economic Crisis and State Reform in Brazil. Towards a New Interpretation of Latin America. (Lynne Rienner Publisher, 1996)..

[40] Lei n.8.158, adopted on 08.01.1991. The law was later revoked by Art. 92 of the Law 8.884 of 1994. The text of the legislation is available at http://www.cade.gov.br/Default.aspx?c77b8b9e76ab40c356e374c09d (20 March 2010).

[41] *Ibid,* Art 7.

[42] Meeting of the author with José Ignacio Gonzaga Franceschini in São Paulo on 13 June 2008. Mr. Franceschini is a founding partner of the law firm Franceschini and Miranda Advogados in São Paulo, http://www.fm-advogados.com.br/?lingua=i (20 March 2010).

In 1993, at the time when the Real Plan to halt hyperinflation was designed,[43] a commission was established within the Brazilian Parliament to discuss the text of a new competition act which would fully reform the Law 4137/62. The result of the work of the Congress was the Law 8884/94, the competition statute currently enforced in Brazil.[44] The two main innovations brought by the new act were the introduction of a system of merger control, and the introduction of a new institution, the *Secretaria de Acompanhamento Econômico* (Secretary for Economic Monitoring, SEAE).[45] This new institution, part of the Ministry of the Economy, acquired a task similar to that of the *Secretaria Nacional de Direito Econômico*, which was renamed *Secretaria de Direito Econômico* (Secretariat of Economic Law, SDE).[46] SEAE and SDE conducted investigations on anti-competitive practices, and delivered opinions to CADE concerning the notified concentrations. The latter was the only institution able to take final decisions.

With the new legislation CADE became a federal agency independent from the Ministry of Justice (*autarquia federal*),[47] composed of a President and six Board Members. CADE Commissioners were appointed for a period of two years, with the possibility of reappointment by the President of the Republic with the approval of the Senate.[48] They could only be dismissed by a decision of the Senate if they were convicted by a non appealable criminal judgement.[49] Despite the fact that the Law 8884/94 underlined the concept of *autarquia federal*, some features of this legislation could undermine the independence of CADE. For instance, the period in office of CADE Commissioners was relatively short, only two years, encouraging them to look for the necessary political support in order to get another re-appointment.

According to Oliveira, former President of CADE during the second half of the 1990s, the Law 8884/94 was considered by its supporters as one of the instruments to disseminate market institutions in Brazil at the beginning of the 1990s.[50] However, at the same time, "the Law 8884/94 drew inspiration from the notion of State intervention in the market, inherited from previous stages."[51] For instance, according to Oliveira, the President of Brazil Itamar Franco 'hoped the law would permit fast punishment of prices abuses in the pharmaceutical sector and demanded approval of what became the new competition law as a condition for implementing the stabilization plan.'[52] Therefore, the Law

[43] After more than ten years of unsuccessful attempts, in July 1994 the Minister of the Economy, Fernando Henrique Cardoso, launched the "Real Plan". Unlike some of the previous plans, the Real Plan did not provide any mechanism of price freezes. Prices were put controlled by a strict monetary policy, and, for the first time, by a program of trade liberalization and privatizations. The latter policies had been implemented very slowly in the years following the adoption of the new democratic constitution of 1988. Moreover, the Real Plan was followed by a number of fiscal reforms, in order to decrease the public deficit. Finally, the old currency, the Cruzeiro, was replaced by a new currency, the Real, which was pegged to the US dollar. The Real Plan cut inflation from an annual average of 5000% in 1994 to 21% in 1995. This victory against inflation ensured public support for Cardoso, given the public had seen its net income progressively reduced by hyper-inflation. Cardoso was thus elected President of Brazil in 1994.

Supra, Bresser Pereira, 191.

[44] Lei n. 8.884, adopted on 11 June 1994. The text of the legislation is available at: http://www.cade.gov.br/legislacao/8884lei.asp (20 March 2010).

[45] For further information concerning SEAE see: http://www.seae.fazenda.gov.br/ (20 March 2010).

[46] For further information concerning SDE see: http://www.mj.gov.br/sde/data/Pages/MJ44407D46PTBRNN.htm (20.03.2010).

[47] *Supra*, Law n.8884/94, Art.3.

[48] *Supra*, Law n.8884/94, Art 4(1),(2).

[49] *Supra*, Law n.8884/94, Art 5.

[50] G. Oliveira, C. Konichi, 'Aspects of Brazilian Competition Policy.' Textos para Discussão 150, Escola de Economia de São Paulo, Fundação Getulio Vargas, May 2006, at 3. The text of the article is available at:

http://virtualbib.fgv.br/dspace/bitstream/handle/10438/1869/TD150.pdf;jsessionid=2F7B7CEA9ED805737A7E61F0753B2D9A?sequence=1 (23 March 2010).

[51] *Ibid*, at 10.

[52] *Ibid*, at 10.

8884/94 was inspired neither by the EU nor by the US model of competition law. The Law 8884/94 received support both from the stakeholders who saw competition law as an instrument to introduce a free market economy in Brazil, and from those ones who saw competition law as a new regulatory tool in the hands of the State; regulatory tool necessary *inter alia* to fight the hyperinflation which affected Brazil at the beginning of the 1990s, by sanctioning for abuse of dominant position the companies which increased the prices of their goods. From an institutional point of view, the result of this internal debate was the triangular structure which characterizes today the system of enforcement of competition law in Brazil. As mentioned above, the Law 8884/94 made CADE an independent authority. However, two advisory bodies linked to the executive branch, SDE and SEAE, were also established to preserve a certain degree of control by the Government over CADE's activities.

In the 1990s the non-orthodox institutional model introduced by the Law 8884/94 was criticized by a number of authors.[53] The triangular structure provided by the Law 8884/94 could slow down the speed of the proceedings, in particular in the area of merger control. Article 54(6) of the Law 8884/94 provides that the total time of review should not last longer than 120 days from the time of the notification.[54] However, the time of review was usually extended, due to the fact that each institution asked the parties for additional documents in order to interrupt the time of review.[55] Moreover, the thresholds of notification were initially interpreted in a broad manner, in order to increase the number of transactions subject to review. [56] The huge number of notifications overloaded CADE, broadened the time of review and impeded CADE/SDE/SEAE to conduct any investigation on anti-competitive practices. Besides the overlaps and the delays caused by the triangular system introduced by the Law 8884/94, there were fears that the relation with SDE and SEAE would have undermined the independence of CADE.

4.2. The Evolution of the Brazilian Competition Law System During the Last Decade

Brazil introduced its competition law of 1994 without referring to international standards in the area of competition law. In particular, the triangular institutional structure was evaluated as inefficient, and it could undermine CADE's independence. During the last decade the Brazilian competition law system has been subject to a slow and steady evolution. One aspect to notice is that this evolution took place thanks to the non-orthodox institutional setting provided by the Law 8884/94. In the following pages the main steps of this evolution will be briefly described.

During the last years a better system of coordination between the SDE and SEAE[57] and a more restrictive interpretation of the thresholds of merger notifications[58] allowed for a reduction of the time

[53] W. H. Page, 'Antitrust Review of Mergers in Transition Economies: A Comment, with some Lessons from Brazil', (1997-1998) 66, *University of Cincinnati Law Review*, 1124.

[54] SDE and SEAE have 30 days each one to submit their reports. Afterwards, CADE has 60 days to adopt a final decision.

[55] Between 1995 and 1998 the average time to review a notified concentration by CADE/SDE/SEAE was of 605 effective days, against the 120 days provided by the Law 8884/94.

G. Oliveira, 'Competition Policy in Brazil and Mercosur: Aspects of Recent Experience', (1999) 3 *Boletín Latinoamericano de Competencia*, 14.

[56] In 1994 only six concentrations were notified. This number increased to 16 in 1996 and to 226 in 1999. This increase was due to the fact that CADE interpreted that the turnover threshold of 400 million Reals provided by Art. 54 of the Law 8884/94 should be calculated on the basis of the world-wide turnover, rather than on the basis of the Brazilian one. Moreover, Art.54 does not expressly include the concept of change of control as a necessary precondition in order to require a notification. Therefore, initially also other kinds of agreements, like non-full functional joint ventures, had to be notified to CADE. The huge number of notifications overloaded CADE and prolonged the review.

[57] On 18 February 2003, the SEAE/SDE adopted a fast-track procedure for categories of mergers which usually do not represent particular competition concerns (e.g. conglomerate mergers; acquisition of Brazilian companies by foreign investors not present yet in the Brazilian market; joint ventures….).

Portaria Conjunta SDE/Seae nº 01, 18.2.2003, available at:

of merger review.[59] In addition, in 2000, the Law 10149 amended the Law 8884/94, by introducing a system of leniency for cartels.[60] The simplification of the proceedings of merger review and the introduction of a leniency system allowed the SDE to dedicate more human resources to the detection of cartels. For instance, the number of dawn raids conducted by SDE increased from 11 in 2003 to 84 in 2007.[61] Finally, in September 2007 CADE adopted the Resolution 46/2007 which introduced the possibility to negotiate settlements with the companies involved in a cartel case, in order to decrease the time of investigations concerning a single case.[62]

According to Camila Safatle, senior officer of the merger review unit of the SDE, SEAE and SDE have achieved an effective division of their tasks during the last years: SEAE mainly deals with projects of competition advocacy towards other regulatory agencies of the Brazilian public administration and it draws the opinion for CADE concerning the notified concentrations. On the other hand, SDE has focussed its resources on the investigations of anti-competitive conducts.[63]

The good enforcement record of the Brazilian NCAs has increased their credibility *vis-à-vis* the other political and economic stakeholders in the country. However, this result has also been achieved through the activities of competition advocacy conducted by the Brazilian NCAs *vis-à-vis* other federal and State bodies and *vis-à-vis* the business community. Competition advocacy is a function of the NCA which is often undermined in comparison to the enforcement action. However, in the emerging economies, which are often characterized by a lack of competition culture, such activity is essential. It allows the NCA to modify the "hostile environment" in which it has to enforce the competition act.

One aspect to notice is that the majority of the activities of competition advocacy have been carried out by SEAE, rather than CADE. In particular, during the last years SEAE has focused its activities of competition advocacy in four areas:[64] providing advice to the Ministries involved in the negotiations of trade tariffs at the WTO and Mercosur level; providing an evaluation on the impact of these additional duties on the level of competition in the Brazilian market to the agency in charge of

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http://www.mj.gov.br/sde/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={0076B8D7-06BB-43C7-9566-B6C1A26EF277}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}(20.03.2010).

On 4 January 2006 SDE/SEAE adopted a new procedure for merger review which allows for the delivery of a joint opinion to CADE. The opinion is drawn by SEAE and it is reviewed by SDE. When SDE's opinion is convergent with SEAE, its opinion to CADE is limited to a note stating that it agrees with SEAE's opinion. This procedure allows SDE to avoid to draw a separate opinion for CADE, which usually is convergent with that one expressed by SEAE.

Portaria Conjunta SDE/Seae nº 33, 4 January 2006, available at http://www.mj.gov.br/sde/data/Pages/MJ5C394253ITEMID827D7C2F4E7C4BF8ABEF6E45CC39F971PTBRNN.htm (20.03.2010).

[58] On 19 January 2005, in the decision concerning the concentration ADC Telecommunications and Krone International Holding Inc, CADE changed its understanding of the notification thresholds: the turnover could be calculated only in relation to the sales within the Brazilian market.

P. Dutra, CADE Votes to Use National Turnover for Merger Calculation. International Law Office (ILO) Newsletter, 10 March 2005. Available at http://www.internationallawoffice.com/ (20 March 2010).

[59] According to the 2007 CADE *Relatório Anual* (CADE's Annual Report), in 2006 the average time to review the cases was of 51 days for CADE. Only two cases took over 2 years to be decided (page 23). The text of the document can be downloaded in Portuguese at http://www.cade.gov.br/publicacoes/relaanual.asp (20 March 2010).

[60] Law n. 10149, adopted on 21 December 2000, which amended the text of the Law 8884/94. The text of the law is available at http://www.cade.gov.br/legislacao/10149lei.asp (20 March 2010).

[61] SDE's press release of 29 August 2007, SDE Carries out the Largest Dawn Raid in Latin America and Fourteen Exectives Were Arrested on Charges of Conspiring to Fix Prices. The press release is available at http://www.mj.gov.br/main.asp?View={AE70F431-442E-44D0-9303-65BF6C217A48} (20 March 2010).

[62] CADE, Resolução n.46 of 4.9.2007. The text of the resolution is available in Portuguese at http://www.cade.gov.br/legislacao/resolucoes/Resolucao46.pdf (20 March 2010).

[63] Meeting of the author with Camila Safatle, senior officer in the merger control unit of the SDE, in Brasilia on 2 June 2008.

[64] SEAE's Annual Report for 2007, at 9.

imposing anti-dumping duties; providing opinions to the federal bodies which decided the sale price of a limited number of goods considered of public interest (e.g. the price of drugs); monitoring the State bodies intervention in non-liberalized markets. Therefore, SEAE tackled a broad range of State's activities with a potential anti-competitive impact, including the foreign competition of the imported goods *vis-à-vis* the domestic production.

The economic studies of the SEAE on the impact of a regulatory measure on the level of competition in a specific market is a particularly valuable contribution for other Ministerial bodies within the Brazilian administration, due to the fact that the SEAE is a part of an influential Ministry, such as the Ministry of Economy.[65] Thanks to its institutional position, SEAE advises the Minister of Economy when the latter has to adopt a regulation to introduce or to modify a regulated tariff in a certain sector.[66] Moreover, a number of NRAs[67] are required by law to communicate to the Ministry of Economy their intention to introduce or to modify the tariffs in the sector that they regulate. Thus, by submitting an opinion to the Minister of Economy, the SEAE can indirectly exercise forms of competition advocacy *vis-à-vis* these bodies.[68]

A newly established fully independent NCA in a country where the concept of competition is not appreciated by other bodies of the State administration would not have the same influence that the SEAE has today. In addition to the lack of credibility, a fully independent NCA may not have sufficient human and financial resources to carry out activities of competition advocacy during the first years of its existence; a problem which less affected the SEAE.

One of the main fears expressed by a number of commentators at the moment of the adoption of the Law 8884/94 was related to the involvement of two bodies linked to the executive branch, such as SDE and SEAE, in the enforcement of the competition law. The latter could undermine the autonomy of CADE, and they could introduce industrial policy considerations within the competition analysis. This fear has gradually disappeared during the last decade. On the one hand, in a number of sensitive merger cases not only CADE, but also SDE and SEAE resisted political pressures which demanded the clearance of concentrations due to reasons of industrial policy.[69] Even though SEAE and SDE do

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[65] For an overview of the SEAE's activities in the area of competition advocacy between 1994 and 2003 see: Monteiro, Considera, Tavares de Araujo, 'Competition Advocacy in Brazil – Recent Developments' (2003) 16 *Boletin Latinoamericano de Competencia*, 72-78.

[66] SEAE's Annual Report for 2007, at 49.

[67] For instance, the *Agência Nacional de Transporte Terrestre* (National Agency for Land Transportation, ANTT), the *Agência Nacional de Saúde Suplementar* (National Agency for Additional Health Care, ANSS) and the *Agência Nacional de Transporte Aquaviário* (National Agency for Maritime Transportation, ANMT) have this duty.

[68] SEAE's opinions to the NRAs concerning the modification of their tariffs can be found at:

http://www.seae.fazenda.gov.br/central_documentos/manifestacoes-em-consultas-publicas/copy_of_2007 (20.03.2010).

[69] The two most controversial cases in this regard are the Ambev case of 1999 and the Nestlé-Garoto case of 2004. Ambev was a new company, resulting from the merger of the two main beer producers in Brazil, Brahma and Antartica. The transaction would have implied the creation of a quasi-monopoly in the Brazilian beer market. In fact, the combined market share of the merging parties varied between 75% and 90%, depending on the regional geographic market for the sale of beer taken in consideration. Moreover, there were strong entry barriers in the sector, due to the well-known brand image of the two companies. SDE and SEAE expressed their intention to block the merger, while the Government, through a recommendation submitted to CADE by the Ministry of Industry, Trade and Development, pleaded in favour of a clearance of the merger without any remedy imposed. Several politicians argued that Ambev would become a national champion, which would be able to increase its exports to other Latin American markets. Finally, CADE authorized the concentration, but it imposed a number of structural commitments.

A summary of the Ambev case can be found at:

OECD Secretariat, *Competition Policy and Regulatory Reform in Brazil. A Progress Report.* Published on 30 March 2000, at 16-17. The document can be downloaded at:

http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7BC7F3270D-81D4-4FBF-BED2-5652F45F330D%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-A40E-4B56390F180A%7D (20.03.2010).

The second case concerned the acquisition by Nestlé of the Brazilian chocolate producer Garoto. Due to the fact that Nestlé was already present in the Brazilian market before the acquisition of Garoto, the horizontal merger would have granted to

not qualify as *de iure* independent from the executive branch, it is a shared opinion that the Government does not interfere in their daily enforcement activities. According to the 2005 OECD Peer Review concerning the Brazilian competition law system, 'traditionally, the Ministry (of Justice) has not interfered in SDE's activities'.[70] This opinion has been confirmed to the author both by officers working in these agencies[71] and by the practicing lawyers working in the field of competition law in São Paulo.[72] To date there is no case known in which the Ministries have exercised pressure on these agencies, even in highly controversial cases. Similarly, CADE has also increased its independence from the executive branch during the last years increasing its credibility due to its positive enforcement record of the competition act.

After many years of debates concerning the inefficiencies and the delays caused by the "triangular" institutional system in Brazil, it seems that this system will be modified in the near future. In December 2008 the Brazilian Chamber of Representative passed the text of a new competition act, which would reshape the current institutional structure.[73] Under the legislative proposal CADE would get exclusive jurisdiction in the field of competition law enforcement, while the competition law division of the SDE would be abolished. The SDE would become part of CADE under the name of *Superintendência-Geral* (Directorate General). The *Superintendência-Geral* would be in charge of conducting the first phase of the investigations,[74] while the final decision would be adopted by a separate body, the *Tribunal Administrativo de Defesa Econômica* (Administrative Tribunal of Economic Defence). The *Tribunal* would play the same adjudicative function performed today by CADE. [75] The SEAE, on the other hand, would not disappear and would instead, continue to carry out its activities of competition advocacy *vis-à-vis* other State agencies.[76]

At the beginning of December 2010 the legislative proposal was approved by the Brazilian Senate.[77] However, the text approved contained some amendments in comparison to the previous version passed by the Chamber of Representatives. Therefore, the Chamber of Representatives will have to vote for a

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Nestlé a market share of 63.10% in the Brazilian market for chocolate bars and 88.50% market share for solid chocolate toppings. CADE decided to block the acquisition, in spite of the political pressures received. Several politicians argued that following the acquisition of Garoto, Nestlé would have opened new factories in Brazil and, thus, it would have created new possibilities for employment for Brazilian workers. However, CADE decided to block the concentration. Following the decision of CADE, the Brazilian Senate refused to re-appoint one of the CADE Commissioners who had voted to block the acquisition. The case, however, is still pending, following an appeal by Nestlé to the judiciary. The court of first instance dismissed the decision of CADE, due to the infringement of the time-limits for the merger review provided by Art. 54 of the Law 8884/94. The judgement has been appealed by CADE public prosecutor.

OECD Secretariat, Peer Review of Brazilian Competition Law System 2005, at 34-35.

The text of the report is available at: http://www.oecd.org/dataoecd/12/45/35445196.pdf (20 March 2010).

[70] *Supra*, at 50.

[71] Meeting of the author with Mr. Ragazzo, former SEAE's Director and CADE's Commissioner since September 2008, in Brasília on 6 June 2008.

Meeting of the author with Ana Paula Martinez, Director of the department of the SDE for the competition law defence, in Brasília on 2 June 2008.

[72] Meeting of the author and José Inácio Gonzaga Franceschini in São Paulo on 13 June 2008.

[73] CADE's press release, 'Câmara dos Deputados aprova o projeto de lei que reforma o Cade e moderniza a legislação antitruste brasileira'. Published on 17 December 2008. The text of the press release is available at: http://www.cade.gov.br/Default.aspx?340717e232e73cc752ff52ec44 (20 March 2010).

[74] Draft Law nº 06/09, approved by the Brazilian Chamber of Representatives on 17 December 2008. The draft law was then sent to the Brazilian Senate for approval on 5 February 2009. Art. 12.

The text of the draft competition act and its legislative history is available at: http://www.cade.gov.br/Default.aspx?340717e232e73cc752ff52ec44 (20 March 2010).

[75] *Ibid*, Draft Law 06/09, Art 9.

[76] *Ibid*, Draft Law 06/09, Art 19.

[77] CADE's press release, 'Senado aprova PL'. Published on 2 December 2010. The text of the press release is available at http://www.cade.gov.br/Default.aspx?3a0d1dec0419ef33c775c790acae (14 December 2010).

second time on the bill, before it enters into force. The amendments approved by the Senate would be of minor importance, and they do not concern the new institutional setting.

It is essential to stress that the new competition act would "consolidate" the results achieved so far by the Brazilian competition law system; results which have been attained during the last decade on the basis of the enforcement of the non-orthodox system provided for by the Law 8884/94.

5. Argentina: "Reference" to the EU Institutional Competition Law Model

5.1. The Lack of Enforcement of the Institutional Arrangements Provided by the Law 25.156/99

If the case of Brazil shows the positive evolution of a competition law system in a developing country, the case of Argentina shows what might go wrong in such process of transition. Argentina adopted its first competition law in 1980.[78] The law had the same scope of application as the Brazilian law of 1962: both legislations sanctioned anticompetitive agreements and abuse of dominant position, but they did not provide any mechanism of merger control.[79] Moreover, they both established competition law authorities dependent on the executive branch. In the case of Argentina, the *Comisión Nacional de Defensa de la Competencia* (CNDC, National Commission of Protection of Competition) was established *en el ambito* (within) of the State Secretary for Trade and International Economic Negotiations.[80] Finally, the CNDC, like CADE before 1994, did not actively enforce Law 22.262/80.

On 25th August 1999, the Argentinean Congress passed the Law 25.156, which replaced the previous act.[81] The new legislation introduced two main innovations: a system of merger control and an independent competition law authority, the *Tribunal Nacional de Defensa de la Competencia*[82] (National Tribunal of Protection of Competition). According to the Law 25.156/99, the Competition Tribunal would be an *organismo autarquico* (autarchic body). Reading the text of the legislation, this autarchy seems *prima facie* substantial. In fact, unlike CADE, the Competition Tribunal does not receive any opinion from any other institution related to the Government: it is the only authority responsible for the enforcement of the Argentinean competition law.[83] Moreover, the seven Members of the Tribunal are not politically appointed, but they are selected through a public competition.[84] Finally, the appointed Members remain in office for a period of six years, rather than the two years of the CADE Board Members.

While the Brazilian competition law of 1994 was the result of an internal debate in Brazil, the Argentinean competition act of 1999 was inspired by foreign models of competition law, especially by the EU competition law model. According to Cabanellas de la Cuevas, "the Law 25.156, by preserving the basic characteristics of the Law 22.262, kept the tendency of the Argentinean competition law to rely on the rules of the European Union as main source of inspiration from a comparative law

[78] Law 22.262, Ley de Defensa de la Competencia, adopted in 1980. The text of the law is available at http://www.poderdelconsumidor.com.ar/legislacion/ley22262.htm (20 March 2010).

[79] *Ibid*, Art 1.

[80] *Ibid*, Art 6.

[81] Ley 25.156 de Defensa de la Competencia, adopted on 25th August 1999 and promulgated on 16th September 1999. The text of the Law is available at http://infoleg.mecon.gov.ar/infolegInternet/anexos/60000-64999/60016/texact.htm (20 March 2010).

For a detailed analysis of the Law 25.156/99 see, G. Cabanellas De Las Cuevas, *Derecho Antimonopolico y de Defensa de la Competencia* (Editorial Heliasta, 2nd edn, 2005).

[82] *Ibid*, Art 17.

[83] *Ibid*, Art 13.

[84] *Ibid*, Art 19.

perspective."[85] The author lists a number of similarities between the Argentinean and the EU competition law. Art. 1 of the Law 25.156/99 contains the same provisions of Article 101 and 102 TFEU.[86] In addition, the system of merger control introduced by the Law 25.156/99 was strongly inspired by the EU system of merger control introduced by the Regulation 4069/89.[87] Finally, from an institutional point of view, the Competition Tribunal was based on the idea of a fully independent NCA, inspired by the idea of independence enjoyed by the European Commission in the enforcement of the EU competition law.[88] The author also mentions a number of reasons to explain the "reference" of the Argentinean competition law to the EU competition law model. First of all, the Argentinean legal system was quite close to the European continental legal system. In fact, the Argentinean legal system is part of the family of the *civil law* countries.[89] In addition, from a linguistic point of view, the drafters of the Argentinean competition law of 1999 could refer to the Spanish version of the Treaty of Rome after the entry of Spain into the European Community.[90] In addition, they could also refer to the Spanish competition law 16/89, which was adopted to introduce in Spain a competition law system compatible with provisions of the Treaty of Rome.[91] Finally, similarly to several emerging economies, the Argentinean competition law of 1999 referred to the European rather than to the US competition law due to the existence of a system of exemptions for anti-competitive agreements which contributed to the production and the technological development of the country (Art. 101.3 TFEU), and due to the reliance on an administrative authority rather than on national courts to enforce the competition law.[92] The judicial system in the emerging economies is, in fact, usually too slow to ensure a proper enforcement of the competition law;[93] in addition, the national judges feel often uncomfortable with the economic concepts underpinning the application of the competition law. These are the main reasons why Argentina "referred" to the EU competition law in drafting its competition law of 1999 notwithstanding the lack of any other incentive or element of conditionality.

A key factor of CADE's success was its independence from the Government, an independence which was strengthened over the years. By contrast, in Argentina the *Tribunal Nacional de Defensa de la Competencia* has never been established. Despite the fact that ten years passed since the approval of the competition law of 1999, the public competition whereby the seven Members of the Tribunal should be selected, has not taken place yet.[94] Since 1999, the Law 25.156/99 has been administered by the CNDC, which reports the results of its investigations both in the area of conduct cases and in the field of merger control to what is today called the *Secretaria del Comercio Interior* (Secretariat for the Internal Trade). As a result, the final decision concerning the clearance of a notified concentration or the sanction against an anti-competitive conduct is not taken by an independent authority, as in Brazil, but by a branch of the Government. This solution was justified under Art. 58 of the Law 25.156/99,

[85] "La Ley 25.156, al mantener los lineamentos básicos de la Ley 22.262, preserve la tendencia de la legislación argentina en materia de defensa de la competencia a utilizar las normas de la hoy Unión Europea como principal fuente en el Derecho Comparado." *Supra*, Cabanellas de las Cuevas, at 13, footnote 10.

[86] *Supra*, Cabanellas de las Cuevas, at 112.

[87] *Supra*, Cabanellas de las Cuevas, at 112.

[88] *Supra*, Cabanellas de las Cuevas, at 112.

[89] *Supra*, Cabanellas de las Cuevas, at 123.

[90] Law n. 16, adopted on 17 July 1989. Published in the Spanish Official Journal n. 170 on 18 July 1989. The text of the legislation is available at: http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx (23 February 2010).

[91] *Supra*, Cabanellas de las Cuevas, at 139.

[92] *Supra*, Cabanellas de las Cuevas, at 123.

[93] International Competition Network, Competition Policy Implementation Working Group, "Competition and the Judiciary". Report published in April 2006. The text of the report, is available at http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group/16 (14 December 2010).

[94] P. Colomo Ibañéz., 'The Revival of Antitrust Law in Argentina: Policy or Politics?' (2006) 27 *European Competition Law Review*, 319.

which provides that until the establishment of the Competition Tribunal, the new act will be enforced by the institutions of the Law 22.262/80.

The failure to establish the Competition Law Tribunal has had an impact on the quality of the enforcement. In fact, the degree if its enforcement depended on which politician was appointed as Secretary for the Internal Trade. Until the financial crisis of 2001, the Secretary approved the majority of CNDC's decisions without interfering in CNDC's investigations. On the other hand, from 2003 the Kirchner's administration, following a more interventionist approach in the economy, has started to influence the activities of CNDC in order to pursue a number of different economic goals. For instance, the Secretary started to negotiate fixed prices with a number of distributors of consumers' products and with the supermarket chains. The companies which did not follow the negotiated prices were warned that CNDC would have been encouraged to start investigations against them on the basis of alleged anti-competitive conducts.[95] Similarly, this institutional structure had implications also on the content of some merger decisions which involved industrial policy considerations.[96] When such poor institutional framework is in force, alleged new entrants in the market and unlike efficiency gains claimed by the merging parties may be accepted by the competition authority to counterbalance real competition concerns, hiding the real political concerns behind the approval of the concentration.

5.2 Reasons behind the Lack of Establishment of the Competition Tribunal

It is usually argued that the Competition Tribunal was never established in Argentina due to the budgetary restraints that the public administration in Argentina faced after the financial crisis which started in the country at the end of 2001. The second reason could be the strong interventionist approach with regards to the economy followed by the Duhalde and Kirchner administrations, which were sceptical about the enforcement of the competition law regime in the country.[97]

[95] *Ibid*, at 320.

[96] One of the most controversial cases in this regard is the acquisition of Multicanal and Teledigital Cable by Cablevisión. Cablevisión was a subsidiary of the group Clarín, one of the main media group in Argentina. Multicanal and Cablevisión are the main cable operators in Argentina, counting for a joint market share between 78% and 94% in some provinces outside of the metropolitan area of Buenos Aires. The analysis of the CNDC has been criticized by a number of competition lawyers, due to the fact that the CNDC departed from its previous case law, in order to find grounds to justify the approval of the concentration. In spite of the impact of the acquisition on the level of competition in a number of relevant markets, the CNDC advised the Secretary to clear the transaction subject to the behavioural commitments offered by the merging parties on 6 December 2007, the day before the adoption of the CNDC's opinion. Two years after the clearance of the concentration, on 18 December 2009 the Secretary of Internal Trade adopted a new Resolution, which revoked the previous one. According to the new Resolution the merging parties have not complied with the commitments offered in December 2007. However, it seems that the new approach has been rather a result of the fact that the group Clarín is not anymore a supporter of Kirchner administration.

The case Cablevisión-Multicanal is interesting because it shows clearly how the lack of independence of the CNDC from the executive branch may have consequences on the objective enforcement of the competition law.

Dictamen of the CNDC n.637, Grupo Clarin S.A., Vistone LLC, Fintech Advisory Inc, Fintech Media LLC, VLG Argentina LLG y Cablevión SA S/ Notificación Articulo 8 Ley 25.156. Adopted on 7 December 2007, para. 45. The document is available at: http://www.mecon.gov.ar/cndc/dictamenes/dictamen_cablevision_multicanal.pdf (20 March 2010).

Resolution of the Secretary of Internal Trade n.1011/2009, adopted on 14 December 2009. The text of the Resolution is available at: http://www.mecon.gov.ar/cndc/dictamenes/resolucion1011_2009.pdf (20 March 2010)

See also M. Den Toom, A. Demarie, 'Approval of the Cablevision - Multicanal - Teledigital Merger. Adequate Understanding of Competitive Dynamics or Wrong Decision?' Article published on 3 January 2008. The article is available at http://www.bomchil.com/publicacion.aspx?PublicacionID=205 (20March 2010).

[97] *Supra*, P. Ibañéz Colomo.

What is usually not taken in consideration by commentators is that the independence of the Competition Tribunal had already been undermined in January 2001, by the *Decreto* 89/2001.[98] This was a Decree adopted by the former President of the Republic - De la Rúa; the President which had signed the Law 25.156/99. The Decree aimed at regulating some aspects of the Law 25.156/99. However, when reading the text of the Decree, it is evident that the objective of this legislation was broader than the regulation of some technical aspects of enforcement of the competition act. The Decree aimed rather at re-introducing a role for the Secretary for Internal Trade within the process of enforcement of this statute. In fact, the *Decreto* 89/2001 re-introduced a role for the Secretary of State within the enforcement process of the competition act. For instance, under the *Decreto* 89/2001 the Secretary of Internal Trade could collect complaints concerning anti-competitive behaviour, and later submit them to the Competition Tribunal.[99] In addition, the Secretary of State would be involved during the proceedings carried out by the Competition Tribunal as "*parte interesada"* ("interested party").[100] Finally, the Secretary for Internal Trade could appeal the decisions of the Competition Tribunal to federal courts.[101]

The provisions mentioned above are rarely discussed by authors who have commented on the Law 25.156/99. These institutional arrangements never had any real impact on the enforcement of the competition legislation, due to the lack of establishment of the Competition Tribunal. The financial crisis of 2001 and the change of government in Argentina in the following years certainly contributed partially to the current situation of non-application of this legislation. Nevertheless, it is important to point out that the *Decreto* 89/2001 was adopted before the beginning of the financial crisis. Prof. Lucas Grosman, former CNDC Commissioner, agrees with the hypothesis that the *Decreto* 89/2001 was intended to re-introduce a role for the *Secretaria del Comercio Interior*; *a* role which had been previously absent from the Law 25.156/99.[102] The Decree received the support of the former Secretary of State Carlos Winograd, who had also supported the adoption of the Law 25.156/99. Winograd believed in the importance of the establishment of an independent Competition Tribunal. During his mandate he did not interfere in the work of the CNDC; he upheld every resolution of the CNDC by transforming them into binding decisions.[103] At that time, the *Secretaria del Comercio Interior* was called *Secretaría de la Competencia, la Desregulación y la Defensa del Consumidor* (Secretary for the Competition, De-regulation and the Consumer Protection). This was not a simple semantic choice: it encapsulated a different idea of State intervention in the economy. Winograd believed that the State intervention in a free market economy should be limited to the enforcement of an efficient competition law and a consumers' protection legislation. However, Winograd was worried that the fully independent Competition Tribunal provided by the Law 25.156/99 would never work; it risked becoming an isolated institution without any political support for its enforcement activities, criticized by a business community unfamiliar with the idea of competition, and unknown to the public at large. For instance, the Law 25.156/99 did not introduce any notification filing fee for notified concentrations. Thus, once established, the Competition Tribunal would still be dependent on the State's financial resources. Therefore, according to Winograd, it was essential that the Competition Tribunal should retain some links with the executive, though it should preserve its autonomy in the enforcement of the competition act. The *Decreto* 89/2001 was an attempt to establish such a link, previously absent from the Law 25.156/99.

[98] Decreto 89/2001, Apruébase la Reglamentación de la Ley n. 25.156. Decree adopted on 25 January 2001 by the Argentinian President of the Republic. The text of the Decree is available at: http://infoleg.mecon.gov.ar/infolegInternet/anexos/65000-69999/65959/norma.htm (20 March 2010).

[99] *Ibid,* Annex, Art 26 (b).

[100] *Ibid,* Annex, Art 26.

[101] *Ibid,* Annex, Art 29, 31.

[102] Meeting with Prof. Lucas Grosman, former CNDC Commissioner, on 8 July 2009 in Buenos Aires.

[103] Meeting with Gabriel Bouzat, former CNDC President, on 16 July 2009 in Buenos Aires.

6. Lessons for Emerging Economies Which Have Recently Imported the EU Institutional Competition Model

Brazil and Argentina are two emerging economies which were not subject to any conditionality "carrot" such as stronger economic links or the enlargement perspective, when introducing the EU institutional competition model. Similarly to several emerging economies, Brazil and Argentina have introduced their competition laws during the 1990s within the broader processes of liberalization and privatization of their economies after decades of strong State intervention. Similarly to other emerging economies, Argentina referred to the EU institutional competition law model, by opting for a fully independent administrative body entrusted with the task to enforce this legislation. The "reference" and the later failure of this institutional model to adapt to the Argentinean specificity allow for some conclusions applicable to those emerging economies where the EU institutional competition law model has been directly "exported" during the last two decades (i.e. CEEC, SEE and ENP countries). The countries where the EU competition model has been recently exported have established fully independent NCAs, following the example of the European Commission and of the NCAs established in the old EU Member States. However, the case of Argentina shows that such institutional setting is not always the most appropriate one in an emerging economy.

The cases of Brazil and Argentina show that competition cannot work as soon as it is introduced into a hostile environment, such as in the majority of the emerging economies that are characterized by decades of strong State intervention in the economy and widespread collusion among business operators. The evolution of the Brazilian competition law shows that there is a time gap of at least ten years between the moment in which the new competition act is adopted, and the moment in which the NCA is ready to start the active enforcement of such legislation. Only at this later stage the gap between the *de iure* and the *de facto* enforcement of the competition law is bridged. During this period of transition the NCA cumulates technical expertise, increases its human resources and strengthens its credibility and independence *vis-à-vis* other State authorities and the business community. The key issue in the introduction of competition law in the emerging economies is to design formal institutions which take in consideration the existence of this time gap, and which are capable to encourage the transformation of an informal institution such as the concept of competition culture.

The time period is not the only factor for the successful development of competition law in a given country. Brazil and Argentina departed in the 1990s from a similar situation in terms of competition culture. However, their competition law systems have evolved in different directions over the last few years. The economic crisis which affected Argentina in 2001 and the scepticism shown by Duhalde and Kirchner's administrations *vis-à-vis* the enforcement of the Law 25.156/99 are the main political and economic factors which have hampered the development of competition law in this country.[104] However, the paper has argued that the development of competition law has also been affected by the different institutional settings chosen in Brazil and Argentina.

Argentina and Brazil represent two opposed institutional models of public enforcement of competition law in two emerging economies. The Law 8884/94 introduced a "hybrid" institutional system: CADE, a competition authority independent *de iure* but which strengthened its budgetary autonomy and the credibility of its enforcement action only after a number of years, interacts with two institutions not formally independent, SDE and SEAE. Through these bodies the Brazilian Government is able to take part indirectly in the enforcement of the competition legislation. However, in spite of their locations within the Ministries of Justice and the Economy, there is a general consensus that the SDE and SEAE have always conducted their analysis in an objective manner, refraining from bowing to political pressure.

[104] This was the main argument recently put forward by Carlos Winograd, the Argentinean State Secretary who promoted the early enforcement of the Law 25.156/99 between 1999 and 2001.

C. Winograd., 'Argentina in the Eye of a Practioner'. (2009) 2 *Concurrences*, at 18-32.

The Argentinean Law 25.156/99 opted for a more "traditional" institutional approach, influenced by the European tradition in this area, where the Competition Tribunal should be a fully independent authority from the executive. The introduction of a system of public competition to appoint the Members of the Competition Tribunal was one of the instruments to safeguard the independence of the new NCA. Nevertheless, the model of the Competition Tribunal failed in Argentina. The *Decreto* 89/2001, adopted in 2001 before the beginning of the financial crisis, was a sign that the institutional model of the Law 25.156/99 was too far-reaching, and would not work in the country. The Decree 89/2001 modified some aspects of the Law 25.156/99 with the objective of re-introducing a role for the Secretary for Internal Trade within the enforcement of the competition legislation. The *Decreto* 89/2001 could be interpreted as an attempt to correct the unrealistic institutional system proposed by the Law 25.156/99. The rationale behind the *Decreto* 89/2001 was similar to that followed under the Brazilian Law 8884/94: it is not realistic to establish a fully independent NCA from a scratch in an emerging country after decades of State intervention in the economy. The NCA risks becoming an isolated institution, lacking support for its activities, as well as for its financial and human resources. There are clear similarities between the functions played by the Secretary for Internal Trade under the Decree 89/2001 and the advisory functions played by the SDE and SEAE within the Brazilian system.

The previous paragraph did not have the intention of suggesting that in an emerging economy the NCA should be part of the executive. The independence of the NCA is essential to ensure that the final decision taken by the agency is based on economic, rather than industrial policy arguments. That is an essential precondition to ensure legal certainty to private investors. This is the main reason why the European Commission has always carefully checked the degree of independence of the newly established NCAs in the countries where the EU competition model has been recently exported. However, it is also essential not to establish an "isolated" NCA, which does not receive sufficient funds from the Government, and which remains unknown to the other State bodies, the business community, and the general public. In an emerging economy where competition law is introduced for the first time into a hostile environment where there is a total lack of a competition culture among the main stakeholders in the economy, the NCA has to keep a "link" with the executive. The question is how to design this link in order to ensure that the NCA may enforce the competition legislation without being the target of any political influence. The previous pages showed that the Brazilian institutional model was successful in achieving these two opposing objectives, and it could be an institutional model useful for other emerging economies. In the Brazilian system, the SEAE and SDE have only an advisory function in merger control, and they collect evidence during the investigations on anti-competitive behaviour. The final decision on the enforcement of the competition legislation is taken by a quasi-judicial body such as CADE, which during the last fifteen years has carefully tried to preserve its autonomy. Such a system also provides a separation between the investigative and adjudicative functions. The current institutional enforcement in Argentina works in the opposite manner: a technical body such as the CNDC submits an opinion to a political body such as the Secretary for Internal Trade, which takes the final decision. When it is a political body that takes the final decision on the enforcement of the competition law, industrial policy considerations will often prevail over competition law considerations. Thus, competition policy may become an instrument of industrial policy in the hands of the Government.

The triangular institutional model introduced in Brazil by the Law 8884/94 is not perfect; it causes a number of overlaps and duplications. This is the reason why, over the last few years, the SDE and SEAE have tried to improve their coordination, and to specialize in different sectors. Such coordination will be completed when the new competition law pending before the Brazilian Congress will be finally approved by the Senate. This will incorporate the SDE into CADE, even though the distinction between the adjudicative and investigative functions will be preserved. However, this transformation is the result of the long process of transition of the Brazilian competition law system over the last fifteen years. Through their positive enforcement record the Brazilian competition authorities have convinced many stakeholders in the country of the importance of their activities, and such credibility ensured them more independence from the executive, in terms of both financial resources and the autonomy of their analysis.

Another argument which supports the idea that the Brazilian institutional model could be the most appropriate one for an emerging economy is related to the successful activities of the Brazilian competition authorities in the area of competition advocacy. This is a function of the NCA which is often underestimated in comparison to the enforcement activities. However, in an emerging economy this function is essential. Over the last few years the Brazilian competition authorities have carried out a full range of competition advocacy activities *vis-à-vis* federal regulatory agencies, State agencies, Ministerial bodies, the business community and the general public. The institutional position of the SDE and the SEAE within the Ministries of Justice and the Economy was one of the factors which allowed this success. A newly established, fully independent NCA in a country where the concept of competition is not appreciated by the other bodies of the State administration would not have the same influence that the SEAE has today. The fact that in the new competition act pending before the Brazilian Congress the SEAE will not be eliminated, and it will continue to carry out its function of competition advocacy, is recognition of this important function in which this institution has specialized over the last few years.

The departing point of the paper was that during the last two decades several emerging economies have adopted the EU competition law model within the enlargement process and the ENP. At the same time, the exported EU competition model was tailored for developed economies with well functioning markets. However, the candidates and the potential candidates, as well as the countries covered by the ENP, have adopted the same model followed by the old Member States. Art. 35 of the Regulation 1/2003 grants to the Member States a certain margin of discretion in relation to the design of the system of enforcement of their competition law. However, such discretion has never been used. In fact, the new EU Member States, the EU candidates in SEE and the ENP partners have usually opted for the establishment of a fully independent competition authority. This is the system of enforcement of the EU competition law, designed in this manner in the Treaty of Rome in order to safeguard the autonomy of the European Commission *vis-à-vis* the influence of the Member States. However, such institutional model is not necessarily the best one in an emerging economy. Taking in consideration that the Regulation 1/2003 establishes two parallel systems of enforcement of the competition law (i.e. at the EU and at the national level), the structure of the system of enforcement could differ at these two levels. In particular, while there are legitimate reasons to argue that the European Commission should continue to preserve its autonomy in the enforcement of the EU competition and State aids rules, the national competition authorities of the new Member States and the candidate countries should be designed in a different manner. In these emerging economies, the NCA should preserve a "link" with the executive branch in order not to become an isolated institution.

This paper focused on the institutional issues undermining the enforcement of the competition law in the emerging economies, taking Brazil and Argentina as cases study. This is just an aspect of the broader issue concerning the compatibility of the EU competition model with the development needs of those emerging economies where it is transplanted. An assessment of the substantive EU competition rules with the development needs and the market structure of the emerging economies could constitute the basis for further research in this area.

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Sustainable Development and the EU: The Concept of Sustainable Development in the CARIFORUM EPA

Ilze Dubava

Abstract

The paper focuses on studying the legal tools (and their legal consequences) proposed by the EU for reducing possible negative effects of the foreign direct investment and, therefore, fostering sustainable development within the EU foreign direct investment regulation as reflected in the recent CARIFORUM economic partnership agreement. These legal tools allegedly fostering sustainable development are explicit references to the concept of sustainable development within the treaty texts, regulations on corporate social responsibility, 'no lowering standards' clauses, explicit reservation for states' right to regulate for public purpose, 'general exceptions' clauses and 'transfer of technology' clauses.

1. Introduction

Foreign direct investment (FDI)[1] is being considered as a *tool* for pursuing sustainable development in the globalized world in line with the Johannesburg Plan of Implementation.[2] Sustainable development is generally understood there as equal balance between economic development, social progress and environmental protection. Nevertheless, the contribution of the FDI to the very economy of investment receiving (host) state is a controversial subject matter. Some studies show that effects of the FDI on economic growth may not be direct, if present at all,[3] and there is not an obvious answer to the question *does the FDI promote economic growth or does economic growth attract FDI?*[4]

Contribution by the FDI to sustainable development is even less clear, since the international legal system of its protection is constantly challenged as being irresponsive to environmental considerations, labour and social standards due to its 'far reaching penetration... into areas of national regulation of public interest'.[5]

For instance, if investors seek for market access, cost reductions, access to natural resources and export platforms,[6] host states are hoping to benefit from the FDI through knowledge transfers and adoption of new technologies, labour training, superior management practices, and access to new market via trade.[7] If these interests are not balanced, the FDI can reversely affect development of the host country, e.g., by exhausting natural resources in environmentally unsustainable manner,

[1] The FDI is an 'investment made by an entity of a foreign country with the objective of establishing a lasting interest in an enterprise resident in the host country,' cited from K.P.Sauvant, 'Introduction', in: *Yearbook on International Investment Law& Policy 2008-2009*, (Oxford University Press, 2009), xxi.

[2] 2002 Johannesburg Plan of Implementation, UN Doc. A/AC.257/32, Chapter 5, paras. 45- 47.

[3] P.Economou, J.H.Dunning, K.P.Sauvant, 'Trends and Issues in International Investment', in: *Yearbook on International Investment Law& Policy 2008-2009*, (Oxford University Press, 2009), 24.

[4] *Idem*.

[5] F.Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law*, 729-747, 729.

[6] S.D.Amarasinha, J.Kokott, 'Multilateral Investment Rules Revisited' in: *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 120-121; J.Kokott, 'Interim Report on the Role of Diplomatic Protection in the Field of the Protection of Foreign Investment' in: *ILA Report of the Seventieth Conference*, New Delhi, (ILA, 2002), 261.

[7] P.Economou, J.H.Dunning, K.P.Sauvant, 'Trends and Issues in International Investment', *op cit*, 26-27.

encumbering the access to basic facilities such as access to drinking water,[8] or in case of a conflict with foreign investor, the legal actions may cost the host state huge amounts of money,[9] thus affecting the interests of the host state population.

These hazards have raised an ongoing debate on the potential costs and benefits of the FDI to host states and have consequently to a continuous search for legal reconciliation mechanisms of various interests involved in the FDI protection, and mechanisms for mitigating negative externalities of the FDI in the host states. Hence, more than ever, the FDI is being considered in the broader context of sustainable development. It is to meet global environmental and social challenges of the 21st century,[10] instead of focusing merely on economic growth and investment protection issues as in 'old school' international investment agreements (IIAs).

The CARIFORUM economic partnership agreement (EPA)[11] is the most recent EPA concluded between the EU and developing countries. It contains substantive provisions on the FDI, thus belonging to the network of IIAs, and it also represents tendencies of 'new generation' IIAs[12] aiming at reassessment of costs and benefits of the FDI within the context of sustainable development. Hence, the CARIFORUM EPA may potentially influence not only the EU agreements in the future, but also the drafting of other future IIAs, thus it is chosen for the more detailed examination. This paper intends to analyze the model proposed by the EU for accommodation of sustainable development within the EU foreign direct investment regulation as represented by the CARIFORUM EPA focusing on the legal implications under public international law of the sustainable development concept inclusion in the treaty text.

2. The Substance of the Concept of Sustainable Development and its Normativity

The most popular definition of sustainable development comes from the Brundtland Report 'Our Common Future' referring to sustainable development as development, which 'meets the needs of the present without compromising the ability of future generations to meet their own needs',[13] reflecting the idea of distributive justice.[14] It is a concept of which a core beneficiary is a human person, as noted in Principle 1 of the Rio Declaration: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[15]

[8] For instance, see: Compania de Aguas del Aconquija, SA& Compagnie Generale des Eaux v. Argentine Republic, Case No. ARB/97/3, Award, 21 November 2000.

[9] G.Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press, 2007) p.7; CME v. The Czech Republic, Final Award, 14 March 2003 where Czech Republic lost investor 353 million US dollars.

[10] For instance, environmental sustainability, stabilization of population and poverty reduction. On general overview, see: J.D.Sachs, *Common Wealth. Economics for a Crowded Planet*, (Penguin Books, 2009) and J.D.Sachs, *The End of Poverty. How We Can Make it Happen in our Lifetime*, (Penguin Books, 2005).

[11] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30.10.2008, 2008 OJ, L 289/I/3, available at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/index_en.htm.

[12] On IIAs generations, see P. Muchlinski, 'Corporate Social Responsibility' in *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 638.

[13] World Commission on Environment and Development, *Our Common Future*, (Oxford: Oxford University Press, 1987), 8.

[14] N.Schrijver, 'Development - The Neglected Dimension in the Post-Rio International Law of Sustainable Development', in: H.C.Bugge, C.Voigt (eds.), *Sustainable Development in International and National Law*, (Europa Law Publishing, 2008), 223-243.

[15] See: Amartya Sen, *Development as Freedom*, (Oxford University Press, 1999), 3-4. See also K.Arts, *Interpreting Human Rights into Development Cooperation: the Case of Lome Convnetion*, (Kluwer Law Internationals, 1998): As from the 1980s, development has become human-centred, see the UN General Assembly, 1986 Declaration on the Right to Development.

Nevertheless, during three decades of the existence of sustainable development as the concept,[16] its content and the legal status has been often challenged, even if sustainable development has been incorporated in a wide range of international instruments, both of legal and non-legal nature.[17] The ideas proposed by scholars vary from associating sustainable development with the body of customary international law to a mere political idea.[18]

However, one aspect of the concept of sustainable development has remained unchallenged and has achieved the general agreement- it is the *principle of integration* of economic, social and environmental aspects, arguably creating the very core of the concept.[19] In other words, economic development, environment protection and social aspects should go hand in hand.[20] This integrating approach is reflected in such world-wide accepted policy documents as the UN report *Our Common Future* of 1987,[21] the UN Declaration on Right to Development,[22] the Rio Declaration 1992,[23] the Johannesburg Declaration 2002[24] and the Doha Development Agenda 2001.[25] Further, pleading parties in the most recent case invoking sustainable development - Pulp Mills case in the ICJ - have relied on sustainable development exactly in this sense.[26] However, it is clear that the very concept of

[16] The origins of the concept of SD go back to the UN and its 1972 Stockholm Declaration on the Human Environment, particularly in its Principles 9, 10, and 11, for the first time underlining that environmental protection and economic development must be understood as compatible, and mutually reinforcing goals. Clear commitments by States to sustainable development are found later in the UN General Assembly's Resolution 35/56 of 5 December 1980 on International Development Strategy for the Third UN Development Decade, in 1987 the UN General Assembly Resolution 42/187 or the Brundtland Report, the 1992 Rio Declaration on Environment and Development and its universally accepted Agenda 21, and follow-up Johannesburg Declaration 2002.

[17] For example: the Energy Charter Treaty, the WTO Agreement, the Lisbon Treaty, the NAFTA, the Cotonou Agreement.

[18] Vice-President Weeramantry, separate opinion, Gabčikovo – Nagymaros Project case (Hungary/Slovakia), ICJ Reports, (1997), the judge considered sustainable development to be "*a principle with normative value*' rather than '*a mere concept*' and that it '*is a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community*'. On general owerview see: A.Boyle, D.Freestone (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, (Oxford University Press, 1999).

[19] For *contra* see K.Bosselman, *The Principle of Sustainability. Transforming Law and Governance* (Ashgate, 2008), pp.29-41, placing the preservation of environmental sustainability at the forefront of the concept.

[20] In *Gabčíkovo-Nagymaros case*, the ICJ expressly invoked the 'concept of sustainable development' as an apt expression of the 'need to reconcile economic development with protection of the environment,' para. 140. The 1992 Rio Declaration, particularly in its Principle 4, clearly stresses the interdependence between economic development and environment protection: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Johannesburg Declaration added the third pillar of the concept- social dimension, see: M/-C. Cordonier Segger, 'Sustainable Development in International Law' in H.C.Bugge, C.Voigt (eds.) *Sustainabe Development in International and National Law*, , (Europa Law Publishing, 2008), 106-116.

[21] *World Commission on Environment and Development, Our Common Future*, (Oxford University Press, 1987), 43.

[22] 'Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.' Second preambular paragraph, UN GA Resolution 41/128, 4 December 1986.

[23] Declaration accepted at 1992 UN Conference on Environment and Development.

[24] World Summit on Sustainable Development (Johannesburg Summit) 'Report' (26 August-4 September 2002) UN Doc A/CONF.199/20.

[25] WTO, Ministerial Conference, Fourth Session, Doha, Ministerial Declaration, WT/MIN(01)/DEC/1, Adopted on 14 November 2001, available at www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf, see also paa.2.1. Communication from the Commission to the Council and the European Parliament, the European Community's Development Policy, COM(2000) 212 final, 26.4.2000.

[26] The *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), ICJ Reports 2010, Counter-Memorial of Uruguay, para.1.8, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=1 (accessed on 31 March 2001).

sustainable development fails the test of being a legal rule. It lacks a norm-creating character since it is not sufficiently precise, clear and does not create an actionable right in itself,[27] and justiciable standards of review are absent.[28]

However, even if it is not an action-oriented rule, it guides states and international organizations in their decision-making and courts in judging, thus having a normative value which goes beyond being merely a political ideal. Then, what is sustainable development if it is not a legal norm directly regulating the behaviour of States, but if we assume it still has a legal function?

There are two leading approaches. The first approach defended by Vaughan Lowe sees sustainable development as a 'meta-principle', exercising 'a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other'.[29] Thus, the function of sustainable development as a 'modifying norm' is to establish relationship between primary norms, and it gets normative power if employed by judges colouring 'the understanding of the norms that it modifies'.[30] In accordance with the thesis that the principle of integrity is the core substance of sustainable development, sustainable development has a similar function as a customary treaty interpretation rules – it is not directly a State behaviour regulating norm, but it is a legal principle guiding judges to arrive at the meaning of the treaty norms.[31] Therefore, similarly as treaty interpretation rules, sustainable development (principle of integrity) is a 'principle of legal logic'[32] applied by a judge while balancing various interests invoked in a particular case. As this principle is binding for a judge (especially where there is a direct reference to sustainable development in an international agreement such as the CARIFORUM EPA), it is a part of a legal system, and thus, has a normative value.[33]

The second approach supported by Philippe Sands defends the concept of 'international law in the field of sustainable development' in line with the Rio Declaration Principle 27.[34] It denotes deducing from the concept of sustainable development some self-contained legal norms[35] irrespective of the normativity of the concept itself,[36] for instance, a well established customary norm on permanent sovereignty over natural resources and its limitation - the responsibility not to cause damage to the

[27] *North Sea Continental Shelf* Case, ICJ Reports, (1969), 43 at para. 72.

[28] On sustainable development lacking norm creating character see: V.Lowe, *International Law*, (Oxford University Press, 2007), 97-99 and V. Lowe, 'Sustainable Development and Unsustainable Arguments' in A.Boyle, D.Freestone (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, *op cit*, 26: '[n]ormativity, by definition, must express itself in normative terms: it must be possible to phrase a norm in normative language'. 'The concept of sustainable development clearly lacks this aspect.'

[29] V.Lowe, 'Sustainable Development and Unsustainable Arguments' *op cit*, 33-34.

[30] *Ibid.*

[31] On this aspect of customary treaty interpretation rules see I.Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford University Press, YEAR), 34.

[32] See: Vice-President Weeramantry, separate opinion, Gabčikovo – Nagymaros Project case (Hungary/Slovakia), ICJ Reports, (1997).

[33] Policies, principles and standards also have normative value, binding on judges, see R. Dworkin, *Taking Rights Seriously*, (Duckworth: 2005), 22-23.

[34] 'States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.'

[35] Keeping in mind that legal norms consist of legal rules and principles, see: A.Allott, *The Limits of Law*, (Butterworths, 1980), 17-18.

[36] P.Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in A.Boyle:, D.Freestone (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, (Oxford University Press, 1999), 39-61. Professor Sands supports the arguments, that the very concept of sustainable development has entered the body of customary international law, however, it is not the thesis supported in this paper.

environment of other states, or to areas beyond national jurisdiction,[37] and the right to clean and healthy environment as a human right.[38]

In sum, the concept of sustainable development as such does not set specific behaviour patterns for States; however, it bounds adjudicators in application and interpretation of law as a principle of integrity among three pillars- economic, social, and environmental. Further, 'international law in the field of sustainable development' entails directly legally binding norms shaping the behaviour of States and international organizations.

3. Concept of Sustainable Development in the EU Development Policy with Third States

Sustainable development is a globally recognized leading-motive for development, meaning balanced relationship between economic and social development, and environment protection. The concept of sustainable development is well reflected in both internal and external actions and policies of the EU,[39] and especially in the EU development policies with third states aiming at the minimization of the divide between industrialized States and developing countries.[40] The EU development policy has resulted from the special development oriented trade relationships between some of the EU countries and their former colonies,[41] and initially it was implemented through Lomé Conventions (Lomé I – Lomé IV). Later, the Cotonou agreement[42] was concluded to make this development cooperation WTO compatible. The Cotonou agreement is valid for a twenty-year period from March 2000 to February 2020. It creates a framework for such development oriented EPAs as CARIFORUM EPA, and the Cotonou agreement is applicable in a parallel manner with EPAs.[43]

The core objective of the framework Cotonou agreement and the subsequent CARIFORUM EPA is to alleviate poverty in developing countries in line with the UN Millennium Development Goals[44] and to achieve sustainable development through political, economical and development partnership financed by European Development Funds, as well as gradually integrating developing ACP[45] countries into the

[37] On explicit analysis see: N.Schrijver, *Sovereignity Over Natural Resources. Balancing Rights and Duties*, (Cambridge University Press, 1997).

[38] See: M. Fitzmaurice, 'The Contribution of Environmental Law to the Development of Modern International Law', in: J Makarczyk (ed.) *The Theroy of International Law at the Threshold of 21st Century*, (Kluwer Law International, 1996), 909-14.

[39] Article 3(5) (ex Article 2 TEU) and 21 TEU.

[40] See the CARIFORUM EPA preamble: 'considering the importance of the existing traditional links, and notably the close historical, political and economic ties between them,' and 'recalling that the European Union (EU) is committed to scale up development aid, including aid for trade and to ensure that a substantial share of the European Community's and EU Member States' commitments is devoted to ACP countries'.

[41] O.Babarinde, G.Faber, 'From Lomé to Cotonou: ACP-EU Partnership in Transition', in: O.Babarinde, G.Faber (eds.),*The European Union and the Developing Countries. The Cotonou Agreement*, (Martinus Nijhoff Publishers, 2005), 1-12.

[42] The Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other part, available at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/index_en.htm (accessed on 27 March 2010).

[43] J.A. McMahon, 'The Negotiations of the Cotonou Agreement: Negotiating Continuity or Change?', in: O.Babarinde, G.Faber (eds.), *The European Union and the Developing Countries. The Cotonou Agreement*, (Martinus Nijhoff Publishers, 2005), 52-53. See also: the CARIFORUM EPA preamble: 'Reaffirming their commitment to work together towards the achievement of the objectives of the Cotonou Agreement, including poverty eradication, sustainable development and the gradual integration of the ACP States into the world economy.'

[44] UN Millennium Development Goals: 1. End poverty and hunger; 2. Universal educationl; 3. Gender equality; 4. Child health; 5. Maternal health; 6. Combat HIV/AIDS; 7. Environmental sustainability; 8. Global partnership; available at http://www.un.org/millenniumgoals/ (accessed on 31 March 2010).

[45] African, Carribean and Pacific Countries.

world economy.[46] The three-pillar partnership contributes to the attractiveness of developing countries for international trade and the FDI in-flows,[47] which is generally (and arguably) considered a great input towards modernization and development of countries.[48]

4. The Concept of Sustainable Development in the CARIFORUM EPA

The CARIFORUM EPA sets the rules for trade and investment liberalization and protection. It also provides mechanisms to minimize negative effects, which trade and investment liberalization might bring since the CARIFORUM EPA is negotiated in order to help developing countries to face the challenges of globalization 'and achieve the economic growth and social progress compatible with sustainable development to which they aim.'[49] Article 3 of the CARIFORUM EPA explains: 'sustainable development is a *commitment* to take into account human, cultural, economic, social, health and environmental best interests of their respective population and of future generations (inter and intra-generational equity)'. Thus, under the CARIFORUM EPA, the participation in economic relationships at every level of decision-making should be consistent with the concept of sustainable development reflecting interdependence of competing goals such as environment and economic development.[50] Humans are seen as main beneficiaries of development (anthropocentric approach).[51] The inclusion of the concept of sustainable development in the CARIFORUM EPA is apparently targeted towards minimizing the North-South divide in international environmental and developmental relations between industrialized States and developing countries (as also indicated in the Rio Declaration, Principles 5 and 6).

The CARIFORUM EPA text contains various references to the concept of sustainable development and its well recognized sub-principles. Besides the preamble of the CARIFORUM EPA, Articles 1 and 3 of the operative part of the treaty explicitly identify sustainable development as an objective of the CARIFORUM EPA. Further, several chapters of the treaty explicitly relate to sustainable development as their object and scope, for instance, chapter on investment, trade in services and e-commerce (Article 60), chapter on environment (Article 183), distinguishing also two legal sub-principles of sustainable development - the principles of sustainable management of natural resources and of the environment as a part of the concept of sustainable development. There are more references to the concept of sustainable development throughout the CARIFORUM EPA, for instance, in the chapters on tourism, agriculture and fisheries, innovation and intellectual property, where the concept is mentioned as the objective of this EPA to be achieved.

[46] D.Willem te Velde, S.Bilal, 'Foreign Direct Investment in the Cotonou Partnership Agreement: Building on Private Sector Initiatives', in: O.Babarinde, G.Faber (eds.), *The European Union and the Developing Countries. The Cotonou Agreement*, (Martinus Nijhoff Publishers, 2005), p.197.

[47] Aspects that affect the FDI inflows in developing countries: market size, growth of the host country, availability of skilled but cheap labour, natural resources, good infrastructure, absence of instability and corruption, good governance, see: P.Economou, J.H.Dunning, K.P.Sauvant, 'Trends and Issues in International Investment', in: *Yearbook on International Investment Law& Policy 2008-2009*, (Oxford University Press, 2009), 23-26.

[48] For general overview see: UNCTAD Report, *Development Implications of International Investment Agreements* (2007), UNCTAD/WEB/ITE/IIA/2007/2: The FDI supposedly brings into host state technology, management know-how, skilled labour, access to international production networks, access to major markets and established brand names, thus contributing to modernization and growth; see also UNCTAD, *Economic Development in Africa, Rethinking the Role of Foreign Direct Investment* (2006); T.H.Moran, *Harnessing Foreign Direct Investment for Development. Policies for Developed and Developing Countries*, (Brooking Institution Press, 2006).

[49] Preamble, CARIFORUM EPA.

[50] P.Sands, *Principles of International Environmental Law*, (Cambridge University Press, 2nd edn, 2003), 263.

[51] See also: Article 9 of the Cotonou Agreement explains the meaning of sustainable development: it is a concept centred on a human, and its integral parts entail respect for and promotion of human rights, democracy, rule of law and good governance.

In sum, the CARIFORUM EPA reflects both approaches to the concept of sustainable development- it refers to it as an objective of the whole development cooperation between states, thus binding those, who apply the treaty, and adjudicators in dispute settlement to take sustainable development and its integrating aspect into account. Secondly, the CARIFORUM EPA contains specific aspects of sustainable development, such as corporate social responsibility, transfer of technology (these issues are not yet part of the international law, however, they can be induced from the concept of sustainable development) and principles of sustainable management of natural resources and environment,[52] recognized in the public international law.[53] In line with the Dispute Settlement Chapter of the CARIFORUM EPA,[54] non-observance of these principles may lead to arbitration between the treaty Parties and fiscal penalties.

a) Inclusion of sustainable development in the CARIFORUM EPA - Legal consequences

Principles of interpretation are generally understood as logical devices that 'guide the interpreter in finding and justifying the meaning of the language used in a treaty'.[55] The general rule of treaty interpretation states that treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[56] Therefore, in the case of the dispute between Parties, the concept of sustainable development may play a significant role in the justification of the arguments used by those who interpret the CARIFORUM EPA norms.[57]

b) Teleological (object and purpose) treaty interpretation

The customary treaty interpretation principles codified in the 1969 Vienna Convention on the Law of Treaties (VCLT) Articles 31-33 VCLT[58] require to interpret the ordinary meaning of the terms of the EPA in the light of a treaty's object and purpose (Art. 31 (1) VCLT). Further, the customary treaty interpretation principles stress the importance of preambles in demonstrating the intentions of parties to a treaty, since most often (and in the case of the CARIFORUM EPA), the object and purpose of the treaty is touched upon already in the preamble.

The preamble of the CARIFORUM EPA, *inter alia*, expresses 'the need to promote economic and social progress for their people in a way consistent with sustainable development by respecting basic labour rights in line with the commitments they have undertaken within the International Labour Organisation and by protecting the environment in line with the 2002 Johannesburg Declaration', reflecting the principle of integration.

This preamble is particularly significant for interpretation of the CARIFORUM EPA norms, since it refers to such soft-law documents as the 2002 Johannesburg Declaration and the Millennium

[52] Article 183.

[53] See P.Sands, *Principles of International Environmental Law*, (Cambridge University Press, 2nd edn, 2003), 257-261.

[54] Articles 202-215.

[55] I.Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford University Press, 2009), 41.

[56] Article 31(1), Vienna Convention on Law of Treaties, 1969.

[57] Article 219 of the CARIFORUM EPA provides rules of interpretation – 'arbitration panels shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided in the provisions of this Agreement'.

[58]The VCLT codified only part of the treaty interpretation principles. Examples of non-codified principles: the principle of effectiveness, the prohibition of abusive interpretations, evolutive interpretation.

Development Goals explicitly incorporating them in the interpretative process of the treaty provisions, and adding to the principle of integration a more subtle content. Thus, the preamble of the CARIFORUM EPA is not 'just a blank phrase',[59] as it goes beyond a mere political significance, and already indicates particular interpretative tools to be used for the operative part of the treaty.[60]

Further, in the CARIFORUM EPA, sustainable development is named as a core objective of the development cooperation in almost every chapter, not only in the preambular language, particularly stressing the need to apply the treaty consistently with sustainable development. However, treaty interpreters referring to the concept of sustainable development as the object of the EPA shall be careful not to open up 'a space for political debate and discussion on the most desirable interpretation of a treaty'.[61] Otherwise, the concept of sustainable development might be abused as a manipulation with development funding in support of the 'Western imperialistic method' to impose Western standards of development on Third countries disregarding their particular circumstances.[62] However, the teleological interpretation as any other method of interpretation has its inherent limits – the text of the treaty. It means that an arbitration tribunal may not go beyond the textual meaning of a particular treaty and the common intention of the Parties.

c) Interpretation with reference to norms outside the Treaty (31(3)(c) VCLT)

The inclusion of the concept of sustainable development as an object and purpose of the treaty and thus the commitment to ensure the balance among economic, environmental and social considerations justifies and even requires reference to other norms of international law applicable in relation between parties when interpreting the CARIFORUM EPA provisions. For instance, Article 31(3)(c) VCLT[63] may be used to interpret the general exception clause in the CARIFORUM EPA, which allows exceptions from its provisions if it is necessary to protect human, animal or plant life or health by, e.g., referring to environmental agreements justifying what protection of animal life.[64]

In addition, sustainable development as the goal of development cooperation could impose the duty on adjudicators to perform such non-codified customary treaty interpretation method as evolutive and effective treaty interpretation.[65] These treaty interpretation methods require considering developments

[59] J.Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997) 8 *Finnish Yearbook of International Law* 138–160.

[60] Art. 31 (2) VCLT: 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes (..)' On importance of a preamble's interpretative function see WTO AB ruling in US Shrimp Case, where the AB referred to 'the objective of sustainable development' embodied in the preamble of the WTO Agreement reflecting the intentions of negotiators of the WTO Agreement, and thus, adding' colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement', paras 129–130, 153. United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp/Turtle I), AB-1998-4, Report of the Appellate Body, WT/DS58/AB/R.

[61] J.Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997) 8 *Finnish Yearbook of International Law*, 138–160.

[62] A Geisinger, 'Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature', (1999) 27 *Boston College Environmental Affairs Law Review*, 43-73.

[63] 31(3)(c) VCLT: 'There shall be taken into account, together with the context (..) any relevant rules of international law applicable in the relations between the parties.'

[64] Similar approach was used in the WTO AB *Shrimp/Turtles* case to interpret 'natural resources', however, in that ruling AB did not refer to Article 31(3)(c) VCLT.

[65]On evolutive interpretation see case: *Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 67-68, para. 112, Permanent Court of Arbitration: In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway, between the Kingdom of Belgium and the Kingdom of the Netherlands (May 24, 2005), Turtle/Shrimps, see also I.Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Draft Article for the EJIL Seminar, *10 November 2009 (forthcoming), para. 103.* Treaty interpretation principles are not exclusive of each other to justify the meaning of the treaty norms, thus the effective

of meanings of such clauses as 'exhaustible natural resources.' The effective treaty interpretation method implies making the interpretation of the treaty and its enforcement effective in achieving its goal. For instance, when balancing host states right to impose more stringent environmental regulations with 'most favourite nations' treatment, arbitration panel would be required to balance these interests through the prism of sustainable development as the throughout objective of the CARIFORUM EPA in order to set the limits of these allegedly conflicting norms. As interpretation methods, evolutive and effective interpretation are limited by the intention of the Parties, prohibiting the arbitration panel to go beyond the intended meaning of the EPA.[66]

d) Application alongside other international norms

Multilateral agreements usually overlap partially in their content and with their contracting parties, thus potentially leading to normative conflicts between various treaty regimes. However, normative conflicts are not only exclusive, namely, when application of one treaty norm necessarily excludes the application of another treaty norm.[67] In a wider sense, normative conflicts denote situations where application of 'a treaty may... frustrate the goals of another treaty without there being any strict incompatibility between their provisions'.[68] The latter group of conflicts is addressed in the CARIFORUM EPA through the inclusion of sustainable development as the object and purpose of the treaty. Sustainable development requires to 'interpret away' conflicts, and to coordinate potentially contradictory treaty obligations in a way to minimize conflict.[69] The textbook example of such conflict would be between international approaches to protection of the environment on the one hand, and trade and investment liberalization norms in the CARIFORUM EPA, eg 'most favourite nations' clause, on the other hand. For instance, in interpretation of 'most favourite nations' clause, inclusion of sustainable development as an objective of the treaty requires to set the legal limits of this vague investment protections standard. Legal limits of this norm should be interpreted against the background of all three pillars of sustainable development potentially extending the scope of applicable law to be 'taken into account' from the CARIFORUM EPA to international environmental law. Hence, commitment to aim at sustainable development requires adjudicators to integrate environmental law into market and investment liberalization plans, by trying to harmonize legal obligations of those two different fields of international law in line with *pacta sunt servanda* principle requiring compliance with all obligations binding to state and assurance of effectiveness in pursuing and achieving their relevant objectives.[70]

(Contd.)
interpretation 'can also be instrumental in justifying an evolutionary interpretation of the treaty', if there is a need to be actualize content of treaty's provisions.

[66] On the limits of effective interpretation see: H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', (1949) 26 British Yearbook of International Law, 73.

[67] C.W.Jenks, 'The Conflict of Law-Making Treaties', in BYIL vol. 30 (1953), 425-427.

[68] M.Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission (Helsinki, 2007), para.24.

[69] C.M. Hirsch, 'Interactions between Investment and Non-Investment Obligations in International Investment Law', in: *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 157-178.

[70] N. Matz-Lück, 'Conflicts between Treaties', *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008), online edition, available at www.mpepil.com, (accessed on 31March 2010). On different kinds of conflicts see R. Wolfrum, N. Matz, *Conflicts in International Environmental Law*, (Springer, 2003) 6-13.

5. Legal Tools for Promotion of Sustainable Development in the Operative Part of the CARIFORUM EPA

As a consequence of the previously analyzed realization of potential loose conflicts of investment liberalization and protection norms in the CARIFORUM EPA on the one hand, and competing goals of social well-being and environment protection safeguarded under the concept of sustainable development, on the other hand, the CARIFORUM EPA contains various legal tools and mechanism arguably serving for conflict avoidance, and minimization of negative externalities of the FDI, thus fostering sustainable development. These mechanisms dealt in turn below are: regulations on corporate social responsibility, 'no lowering standards' clauses, explicit reservation for states' right to regulate for public purpose, 'general exceptions' clauses and 'transfer of technology' clauses.

a) The regulation of investors' behaviour in the CARIFORUM EPA (Corporate Social Responsibility)

The Corporate Social Responsibility (CSR) is not a new subject; it has been on the UN agenda since 1970s,[71] and is addressed in the OECD[72] and on other international fora. The notion of the CSR embraces matters related to the economic and social impact of investor activities on the host state, and reflects the awareness that the liberalization and protection of foreign investment requires certain corresponding responsibilities of foreign investors.

The CARIFORUM EPA provides a novel approach regarding the CSR comparing to other IIAs within and outside the EU law, as it contains explicit provisions on behaviour of investors imposing on it sustainable development principles. Article 72 of the CARIFORUM EPA deals with the CSR by imposing duty on Parties through national legislation and effected by national enforcement procedures to ensure that: (1) investors are subject to anti-corruption provisions, (2) investors observe core labour standards the Parties have committed to, (3) investors do not avoid international environment obligations binding the Parties, and (4) investors establish and maintain, where appropriate, local community liaison processes.

The CARIFORUM EPA is an international agreement made between subjects of international law, thus it is not possible to impose direct responsibility on investors by means of this agreement.[73] Thus, investor responsibilities are imposed on them indirectly, through national laws, giving the Party discretion to choose what norms are 'necessary' and would best achieve the goal. In addition, if national laws cover the CSR questions, both national and foreign investors are equally subjected to the CSR requirements of national legislation.

b) No lowering of standards clause

Like many non-EU IIAs, the CARIFORUM EPA and other EU EPAs contain 'no lowering of domestic standards' clauses, which require no lowering of domestic environmental, health and social standards in the encouragement process of the FDI.[74]

Such clauses may take a non-binding 'best effort' approach, as does the NAFTA Article 1114 (2), which recognizes that it is 'inappropriate to encourage investment by relaxing domestic health, safety

[71] UN Draft Code of Conduct for TNC, UN Global Compact, 1999.

[72] OECD Guidelines for Multinational Enterprises OECD Doc DAFFE/IME (2000), 40 ILMA 236 (2001).

[73] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Ruggies Report), UN Doc E/CN.4/2006/97 (2006).

[74] See: UNCTAD Series. Environment. (2001), UNCTAD/ITE/IIT/23.

or environmental laws'. Article 73 CARIFORORUM EPA takes stricter approach ('shall ensure') comparing to other recent IIAs.[75] This Article places responsibility on Parties to maintain domestic environmental, labour or occupational health and safety legislation and standards or laws aimed at protecting and promoting cultural diversity while encouraging the FDI. The 'no lowering of standards' clause is a mechanism for taking into account third-party stakeholder interests, for instance, interests of local communities. Its inclusion in the IIA functions as a reminder for host states to bear in mind all potentially affected interests by the FDI establishment in the host state, and sends a signal to foreign investors in shaping their legitimate expectations towards the treatment they may get in the host state.

c) Reservation of right to regulate

Like in many other IIAs, Parties to the CARIFORUM EPA have explicitly reserved their right to regulate for general public interest in relation to investment and trade in services,[76] environment[77] and social issues.[78] For instance, the CARIFORUM EPA Article 184 (3) states: '[t]he right to adopt or maintaining measures necessary to protect human, animal or plant life or health, related to the conservation of natural resources or protection of the environment is recognized', acknowledging the balance between trade, investment and other values required under the principle of integration.

This right, in essence, indicates powers of state to establish its own regulations and standards along the lines of its own policies and priorities by adopting new regulations or modifying existing ones. In fact, it is a basic function of any sovereign state under customary international law. Nevertheless, consequences of using this state's right to regulate have caused many controversies in international trade and investment law: national regulatory measures for general purpose, e.g., to protect environment, are often challenged as incompatible with trade liberalization and investment protection standards. Thus, numerous 'new generation' IIAs explicitly reapprove the host state's right to regulate for public purpose in a response to the criticism most often addressed towards international investment law, namely, causing 'regulatory chill'[79] in host states due to too extensive interpretation of investment and trade liberalization and protection clauses.[80]

Nevertheless, right to regulate is not an absolute right. It is limited by such general principles of law as *good faith* and various international obligations states undertake, such as the WTO Agreement and the CARIFORUM EPA. For example, if the host state is willing to heighten its domestic environmental protection standards, those standards should be applied equally to domestic and foreign investors in accordance with the well-established principle of non-discrimination in international trade and investment law, and may not unjustifiably protect its domestic entrepreneurs. Accordingly, CARIFORUM EPA Article 184 (3) on environment specifies that the right to regulate is retained only 'if such measures do not constitute arbitrary or unjustifiable discrimination or a disguised restriction

[75] K.J.Vandevelde, 'A Comparison of the 2004 and 1994 U.S. Model BITs. Rebalancing Investor and Host Country Interests' in: *Yearbook on International Investment Law& Policy 2008-2009*, (Oxford University Press, 2009), 283-317. Similar approach is taken in the NAFTA -Article 1114 on Environmental Measures, and the latest US Model BIT (2004) Article 12 and 13 with regard domestic environmental and labour laws. In the US Model BIT there is only a consultation procedure provided for with reference to these provisions and no arbitration.

[76] Parties retain their 'right to regulate and to introduce new regulations to meet legitimate policy objectives' see Article 60(4) The CARIFORUM EPA.

[77] Article 184 (1) and (3).

[78] Article 192.

[79] Namely, a situation, where a host state refrains from safeguarding its public interests caused by fears of the consequences, e.g., litigation.

[80] On regulatory powers in international investment law see, Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL (NAFTA), (2005), Part IV - Chapter D - Page 4, para.7., available at http://www.state.gov/documents (accessed on 31 March 2010).

between Parties', thus the right to regulate is unattached from protectionist measures, latter being illegitimate under the EPA.

Article 60 on investment and trade specifies that the right to 'regulate and to introduce new regulations' is retained only to meet 'legitimate policy objectives' consistent with the provisions on investment, trade in services and e-commerce (such as non-discrimination).

To conclude, the CARIFORUM EPA reaffirms the general recognition of State's right to regulate in a reasonable manner whenever public interests come in question, if regulatory measures are *bona fide*, within policy powers of the state, for public interests and are pursued in a non-discriminatory manner.[81]

d) General Exception Clause

Another legal tool for safeguarding public interests and balancing various and often competing interest involved in the trade and investment liberalization process is to include general exception clauses (GEC) in the agreements, which allow a State in exceptional circumstances to 'step away' from investment liberalization and protection norms if more pressing public interests so require.[82]

General exception clauses, while common in trade treaties as 'standard safeguard clause for public policy purposes',[83] are rare in IIAs. Thus far, there are few examples where IIAs contain similar clause, for instance, Canada Model BIT 2004, which contains GATT Article XX-like general exceptions provision in its Article 10.[84]

Article 224 CARIFORUM EPA in Part 4 on General Exceptions lays down 'standard safeguard clause for public policy purposes',[85] similar to GATT Article XX, which exempts national measures under a number of headings, providing that they do not constitute arbitrary or unjustified discrimination or a disguised restriction on international trade and investment between Parties. Article 224 includes exceptions allowing Parties to preserve their own standards and responsibilities, among others, if it is necessary to protect human, animal or plant life or health, or artistic, historic or archaeological value, relate to the conservation of exhaustible natural resources. As the wording is similar to GATT Article XX on general exceptions, its interpretation would also follow the one provided by the WTO dispute settlement bodies. Correspondingly, then condition for the national legislation to be 'necessary' would mean the less restrictive alternative. Probably, necessity requirement is the most sensitive aspect of general exception clause, as it 'illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns'.[86] However, whether it is a 'margin of appreciation' and doctrine of proportionality in human rights fora or necessity test in the field of investment and trade, national discretion is always subject to number of tests in order to check and balance various interests at stake and obligations undertaken.

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[81] On regulatory powers in international investment law see, for example: Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL (NAFTA), (2005), Part IV - Chapter D - Page 4, para.7., available at http://www.state.gov/documents (accessed on 31 March 2010).

[82] See: C.H.Brower II, 'Obstacles and Pathways to Considerations of the Public Interest in Investment Treaty Disputes', in *Yearbook on International Investment Law& Policy 2008-2009* (Oxford University Press, 2009), 347-379.

[83] E-U Petersmann, International and European Trade and Environmental Law after the Uruguay Round, (Kluwer Law International, 1995), 1.

[84] On the brief analysis of Canadian Model BIT, see A.Newcombe, *Canada's New Model Foreign Investment Protection Agreement*, August 2004, available at: http://ita.law.uvic.ca/documents/CanadianFIPA.pdf (accessed on 31 March 2010).

[85] E-U Petersmann, International and European Trade and Environmental Law after the Uruguay Round, (Kluwer Law International, 1995), 1.

[86] Brazil-Measures Affecting Imports of Retreated Tyres, AB-2007-4, Report of the Appellate Body, WT/DS332/AB/R , para. 210.

e) Transfer of technology

Last, but not least, the transfer of technology is highly important in the context of sustainable development, because it gives opportunities for modernization of local communities through enhancement of productivity, jobs creation and access to know-how and host state is interested to attract the FDI in order to bring capital, work opportunities and new technologies to develop their societies.[87]

The CARIFORUM EPA contains incentives or 'best effort' clauses to promote transfer of technology, these norms do not create legally binding obligations. This approach is in line with both: the Rio Declaration (1992) Principle 9 and the Johannesburg Declaration (2002) paragraph 18, requiring cooperation among states to 'use modern technology to bring about development and make sure that there is technology transfer'.

Compulsory requirement to transfer technology is considered illegal under IIAs as a performance requirement, and contrary to the standards of intellectual property protection.

Article 112 on access to technology, Article 132 on innovation and intellectual property, and Article 142 on transfer of technology request Parties to 'endeavour to facilitate' the transfer of technology on commercial basis or to 'contribute to promotion of technological innovation and to the transfer and dissemination of technology and know-how'. The CARIFORUM EPA is not the only IIA containing transfer of technology incentives. Transfer of technology clause is also in the NAFTA (Art. 1106 (1) (f)), and recent BITs, for instance, US-Uruguay BIT.[88]

The transfer of technology is important in the context of sustainable development, because through transfer of technology local communities can get access to environmentally friendly techniques, enhance productivity, and create new jobs. As the MNEs are the most important source of technology transfer across borders, voluntary codes of conduct address this issue (OECD Guidelines for Multinational Enterprises, Global Compact. Principle 9).

f) Enforcement

The focus of the CARIFORUM EPA lies on cooperation (Articles 8 and 196) and dispute avoidance (Article 202). However, in case of a dispute, not solved by consultations or mediation, the EPA provides state-to-state arbitration as a dispute settlement mechanism to *any* dispute concerning interpretation (Articles 202 and 206).[89] Environment and labour provisions require specific consultation and monitoring process set under Article 189(3), (4) and (5) and Article 195(3), (4) and (5), before the dispute may be submitted for arbitration.

As regards the concept of sustainable development, provisions on the CSR, 'reserving the right to regulate' and 'general exception' standards are fully subject to dispute settlement, for instance, if the disagreement appears between Parties, whether national policy goals fit in the exceptions mentioned in the CARIFORUM EPA and, whether they satisfy other requirements such as 'necessity'.

CARIFORUM EPA is silent on sanctions, leaving this question up to arbitrators and public international law on state responsibility.

[87] On the overview of the subject see UNCTAD Series, *Transfer of Technology* (2001).

[88] US-Uruguay BIT, 25 October 2004, Art. 8(3)(c).

[89] With the exception of disputes concerning development, finance cooperation as provided for by the Cotonou Agreement - these disputes are subject to political dispute settlement mechanism provided for in Article 98 Cotonou Agreement (Council of Ministers or arbitration).

6. Conclusions

This paper aimed at analyzing the legal tools (and their legal consequences) proposed by the EU for reducing possible negative effects of the foreign direct investment, and therefore fostering sustainable development within the EU foreign direct investment regulation as reflected in the recent CARIFORUM economic partnership agreement.

Philippe Sands has remarkably mentioned that 'global trade rules necessitate discourse and debate on cultural and social values', because 'free trade is not socially or culturally neutral',[90] the same applies to the FDI rules. The latest IIAs have become aware of this by leaving more and more room for the preservation of State interests and by doing so, they have started to strike a new balance between interests of investors and States.[91]

Nevertheless, principal goals, and the mechanisms for balancing three pillars of sustainable development used in EU EPAs have a limited influence on traditional international investment law. The strong sustainable development–oriented setting behind the EU internal and external actions in the field of foreign investment distinguish significantly the EU investment regime from traditional (non – EU) international investment protection law with its most apparent emphasis and objective of investment protection.

Traditional investment protection law, which mainly consists of 'old school' bilateral investment promotion and protection agreements (BITs) is very slender with respect to their object and purpose. Traditional IIAs contain explicit references to sustainable development in 'new generation' agreements only. However, 'new generation' IIA contain other legal mechanisms giving more flexibility to host state in balancing between its public policies and obligations of the treaty, thus contributing to the principle of integration as the core aspect of sustainable development. 'Reservation of right to regulate' and 'general exception' clause serves this purpose, preserving national regulatory space for environmental protection and other public purpose issues. Inclusion of 'no lowering standards' clause serves the aim to achieve sustainable development within the interests of all society, and not only particular interest – groups.

The CARIFORUM EPA mirrors the understanding of complex relationship between economic liberalization, environment protection and social advancement, going further than most non-EU IIAs. The CARIFORUM EPA is ahead other IIAs in two main aspects – through the inclusion of the requirement to regulate domestically CSR issues, and through the reference to the objective of sustainable development in its investment related chapters. The latter has a significant legal consequence with regard to the interpretation of the CARIFORUM EPA and its application in accordance with other international norms, thus potentially influencing the outcome of the dispute settlement procedure. Drafters of future IIAs could learn from these aspects of the CARIFORUM EPA, as they provide more space for balancing of all interests involved in the economic relations, focusing not only on economic actors.

[90] P.Sands, Lawless World. America and the Making and Breaking of Global Rules, (Penguin Books, 2005), 104.

[91] See: C.H.Brower, II, Obstacles and Pathways to Considerations of the Public Interest in Investment Treaty Disputes, in: *Yearbook on International Investment Law& Policy 2008-2009*, (Oxford University Press, 2009), 347-379.

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External Dimension of Sustainable Development and its Impact on EU-MERCOSUR Relations

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Abstract

Regional integration is deemed as a means for promoting sustainable development. Regional blocs became a consolidated phenomenon in the past decades, and their agenda has been gradually expanded to include not only trade liberalization but also other issues that affect regional development; moreover, they have been increasingly establishing an external agenda, developing a role as international actors and promoting new ways of governance towards the promotion of global challenges. Sustainable development has become a mainstream goal of the international community and, in this regard, has been encompassed by the agenda of regional blocs such as the European Union, which placed it as a core guiding principle of its internal policies and external relations. This paper aims at providing a legal perspective of how sustainable development is promoted by regional integration blocs, focusing on the external action of the European Union and, more specifically on its relations with the Common Market of the South - MERCOSUR.

1. Introduction

The ongoing transformations of the international scenario have been affecting the dynamics of international relations, changing traditional distributions of power and broadening the spectrum of actors beyond the state, as well as of international law, widening its scope and bringing in new ways of regulation responding to these new paradigms. Phenomena such as globalization and interdependence have undermined the sovereignty and independence of national states and favored the emergence of new actors that influence the international scenario.[1] In addition, the recognition of global challenges such as the exhaustion of natural resources and climate change, poverty eradication, development and security, which have a trans-boundary nature, called for increased joint action by the international community and to the establishment of new forms of governance. Several of these challenges concern what is nowadays considered as "global public goods", due to their interest to all peoples, such as peace, a clean environment and a fair international trade system;[2] others are considered as common goals of the international community such as the promotion of a sustainable development process, which involve several interconnected issues.[3]

This framework has favored the establishment of new forms of 'global governance'[4] during the last century, notably in the period after the World War II, which witnessed the creation of several multilateral organizations whose scope was to promote better responses to these global challenges, such as the United Nations, the "Bretton Woods Institutions" and the World Trade Organization. In

[1] C. Arenal, 'La nueva sociedad mundial y las nuevas realidades', *Cursos de Derecho Internacional y Relaciones Internacionales* (Bilbao, Servicio Ed. de la Universidad del País Vasco, 2002).

[2] Kaul, et al., *Global public goods: international cooperation in the 21st century* (Oxford University Press 1999).

[3] One example is the establishment of sustainable development as the first priority of the United Nations for 2011, in a speech delivered by Secretary-General Ban Ki Moon, February 2011, http://www.un.org/apps/sg/sgstats.asp?nid=5034.

[4] Understood as a system of rules and norms adopted by different actors influencing the global order; see J. Rosenau, *Governance without government: order and change in world politics* (Cambridge University Press 1992) for an earlier reference; also D Held, A McGrew (eds.), *Governing Globalization: Power, Authority and Global Governance (*Cambridge: Polity Press, 2002); AM Slaughter, *A New World Order*, (Princeton University Press 2004).

parallel to these attempts of providing multilateral governance, regional integration agreements have also proliferated and became a consolidated phenomenon worldwide.[5]

Regional blocs started fundamentally with the creation of free trade areas, but the scope of regionalism has evolved over time and encompassed also other policy objectives such as environmental protection and social cohesion. Moreover, several regional blocs have developed a stronger external dimension and started to play a role as global actors, performing an innovative form of governance recognized as "interregionalism". In this regard, the agenda of regional blocs has also included issues such as the promotion of sustainable development, as it is the case of the European Union. The EU has incorporated sustainable development as a guiding principle in its legal system and as an objective for its internal and external policies. In addition, the bloc supports the idea that regional integration is a means of promoting this goal worldwide, which can be perceived in its relations with other actors, such as the "Common Market of the South – MERCOSUR".

This paper aims to provide a legal perspective on the links between regional integration and sustainable development, and an analysis of the extent to which regional integration projects can be a tool for the promotion of this objective/principle. The work is divided in three main parts. The *first part* provides a conceptual framework of sustainable development, examining how this issue evolved in international law. The *second part* takes a regional perspective on this issue, presenting a historical analysis of how sustainable development was incorporated into EU law and how it guides also the external relations of the bloc, focusing on the development cooperation policy. Finally, the *third part* presents a case study on the relations of the EU and MERCOSUR, and the prospective association agreement between the two regions.

2. Sustainable Development in International Law

2.1 Development and International Law

International law has long been concerned with the regulation of international economic relations, including issues broadly defined as relating to development and actors involved in the development process, and literature nowadays recognizes a new branch of law - international development law (IDL), which deals with rights and duties of actors involved in the development process.[6] Notwithstanding, there is no general consensus about a concept of development - depending to a large extent on the relationship between economic growth and social (including human rights), environmental, political, and cultural aspects. Daniel Bradlow identifies, in this regard, a traditional and a modern concept of development, and consequently a "traditional type of IDL", focused on economic growth and dealing with international economic law issues, and a "modern type of IDL", based on a more holistic vision of human development, including economic, environmental and social areas of international law.[7] As will be argued below, these notions are nowadays bound by the emergence of the principle of sustainable development.

[5] A Winters, *Regional integration and development* (World Bank; Oxford University Press 2003), notes that regional integration has been one of the major developments in international relations, especially during the last decade, with virtually every country in the world nowadays being part of at least one regional or multilateral integration scheme; in addition, there is a trend towards deeper levels of integration and the regulation of issues other than trade, such as security, development and environmental issues.

[6] Which shall not be confused with the "law and development movement", initiated in the United States in the 1960's whose guiding assumption was that law is central to the development process – mainly the rule of law, and which aimed at improving development and generating social and political change through legal reform, at the national level.

[7] D Bradlow, 'Differing Conceptions of Development and the Content of International Development Law', (2005) 1 *South African Journal on Human Rights* 21.

2.2 International Economic Law and Development

Development has been traditionally associated with economic growth and, for a long time, was considered separately from other problems of society; it was understood to be primarily an economic process that consisted of projects and specific economic policies, having the state as the key subject and as responsible for decision-making and implementation. Based on the traditional views of development, IDL initially focused on international economic issues as a branch of International Economic Law (IEL), dealing with legal aspects of international trade, finance and investment that relate to the challenges faced by developing countries.[8]

After the World War II, there has been a movement aiming at generating new legal rules related to the core international economic issues of interest to developing countries. These efforts were reflected in several initiatives taken at the international level: the establishment of specialized agencies regulating international economic issues, such as the "Bretton Woods institutions", the General System of Tariffs and Trade (GATT) and later on the World Trade Organization; a specialized body at the United Nations to deal with development issues related to trade, the UNCTAD;[9] the efforts to establish a "New international Economic Order";[10] and the proclamation of a right to economic self-determination – focused on the State.[11]

In the trade area, example of development-oriented measures were the institutionalization of "special and differential treatment" provisions agreed in the GATT, with the establishment of the Generalized System of Preferences (GSP), and the impact of the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreements) on developing countries; efforts to make trade in commodities more predictable, and to develop legal arguments that support changes designed to make the international trading system more equitable; and later, the mandate of the "Doha Development Round" (DDR) explicitly stating the mutually supporting relationship between an open trading system and development.[12] In the investment area, such issues as nationalization and compensation, the treatment and responsibilities of investors, and the resolution of disputes between investors and host states. Finally, in the international financial area, issues as access to capital, debt renegotiation, the operations of the "Bretton Woods Institutions" and foreign aid.[13] In this traditional type of IDL, issues outside the economic sphere such as social, environmental, cultural and political aspects of development have a limited role and are seen as externalities.[14]

[8] AH Qureshi, AR Ziegler, *International economic law*. (London: Sweet & Maxwell, 2007).

[9] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a 'permanent intergovernmental body to deal with trade, investment and development issues, especially regarding developing countries and assist them in their efforts to integrate into the world economy on an equitable basis' (official website information, see: www.unctad.org).

[10] Declaration on the Establishment of a New International Economic Order, UNGA Res. 3201, which states that States 'shall correct inequalities and redress existing injustices' and 'make it possible to eliminate the widening gap between the developed and developing countries'.

[11] Charter of Economic Rights and Duties of States, UN GA Res 3281, UN Doc. A/9631 (1975), which calls for the establishment of a new international economic order designed to remove major hurdles to economic development in developing countries.

[12] Doha Declaration, clause 6.

[13] D. Bradlow, *op cit*.

[14] This can be perceived, for instance, in the debate regarding the discussion of environmental or human rights issues at the WTO, despite the inclusion of "sustainable development" in the preamble of the Marrakesh Agreement establishing the organization and the mandate of the DDR.

2.3. A Shift Towards "Human Development"

More recent economic theories, led by prominent scholars such as Amartya Sen, have expanded the concept of development and advocated a holistic approach, integrating social, cultural, political and environmental issues into the development agenda. Sen's work, recognized by the Nobel Prize in Economics, had a great impact on the conceptualization of development, focusing on the individual freedom as the primary end and as the principal means of development.[15] A "modern" approach to IDL reflects these ideas, aiming to promote norms and policies that are economically, environmentally and socially concerned with the rights and responsibilities of the developing and industrialized states towards each other and to other actors in the international scenario.[16]

The foundations of this approach were laid down in the UN Charter, the Universal Declaration of Human Rights (according to which human rights comprise both civil and political rights (Articles 1 to 21) and economic, social, and cultural rights (articles 22 to 28), and the later signature of the international covenants regarding fundamental civil, political, economic, social and cultural rights.[17] Later on, it was expressly affirmed through the Declaration on the "Right to Development" (DRD) in 1986 by the General Assembly of the UN,[18] describing development as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'. The 1st article of the DRD reaffirms this broader status by stating that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. By affirming development as a process but also as a human right with many interconnected aspects, the DRD transposed to international law the concerns generated by the modern vision of development, such as the ones raised by Sen's work.[19]

Notwithstanding the fact that the DRD is a soft law document, thus not legally binding, it marked a commitment of the international community towards a global recognition of this new approach.[20] The right to development was unanimously proclaimed as a human right in the 1993 UN World

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[15] A.K. Sen, *Development as freedom* (1999, Oxford: Oxford University Press). The author recognizes development as 'freedom', and highlights five different types of "instrumental freedoms" that have an important role enhance the capabilities of a person: political freedom, economic facilities, social opportunities, transparency guarantees and security. He also states that there is empirical evidence that these freedoms are mutually reinforcing.

[16] D Bradlow, *op cit.*

[17] The International Covenant on Civil and Political Rights, ICCPR and the International Covenant on Economic, Social, and Cultural Rights, ICESCR.

[18] Declaration of the "Right to Development", UNGA Resolution 41/128, December 4th 1986. The DRD was not adopted by unanimity, but by vast majority, the United States being the only country to vote against its approval, with abstention from six European countries.

[19] In fact, it is argued that there is a parallel between modern IDL and Sen's vision of development; see B. Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', (2008) 1 *The Law and Development Review* 1, Article 2.

[20] A. Sengupta, 'On the Theory and Practice of the Right to Development', (2002) *Human Rights Quarterly* 24, The Johns Hopkins University Press, 837-889. The author highlights that four main ideas can be extracted from the DRD: (i) the right to development is a human right, and human rights in general are reaffirmed as a means and as a condition to the realization of such right, considering that "all human rights and fundamental freedoms are indivisible and interdependent"; (ii) the human right to development is a right to a process of development in which all human rights and fundamental freedoms can be fully realized; (iii) the meaning of exercising these rights consistently with freedom implies participation of all the individuals concerned in the decision making and the implementation of the process, which should be transparent and accountable, and that individuals must have equal opportunity of access to the resources for development and receive fair distribution of the benefits of development; (iv) finally, it creates a system of rights/goals and obligations, distributed on duty-holders: individuals in the community, states at the national and international level; states have the responsibility to help realize the process of development through appropriate development policies; other states and international agencies have the obligation to cooperate with the national states to facilitate the realization of the process of development.

Conference on Human Rights and its Vienna Declaration of Human Rights,[21] which reaffirmed it as 'a universal and inalienable right and an integral part of fundamental human rights'. Despite this recognition, several critical aspects are raised regarding a "rights approach to development", due to the lack of a binding instrument making it an enforceable human right and thus lack of justiciability.[22] Nevertheless, from a normative point of view, the influence exerted by the DRD in proclaiming development as a human right seems to imply a commitment to place the individual – and all human rights that secure his freedom - in the center of development law and policy making, and the State as the main responsible for implementation, be it nationally towards its own citizens, or internationally, through the support for the development of other states and their citizens.[23]

2.4. A Move Towards "Sustainability"

In parallel to the "humanization" of the development debate, environmental concerns and the need to ensure that the development process is carried out in a way that does not lead to the exhaustion of the Earth's natural resources has gradually become another mainstream concern in the international scenario, and ultimately led to the creation of the concept of sustainable development, nowadays widely spread. In fact, many of the central ideas of sustainable development were initially related to environmental aspects as opposed to economic interests - being afterwards expanded to include also social aspects.

In the context of the post-WWII period, conservation of natural resources gained strength as a concern of the international community, but environmental issues became the focus of attention on large scale for the first time in the 1972 United Nations Conference on the Human Environment (UNCHE).[24] The main outcome was a statement of principles, the "Stockholm Declaration on the Human Environment",[25] which expressed the idea that 'the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world". Among these, some of these principles became more known and relevant over time: principle 14 recognizes the 'need to reconcile the conflicts between the needs of development and the need to protect and improve the environment', and principle 21 declares that 'states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', which became consolidated as a duty not to damage the environment, even if in a trans-boundary context. In addition to the recognition of the human impact on the environment, the conference also had two main

[21] Vienna Declaration and Program of Action, UNGA Declaration 157/23, Article 10.

[22] See, in this regard, S Marks and B Andreassen (eds.), *Development as a Human Right – Legal, Political and Economic Dimensions*, (Intersentia 2010); particularly the chapter by Marks, in which he highlights the fact that, despite de disagreement regarding the legal recognition of the RTD, the normative input that it gave to the elaboration of norms and policies at the international level should be on focus – page 98. For a more critical approach, J Grugel, 'Do rights promote Development?', in (2009) 1 *Global Social Policy* 9, pp. 79-98.

[23] In this regard, Nico Schrijver sees the right to development as 'the sum of all other human rights' and thus able to build bridges and work for the integration of the different categories of human rights, such as to connect rights of individuals, peoples and developing countries, while still allocating responsibility for the achievement to national states, which in turn can request assistance from the international community, creating thus a system. N. Schrijver and the Hague Academy of International Law, *The evolution of sustainable development in international law : inception, meaning and status* (Martinus Nijhoff 2008).

[24] D. Bodansky, *The art and craft of international environmental law* (Harvard University Press 2010), notes that even though it was not the first major conference focusing on the environment, but the first to receive high level political attention and popular interest; it was the first major UN theme convention; in addition, brought developing countries into the debate, which had been conducted by developed states so far.

[25] Declaration of the United Nations Conference on Human Environment, UNGA A/CONF.151/26 available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

outcomes: it led to the creation of the UN Environmental Program (UNEP) in 1972,[26] aiming at coordinating environmental policies worldwide, and, in 1983, to the creation of the World Commission on the Environment and Development (WCED),[27] with a mandate of proposing ways of action.

In 1987 the WCED published the report "Our Common Future",[28] providing the most known definition of sustainable development 'as development that meets the needs of the present without compromising the ability of future generations to meet their own needs; it contains two key concepts: the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs'; and 'as a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'. Moreover, in the Annex 1 of the report, there were a set of proposed general principles, rights and responsibilities, in which the WCED stated that all human beings have a right to 'an environment adequate for their health and well being', and that states have a duty to 'ensure that conservation is treated as an integral part of the planning and implementation of development activities and provide assistance to other States, especially to countries of the global South, in support of environmental protection and sustainable development'.

This influential report led the UN to recognize that sustainable development 'should become a central guiding principle of the organization itself, of governments and enterprises,[29] and to convene a second global conference in 1992 to focus on this principle, the UN Conference on Environment and Development in Rio de Janeiro, Brazil (UNCED). The UNCED had three main outcomes: the first one was the "Rio Declaration",[30] another non-binding instrument that nevertheless placed sustainable development as a recognized principle within the international community. Building on the Stockholm declaration, it proclaimed that "human beings are the center of concern for sustainable development', and that in order to achieve it, environmental protection should be an integral part of the development process"; moreover, it proclaimed a series of principles that should guide this objective and 'a new and equitable global partnership (…) towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system'.[31] The Declaration was complemented by "Agenda 21",[32] a 'comprehensive plan of action to be taken globally, regionally

[26] UNGA Resolution 2997 (XXVII) 1972.

[27] UNGA Resolution 38/161, 1983. The mandate of the WCED was stated as: '(a) To propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond; (b) To recommend ways in which concern for the environment may be translated into greater co-operation (…) and lead to the achievement of common and mutually supportive objectives which take account of the interrelationships between people, resources, environment and development; (c) To consider ways and means by which the international community can deal more effectively with environmental concerns; (d) To help to define shared perceptions of long-term environmental issues and of the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community;'

[28] Report of the WCED to the UNGA, recognized by UNGA Resolution 42/187, available at http://www.un-documents.net/wced-ocf.htm.

[29] UNGA Resolution A/RES/42/187**.**

[30] Rio Declaration on the Environment and Development, UN Report A/CONF.151/26. Afterwards, the GA issued a resolution endorsing the declaration and the Agenda 21, urging the international community to take the provisions into account and calling for a follow up of the agreements, UNGA Resolution A/RES/47/190.

[31] The 1992 Rio Declaration main principles can be summarized, i.e., in terms of substantive measures: Principle 4, determining that environmental protection should be an integral part of development process; Principle 11, determining the enactment of effective environmental legislation, and 13, asking for the development of law relating to environmental liability; in terms of procedural measures, Principle 10, requiring means of enabling public participation in decision making and access to justice; and 17, determining the use of environmental impact assessment procedures.

[32] Agenda 21, UNGA Document A/CONF/151.26.

and locally.[33] The two other main outcomes of the conference were two international agreements – legally binding instruments – which expressly mention sustainable development as rationale and objective: the Convention on Biological Diversity (CDB) and the United Nations Framework Convention on Climate Change (UNFCCC). Moreover, the creation of the "UN Commission on Sustainable Development (CSD)"[34] was determined in order to ensure effective follow-up of UNCED, to monitor and report on implementation of the agreements at the local, national, regional and international levels.

Beyond the mainstreaming of the concept of sustainable development, the importance of the Rio Declaration was the change of focus, until then placed on the human impact on the environment, to the recognition of environmental protection and the advancement of development as equally important objectives. Nevertheless, critics pointed to the fact that social development and poverty were mainly seen as a part (or a goal) of economic development, and human rights, including social, economic, and cultural rights were not clearly a part of the program; moreover, the model adopted with the Agenda 21 left to States the task of elaborating a national strategy of sustainable development, leading to divergent and incoherent implementation of the agreements.[35]

2.5. An Integrated Approach to Development

Despite the mentioned critical aspects, after the Rio Declaration sustainable development became a mainstream concept, and the scope of the subsequent international debates reflected the influence of this holistic vision of development. On the other hand, from the end of the 1990's an emphasis on the social sphere of the process and the issue of poverty eradication emerged more strongly, together with concerns about the implementation and coordination aspects of agreements.

In the year 2000, the UN hosted the 55th Session of the General Assembly, called the "Millennium Summit", whose final document, the Millennium Declaration[36] included a commitment 'to making the right to development a reality for everyone and to freeing the entire human race from want,[37] but also went beyond it, establishing a framework for an ambitious global strategy to address development needs. The declaration can be divided in two main parts: section I established a set of fundamental values and principles that should guide 'international relations in the twentieth-first century', including the principles of the UN Charter and also the values of freedom, equality, solidarity, tolerance, respect for nature and shared responsibility among the nations of the world towards economic and social development, peace and security; subsequent sections II to VIII seek to 'translate these shared values into actions' by identifying key objectives: peace, security and disarmament (section II); development and poverty eradication (section III); protection of the "common environment" (section IV); promoting human rights, democracy and good governance (section V); protection of the most vulnerable peoples in the world (section VI); meeting the special needs of Africa (section VII) and strengthening the UN system (section VIII).

Subsequent work was carried out until 2001, when the Secretary General presented a report[38] stating that the international community had just emerged 'from an era of commitment and must now enter an era of implementation, in which it mobilizes the will and resources needed to fulfill the promises made', and a 'road map to set out in detail how these commitments could be fulfilled'. Thus, after

[33] Section IV, Chapter 39.

[34] Section IV, Chapter 38, article 38.11.

[35] M.C. Codornier-Segger, *Sustainable development law: principles, practices and prospects* (Oxford University Press 2004), p. 29.

[36] UNGA Resolution A/RES/55/2, http://www.un.org/millenniumgoals.

[37] Article 11.

[38] UN GA Resolution A/RES/56/326, paragraphs 1 to 11.

consultations 'among members of the United Nations Secretariat and representatives of IMF, OECD and the World Bank in order to harmonize reporting on the development goals in the Millennium Declaration and the international development goals', the group 'discussed the respective targets and selected relevant indicators with a view to developing a comprehensive set of indicators for the millennium development goals', having as a main reference the section III of the Millennium Declaration, 'development and poverty eradication'. It was decided to quantify and establish the plan of action though a framework of eight main goals, subdivided in 18 targets with indicators of assessment, which became known as the "Millennium Development Goals (MDGs)": (i) eradicate extreme poverty and hunger; (ii) achieve universal primary education; (iii) promote gender equality and empower women; (iv) reduce child mortality; (v) improve maternal health; (vi) combat HIV/AIDS, malaria and other diseases; (vii) ensure environmental sustainability and (viii) develop a global partnership for development.[39] Since then, the majority of the efforts taken by the international community to address development issues have been based on this framework. The most concrete commitments in this regard were related to the increase in development aid expenditure and coordination, financial and technical cooperation, trade liberalization and debt relief, and several conferences and plans of action have been carried out thereto, but still not reaching up to the promised levels.[40]

Following the MDGs process, the implementation of Agenda 21 and the principles of the Rio Declaration were strongly reaffirmed at another major international conference, the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa, in 2002. This conference resulted in another non-binding declaration[41] which, above all, took stock and reinforced the principles established previously, but firmly highlighted that the sustainability of the development process should be based on "*the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection*" to be reinforced at local, national, regional, and global levels.

2.6. Sustainable Development and International Law

Sustainable development emerges from these instruments as a concept that encompasses two main normative assumptions: a horizontal/policy dimension that reoriented the relationship between development and the environment, prescribing that the development process should be carried out in a way that allows for economic development while also assuring environmental protection and social justice; moreover, placing the individual as the main subject of the development process – through human rights, while also bearing a responsibility in it, shared with states; in addition, the inter-generational/temporal dimension, represented by the "sustainability" component, translated in the need to ensure the rights of future generations to meet their needs just as the current one.

Despite its normative appeal and its widespread recognition, there is no binding definition of sustainable development, as most of the documents referring to its meaning at the international level are "soft law", leading to a debate regarding its status as a principle of international law and to the precise content of its implications. While the majority of the doctrine still rejects the recognition of

[39] Annex to the Resolution 56/326, pages 55 to 58.

[40] Among these, the most important ones are: The International Conference on Financing for Development, held from 18-22 March 2002 in Monterrey, Mexico, by the UN to address financing for development, as a way to implement the MDGs: even though there was even no expectation of a real binding commitment, some important outcomes: one was the recognition of the goal to increase ODA level to 0.7 per cent of GDP; in addition, a general sense in developing countries delegations of the importance of good governance practices in addition to receiving development aid; the Paris Declaration on Aid Effectiveness 2005 and its follow up meetings, the last of them in 2008. Despite these commitments, ODA levels are still around about 0.32% of the combined gross national income (GNI) of DAC member countries (OECD, 2001).

[41] Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002, UN A/CONF.199/20).

sustainable development as a formal principle of international law (even customary),[42] several authors defend it as a norm which became part of international law operating in different ways, even if without binding character. Nico Schrijver points out that international law functions as a system of values and norms but also as a regulatory framework for the conduct of States, international organizations, transnational corporations and citizens, and in this regard considers that sustainability is emerging as a core value of the international community, and functions not only in a declaratory and programmatic way, but also providing the instruments of law that can be used to produce more action-oriented programs and rules: *"in the field of sustainable development, international law often functions, at a high political level, as an instrument to record agreed basic principles and prudent courses of action in a legal document, more than to codify what is occurring in accordance with a generally accepted 'opinio juris' in the practice of States and international organizations"*.[43]

Further, Marie Claire Codornier-Segger argues that, even if it is not possible to consider sustainable development as a binding principle or even as a customary norm of international law - by lack of normative certainty and absence of justiciable standards of review suggesting that States are bound by a legal obligation to develop sustainably - neither it is accurate to describe it only as a vague policy goal void of normative value. She suggests that sustainable development in international law can be understood in a twofold manner: firstly, as a growing body of law, an emerging area of international law on its own right, given the substantive amount of legal instruments that are based on its normative assumptions or created to implement them (or both); in this way, it is a set of substantive and procedural norms at the intersection of international economic, social and environmental law, which help to reconcile these separate fields. Secondly, it can be seen as a different type of norm on its own right, a "meta-principle" acting upon other existing principles and rules, exercising a type of interstitial normativity requiring the reconciliation and balance of the conflicting interests of economic growth, environmental protection and social justice, for present and future generations: "The substantive aspect of this interstitial norm is the requirement that all three sets of priorities be reflected in the substantive outcomes of a given dispute or conflict. Viewed in this way, sustainable development helps to curb the worst social and environmental excesses of nations in economic development activities; it coordinates the internalization of otherwise externalized objectives. It can exert an immense gravitational pull when used by States as they negotiate treaties, or by judges as they seek ways to reconcile other conflicting norms and principles".[44]

Thus, despite the criticism and the uncertainty regarding its legal status, it can be argued that sustainable development became both an objective and a guiding principle recognized by and widely spread within the international community: an objective of achieving a balance in the competing spheres of the development process – seen in a holistic way, and a guiding principle that encompasses a set of substantive and procedural tools thereto. In this regard, this principle has been influencing decision-making worldwide, and has also been widely used in the legal sphere - being present in several international treaties and legal instruments – and dispute resolution at national, regional and multilateral levels.

In an attempt to clarify its legal meaning, the International Law Association Committee (ILA) released in 2002 the "New Delhi Declaration on the Principles of International Law Related to Sustainable Development",[45] a document which summarizes, from a legal perspective, the goals and commitments which emerge from this principle and the principles of international law which pursue this objectives. The declaration notes, in the preamble, that 'sustainable development is now widely accepted as a

[42] One famous exception was expressed by ICJ Judge C.J. Weeramantry in the Case Hungary x Slovakia, 1997 (Gabcikovo Nagymaros Project), in which he states that sustainable development is beyond doubt a part of modern international law.

[43] See, in this regard, N. Schrijver, *op cit.*

[44] MC Codornier-Segger, *op cit*, pp. 45-50 and 368-71.

[45] ILA Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development* , in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002), available at: http://www.ila-hq.org.

global objective and that the concept has been amply recognized in various international and national legal instruments, including treaty law and jurisprudence at international and national levels' and that 'it should be integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights'. Furthermore, it highlights seven sub-principles that should guide the international community in implementing these commitments: 1. The duty of States to ensure sustainable use of natural resources; 2. equity - inter and intra generational - and the eradication of poverty; 3. The common but differentiated responsibilities of all the actors involved in the development process, mainly states, according to their level of development; 4. The precautionary approach to human health, natural resources and ecosystems; 5. Public participation and access to information and justice; 6. Good governance – democracy, fight against corruption, rule of law and respect for human rights and transparency, public procurement rules; and 7, The need to promote integration and the interrelationship of human rights and social, economic and environmental objectives.[46]

It can be concluded that, despite the criticism and legal ambivalence, the principle of sustainable development has a normative content that makes it a relevant goal of international law and of the international community. The real challenge seems to be its implementation in practice, given the weak enforcement capability of the international standard setting agencies and the uneven implementation at national level worldwide. Taking the framework described above as a base, next section analyzes how the principle of sustainable development has influenced the law and policy making of an international actor, the European Union, examining the way in which it was incorporated into the legal system of the EU and became a guiding principle of all its policies.

3. Sustainable Development and the External Relations of the EU

3.1. Sustainable Development in EU Law

The EU is considered nowadays the most advanced project of regional integration, and is deemed as a global actor that performs different roles in international relations.[47] In this regard, the bloc has incorporated the principle of sustainable development in its legal order and promotes it both internally and through its external relations. The first reference to sustainable development in the EU legal framework was introduced in 1992 – coinciding with the "Rio Declaration" – through the Maastricht Treaty. The new Treaty on the European Union (TEU) stated in Article B that "*the Union shall set itself the following objectives: to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion*". In addition, the amendments to the Treaty on the European Community (TEC) included in Article 2, among the EC's objectives, "*to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment*".

Later on, the Treaty of Amsterdam gave a bigger prominence to this issue.[48] In the TEU preamble, the 7th recital was amended to include that the Member States were 'determined to promote economic and

[46] For a more detailed analysis of the sub-principles of sustainable development, see H. C. Bugge and C. Voigt, *Sustainable development in international and national law: what did the Brundtland report do to legal thinking and legal development, and where can we go from here?* (Avosetta series, 2008), pp. 141-162.

[47] The EU is attributed with many other roles in the international scenario. Regarding development, apart from promoting a development policy as such, it promotes this subject in other ways: by exporting its own values, among which sustainable development has a prominent place, on international fora, influencing the drafting of international legal texts through the Commission and the member states, which are bound to have a coherent position with the EU, and etc. These roles, while certainly important, won't be analyzed due to length constraints of this paper. For further analysis see M. Cremona, 'The Union as a global actor; roles, models and identities', (2004) 2 *Common Market Law Review* 41; M. Smith, "The European Union and the International Order: European and global dimensions",2007, *European Foreign Affairs Review 12*.

[48] In this regard, it should be noted that this impetus to promote sustainable development has been influenced by Finland and Sweden, two Nordic countries with strong environmental concerns that acceded to the EU in 1995. L. Kramer, 'Sustainable development in EC Law', in H. C. Bugge (*op cit*).

social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields'; Article B was also amended (and renumbered article 2) to include a direct link to sustainable development: 'The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion'. Sustainable development thus emerged as both an objective and a guiding principle of the whole Union.

More amendments were done in the TEC: article 2 stated that 'the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'. The previous reference to "harmonious and balanced" was thus replaced by a direct mention to sustainable development and its three pillars; in addition, the new article 6 stated that 'environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

These innovations show that sustainable development became a guiding principle of EU policies in general, being granted a place in the "constitutional" treaties; nevertheless, no definition of the meaning of sustainable development has been provided in primary law, being found only in policy documents drafted afterwards. A first "Sustainable Development Strategy" for the EU was presented in 2001, complemented in 2005 by the 'Declaration on the guiding principles for sustainable development',[49] which reiterated the commitment to sustainable development as a key principle governing all policies and activities. The declaration set key objectives and guiding principles to 'serve as a basis for the renewed sustainable development strategy, comprising targets, indicators and an effective monitoring procedure, to be adopted before the end of 2005': the promotion and protection of fundamental rights; – 'placing human beings at the centre of the European Union's policies'; solidarity – intra and intergenerational equity; democracy and access to justice; public participation in decision-making; involvement of social dialogue, corporate social responsibility and private-public partnerships to foster cooperation and common responsibilities to achieve sustainable production and consumption; precaution - preventive action in order to avoid damage to human health or to the environment; the "polluters pay" principle; coherence between all policies and good governance; and integration of economic, social and environmental considerations in all policies by using instruments such as balanced impact assessment. The document also expressed a commitment to ensure 'that the EU's internal and external policies are consistent with global sustainable development and its international commitments', implying that the EU should promote it internally, integrating sustainable development into all its policies, and also externally, by improving coherence between internal and external policy objectives, and providing development aid and cooperation at the international level; in addition, recognizing that the concept of sustainable development should be consistent with the international declarations and agreements mentioned above.

In 2006 the Council adopted a renewed Sustainable Development Strategy (SDS), proposing seven key challenges and corresponding targets, operational objectives and actions that should guide policy design and implementation: to limit climate change; to ensure a sustainable transport system; to promote sustainable consumption and production patterns; to improve management and avoid overexploitation of natural resources; to promote good public health; to create a socially inclusive

[49] Council document 10255/1/05, available at http://register.consilium.europa.eu.

society by taking into account solidarity between and within generations; and to promote sustainable development worldwide and ensure that the EU's internal and external policies are consistent with global sustainable development and its international commitments – meeting the commitments of the EU regarding internationally agreed goals and targets, in particular those of the Millennium and Johannesburg declarations and related processes such as the Monterrey Consensus, the DDA and the Paris Declaration on Aid Harmonization.[50]

The Lisbon Treaty reinforced and constitutionalized the status of sustainable development within the EU. The preamble of the new TEU maintained the determination to 'promote economic and social progress for their peoples, taking into account the principle of sustainable development'. In the common provisions part, Article 3(3) states that

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'.

On the external dimension, Article 3(5) states 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.'

Moreover, on Title V, covering the general provisions on external action, Article 21.2 determines 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: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; and (h) promote an international system based on stronger multilateral cooperation and good global governance' (emphasis added).

Finally, in 2009 the Commission presented a review of the 2006 SDS, assessing the stage of implementation of the strategies on the seven keys areas and proposing new focal points. As regards the external agenda, the external dimension of sustainable development was cited among "new challenges which are not covered or only marginally in the SDS", and which should concentrate on climate change and the promotion of the MDGs. Particular areas of attention should be contribution to a low-carbon and low-input economy and a shift towards sustainable consumption patterns, as well as the strengthening of the international dimension of sustainable development and efforts to combat global poverty. Among the highlighted policies was the mainstreaming of sustainable development externally through tools such as impact assessment of trade agreements - which will be further discussed below.[51]

All this shows that sustainable development is nowadays both an objective and a guiding principle enshrined in primary law of the EU, and that the bloc aims to integrate it into all policy fields. Nevertheless, the definition of sustainable development is provided in policy statements that represent

[50] Council document 10917/06. In the context of the follow up procedures established, the Commission published a report, COM(2007) 642, available as Council document 14238/07, in which it evaluates progress of the commitments established at the SDS, showing "relatively modest progress on the ground", but more encouraging initiatives at EU and member states level.

[51] European Commission, *Communication from the Commission to the Parliament, the Council, the ECOSOC and the Committee of the Regions, Mainstreaming sustainable development into EU policies: review of the 2006 SDS*, COM (2009) 400.

political commitment, but on the other hand are not legally binding and thus might leave space for political bargaining in the implementation phase. Next section analyzes how the EU has been putting this principle into practice on its external relations through the development cooperation policy in the context of its relations with MERCOSUR.

3.2. The External Dimension of Sustainable Development in the EU

A wide development cooperation policy was established through the reform process of the Maastricht Treaty.[52] Article 3(q) was included in the TEC to enshrine among the activities of the community a 'policy in the sphere of development cooperation', which was further regulated in the newly created chapter on this subject (title XVII, articles "130u" to "y"). The community development policy was designed as a shared competence with Member States, and aimed to 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', and also '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'.

There was the express prevision that 'the Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations'. In regard to this provision, it is interesting to note the express mention of sustainable development as one of the main objectives of the development cooperation policy, which seems to be a clear reference that within the EU the meaning of sustainable development should be compatible with the one expressed in the IDL documents, given the lack of a description of this concept in primary law, as discussed above.

In the year 2000, the Council and the Commission issued a statement deciding to concentrate the development action on a limited number of areas selected on the basis of their contribution towards reducing poverty and for which they believed the Community could provide added value: the link between trade and development; support for regional integration and cooperation; support for macroeconomic policies; transport; food security and sustainable rural development; and institutional capacity-building, particularly in the area of good governance and the rule of law, highlighting the need to mainstream *cross-cutting concerns*, namely the promotion of human rights, gender, children's rights and the environmental dimension.[53]

This thinking gave impetus for the EU to strengthen its efforts in development cooperation and to expand the scope of this policy, which had remained concentrated in the ACP countries, and also to make it more coherent and unified with the member states, ultimately leading to the adoption of the "European Consensus for development (ECD)" in 2005.[54] The ECD is a joint statement adopted by the Council providing a common framework of objectives, values and principles that the Union – all Member States and the Community - supports and promotes as a 'global player and a global partner',

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[52] Before, development measures were carried out mainly through the external trade policy. See in this regard, L. Bartels, 'The Trade and Development Policy of the European Union', 2007 4 *European Journal of International Law* 18, 715-756.

[53] Statement by the Council and the Commission of 20 November 2000, summary available at http://europa.eu/legislation_summaries/other/r12001. In this regard, Regulation 2493/2000 (OJ L 288/1, 15.11.2000) was passed in order to 'promote the full integration of the environmental dimension in the development process of developing countries', stating that 'the Community shall provide financial assistance and appropriate expertise aimed at drawing up and promoting the implementation of policies, strategies, tools and technologies for the pursuit of sustainable development'; it provides one definition of sustainable development in secondary law" as 'the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations'.

[54] 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, Council Document 14820/05.

providing 'for the first time, a common vision that guides the action of the EU, both at its Member States and Community levels, in development cooperation'. The document is divided into two parts: the first part presents a common vision of the whole EU on development, which includes: (i) a common objective of development cooperation, set as the eradication of poverty in the context of sustainable development and the pursuit of the MDGs; (ii) a common set of principles to guide all EU action: partnership and ownership, political dialogue, civil society participation, gender equality; (iii) a commitment to increase development financial aid: one of the mainstream commitments of the ECD, sets a target of 0,7% of member states GNI by 2015;[55] moreover, makes a commitment to deliver more efficient aid, and to reserve at least half of it to Africa; (iv) a commitment to promote coherence among all EU policies in order to observe these development cooperation commitments – recognizing that other internal policies such as the "Common Agricultural Policy" might have a trade distortion impact on developing countries;[56] (v) finally, recognizing the interconnection between development and security. The second part presents the focal areas and implementation strategies to guide specifically EC action on this field: (i) trade and regional integration: assistance to developing countries on trade and regional integration and gradual integration into the world economy, and linking trade and poverty reduction or equivalent strategies; (ii) environment and sustainable management of natural resources; (iii) governance, democracy, human rights and institutional reform; (iv) human development through MDG enforcement; and (v) social cohesion and employment.

The ECD is not a legally binding document, but represents a political compromise and has been influencing EU policy making since its adoption. In 2006, a series of new regulations was passed, among which a new Development Cooperation Instrument,[57] providing finance for cooperation with developing countries, territories and regions included in the list of aid recipients of the OECD/DAC, unifying previous regulations which had a more limited scope. Article 2 of the Regulation sets as objectives the eradication of poverty in partner countries in the context of sustainable development, including pursuit of the MDGs, as well as the promotion of democracy, good governance and respect for human rights and rule of law. The policies should be implemented through geographic - South- and Central America, Asia, Central Asia and South Africa - and thematic programs, providing financial resources to develop the cooperation measures which carry out the strategy plans guiding relations with external parties - such as MERCOSUR, which will be analyzed in the following section. Moreover, despite the financial crisis, the ODA level of the EU rose by about €4.5 billion from 2009, reaching a total of €53.8 billion in 2010, keeping the EU's position as the largest donor; on the other hand, this level represents 0.43% of the bloc's combined GNI, thus still legging far behind the 0.7% target.[58]

Thus, it can be noted that the scope of the development cooperation policy is legally bound by the overall objective of pursuing sustainable development, which can be said to be a "horizontal" element guiding EU external action. Nevertheless, there is no definition of sustainable development in primary law, and the concept of what sustainable development should imply is put forward in policy guidelines which are, on the one hand, as broad and all-encompassing as the international declarations and, on the other hand, also not legally binding. The subsequent section presents a case study analyzing the extent to which this principle and its implications are taken into account in the design and implementation of policies and agreements.

[55] In this regard, it is noted that developing countries have tried for long to argue for a legal obligation to receive a steady flow of development aid measured as a percentage of the budget of industrialized countries. In that respect the EU made an important political commitment, even though not amounting to an acknowledgement of a customary law obligation to do so, it nevertheless shows the impact that UN development 'soft law' may have on the European Union and vice versa. [F Hoffmeister, 'The contribution of EU practice to international law', in M. Cremona, *Developments in EU external relations law*, (Oxford University Press, 2008)]. Nevertheless, ODA levels remain far below this threshold, see note 40 above.

[56] Regarding policy coherence, see: M Carbone, *Policy coherence and EU development policy* (Routledge 2009).

[57] Council Regulation 1905/2006, OJ L 378/41, 27.12.2006.

[58] Source: EU Commission DG EuropeAid website, April 2011.

4. Sustainable Development in the Relations of the EU with MERCOSUR

Through its external action, the EU pursues several goals, which not only are related to the achievement of its internal objectives, but also to shaping international relations according to its vision, and strengthening its position as a relevant global player. In this regard, within its external relations network, the EU has a strong focus on supporting other regional projects, promoting integration not only as a means of achieving its own policy goals but also of shaping new ways of governance in which regional blocs are legitimized. Such is the case of the relations with MERCOSUR, which is framed by the general objective of promoting sustainable development and aims at fostering the development of the region, but also at strengthening this integration project as a partner and the recognition of the EU as a global actor.[59]

4.1. Background and Framework of the Relationship of the EU with MERCOSUR

Latin America and Europe are two strongly linked regions, not only from a historical perspective - taking into account the colonial past and the shared cultural heritage that resulted from it - but also considering their current relations in terms of trade, investment, cooperation and political dialogue on different issues; in addition, on both sides of the Atlantic the period after the WWII witnessed different experiences of regional integration. In this regard, the European initiative is considered to be the most successful to date, and similar initiatives that have emerged in Latin America have always looked up to this 'model'; moreover, given these similarities and links, Europe has seen in Latin America a region with the potential to develop regional integration projects that resemble its own.[60]

The relations of the EU with Latin America are amid a "spaghetti bowl" of trade agreements in the continent and a complex net of different policy strategies: several EU Member States have historical relations with MERCOSUR Member States and with MERCOSUR itself; on the EU level, the bloc has also relations with MERCOSUR Member States,[61] a general strategy towards the whole Latin America[62] and finally a strategy specifically targeting MERCOSUR, which will be the object of the analysis here.

The interest of the EU for MERCOSUR goes back to the very early years of the South American bloc, which on the one hand had the EU as a benchmark, even though its goals were more modest compared to its European counterpart;[63] on the other hand, the EU has seen in this project the potential to be

[59] F Söderbaum et al, 'The EU as a Global Actor and the dynamics of Interregionalism: a comparative analysis', in F Söderbaum et al, *The EU as a global player: the politics of interregionalism* (Routledge 2006); the author notes that interregionalism, or the establishment of relations between regions, is one of the main trends in EU foreign relations nowadays, through which it seeks to incentive the creation of other projects of integration which resemble its own, thus helping to shape an international scenario in which regions are recognized actors.

[60] R Seidelmann, 'EU-Latin American biregionalism as object and subject of global change', in W. Grabendorff and R. Seidelmann, *Relations between the European Union and Latin America : biregionalism in a changing global system* (Nomos 2005).

[61]Such is the case with Brazil, for instance, which was declared as a strategic partner in the region in the first Summit Brazil - EU held in Lisbon in 2007. The partnership has mainly a political symbolism, but 'places Brazil, the Mercosur region and South America high on the EU's political map'. A EU-Brazil Joint Action Plan (JAP) for a period of three-years (2009-2011) was adopted at the 2nd Summit held in Rio de Janeiro in December 2008, including themes such as political dialogue, economic and trade matters including environment and sustainable development, bi-regional cooperation, science and technology, and people-to-people and cultural matters.

For more information see: http://eeas.europa.eu/brazil/summit/index_en.htm.

[62] EU - LA Strategy paper 2007-13, in which the main objectives are to promote regional integration and negotiations to establish Association Agreements with sub-regions in Latin America, steer development cooperation towards the reduction of poverty and social inequality and improve educational levels.

[63] MERCOSUR was established through the Treaty of Asunción in 1991 between Argentina, Brazil, Uruguay and Paraguay, aiming at creating a common market, an ambitious agenda that resulted from the momentum the region was going through at that point, with the reestablishment of democracy after decades of dictatorship regimes and new policies of openness to the

modeled after its own image.[64] In this regard, as early as 1992, even before MERCOSUR had completed its institutional setting and acquired legal personality,[65] the parties signed an Inter-institutional Cooperation Agreement through which the EC committed to provide technical assistance, training for personnel and institutional support for the newly created bloc.[66] Three years later, after MERCOSUR was already functioning properly, an Interregional Framework Cooperation Agreement (IFCA)[67] was signed, with an ambitious plan of establishing 'a political and economic interregional association founded on greater political cooperation and progressive and reciprocal liberalization of all trade', aiming to 'strengthen existing relations between the Parties and to prepare the conditions enabling an interregional association to be created'.

The Agreement was founded on three main pillars: the first one was the establishment of an official channel for political dialogue creating a "cooperation council", responsible for the implementation of the decisions and formed by members of the Council and the Commission on the EU side and of the Common Market Group and Council on the MERCOSUR side (Article 25). The dialogue was also contemplated in a 'Joint Declaration on political dialogue between the European Union and MERCOSUR' annexed to the main agreement, in which the influence of sustainable development as a goal and guiding principle stands out: the preamble stated that the parties shared 'an interest in regional integration as a means of enabling their citizens to achieve sustainable and harmonious development predicated upon social progress and solidarity between their members' (6th recital); this belief was reinforced among the objectives, in which they reaffirmed that 'regional integration is one means of achieving sustainable and socially harmonious development, and a tool for ensuring competitiveness in the world economy'.

The second pillar was concerned with the trade relations between the two blocs, which should guide the preparation for the future association agreement, forging 'closer relations with the aim of encouraging the increase and diversification of trade, preparing for subsequent gradual and reciprocal liberalization of trade and promoting conditions which are conducive to the establishment of the Interregional Association, taking into account, in conformity with WTO rules, the sensitivity of certain goods'. The text of the agreement determined cooperation in trade matters and the start of negotiations, but didn't include any binding obligations – it was rather an obligation of means, not of results, fixing no timetable for its conclusion.

Finally, the third chapter established an official channel for cooperation, which should be 'as wide as possible' in order 'to help (the parties) to expand their economies, increase their international competitiveness, foster technical and scientific development, improve their standards of living, establish conditions conducive to job creation and job quality and diversify and strengthen economic links between them', and 'shall encourage the conferring of a regional character on any aspect of cooperation which, by virtue of its scope or economies of scale, results in what they consider to be a more rational and efficient use of available resources and a better outcome' (Article 10). Cooperation

(Contd.)
external market. Nevertheless, it followed an intergovernmental model, being given institutions that represent the interest of Member States.

[64] S. Santander 'The European Partnership with MERCOSUR: a relationship based on strategic and neo-liberal principles' in Söderbaum et al (*op cit*).

[65] The Asunción Treaty is a framework agreement which established the objectives and institutional structures of the bloc; the actual functioning of the institutions and activities was determined through subsequent protocols, the most important of them the "Ouro Preto Protocol" of 1994, which created officially the institutional bodies and allowed MERCOSUR to sign agreements and thus to pursue external relations, even though it had a pragmatic approach on the issue from the beginning. See, in this regard, M. Toscano Franca Filho, 'MERCOSUR External Relations' in L Lixinski M Toscano Franca Filho, and M.B. Olmos Giupponi (eds.), *The Law of MERCOSUR* (Hart Publishing, forthcoming 2010; manuscript on file with the author, cited with permission).

[66] Interinstitutional Cooperation Agreement, 29th of May 1992.

[67] Interregional Framework Cooperation Agreement between the European Community and its Member States and MERCOSUR and its Party States, 15th of December 1995, *Official Journal of the European Union L 069 , 19/03/1996.* Technically, it was a mixed agreement on both sides: EU: legal base: Article 133, 181, 310, TEC; MERCOSUR: 8 "Ouro Preto Protocol".

in several areas was foreseen, including institutional and technical assistance for the integration project itself. In addition, Article 17 stated that 'with the aim of achieving sustainable development, the Parties shall encourage awareness of the issues of environmental protection and the rational use of natural resources in all fields of interregional cooperation'.

The EU policy *vis-à-vis* MERCOSUR nowadays is based on the IFCA and carried out through "regional strategy papers" (RSP) prepared by DG RELEX, whose programs are funded by the "Development Cooperation Instrument" – thus, falling under the 'development cooperation policy'. The current RSP covers the period 2007 – 2013,[68] having as the main goal the preparation for the future Association Agreement. In this regard, three main priority areas have been determined: firstly, providing support for MERCOSUR institutionalization, establishing cooperation measures to improve decision making processes and internalization of rules in Member States; second, support for the deepening of integration, aiming at fostering measures which would create better conditions to the final implementation of the common market provisions, which in turn would support the implementation of the future association agreement; finally, the third priority is to strengthen civil society participation, knowledge of the regional integration process, mutual understanding and mutual visibility, not only enhancing civil society understanding of MERCOSUR, but also of the EU, not only as a trade partner but also as a political actor and a model of regional integration, which could 'create aspirations to emulate and imitate the EU'.

Within this framework, while the negotiations of the association agreement are not concluded, some progress has been achieved. The political cooperation chapter has been active through the organization of summits at Heads of State, Ministerial and Senior Official levels, in the framework of the European and Latin American Summits,[69] in which the EU and MERCOSUR gather on separate sessions. The VI EU-LAC Summit of Heads of State and Government took place in Madrid, Spain on May 2010 and, in its margins, a series of bilateral meetings with specific countries and sub-regions were held, among which the one with MERCOSUR. The central theme of the Summit was "Towards a new phase of the bi-regional association: innovation and technology for sustainable development and social inclusion", and the EU's contribution to the Summit is primarily based on the 2009 Commission Communication on Latin America, "The European Union and Latin America: Global Players in Partnership", stressing the link between regional integration and sustainable development and issues such as climate change and poverty reduction.[70]

The most important outcomes of the Summit were an official decision to re-launch negotiations for the EU-MERCOSUR association agreement, the political approval to the conclusion of trade agreement between the EU and the Andean Countries (Peru and Colombia), and most importantly, the conclusion of the negotiations of the first biregional association agreement, between the EU and Central American Integration System (SICA).[71] These outcomes show the importance of the system of summits in terms of political coordination; on the other hand, the specific outcomes regarding the negotiation of the association agreements with South-American blocs show that the interregional relations are losing some of its relevance for the EU, since in the case of the Andean countries bilateral agreements were finally preferred, given the difficulties of finalizing the biregional one.

The cooperation chapter has also been active in the framework of the RSP, of which sustainable development is a "*cross cutting issue*".[72] In this regard, one of the most significant outcomes has been

[68] It is the second RSP after the IFCA entered into force in 1999; the first covered the period 2000 – 2006.

[69] The EU – Latin American Summits took place for the first time in 1999 in Rio de Janeiro, Brazil, focused on strengthening relations and cooperation on political, economic/trade, cultural, educational and human issues; Subsequent meetings took place in 2002, in Madrid; 2004, in Guadalajara; in 2006, in Vienna and in 2008, in Lima. The documents related to the summits can be accessed at: http://ec.europa.eu/external_relations/lac/index_en.htm.

[70] COM(2009) 495/3.

[71] EU DG Trade website.

[72] Regional Strategy Paper 2007-13, available at http://ec.europa.eu/external_relations/mercosur/index_en.htm.

the signature of a cooperation agreement between the EC and MERCOSUR in November 2009,[73] framed in the 2nd pillar of the RSP and aiming at financing 'the deepening of economic integration process and the sustainable development of MERCOSUR'. The agreement will provide funding for a project called "Eco-norms", founded on preexisting projects within MERCOSUR and based on four areas of action: the promotion of sustainable production and consumption patterns; the fight against desertification and the effects of draught; the implementation of the "Global harmonized system of labeling and classification of chemical products"; and finally the convergence of norms and regulations of quality and security on selected production sectors and development of regional capacity on evaluation. The general objective of the program is to strengthen product quality on MERCOSUR and its capacity to conciliate economic and commercial growth with sustainable management of natural resources and strengthened environmental protection, fostering the integration process of the bloc and its insertion on the international market.

While the two previous chapters showed more progress, the trade chapter has been problematic. The goal has remained to prepare an ambitious agreement, which would cover not only liberalization of trade in goods, but also in other issues such as services, government procurement and intellectual property. Negotiations have come to several difficult moments, being even paralyzed in 2004 and retaken afterwards, but remain unfinished. After the re-launch at the EU – LAC Summit, four rounds of negotiation have been carried out, the last of them in March 2011, with progress being achieved 'in the normative part of several areas of the negotiations, including rules of origin, public procurement, services and investment, competition and dispute settlement, among others', but no timeline was established for the conclusions, and it was recognized that further intense work will be necessary in all negotiating areas. The next round of negotiations will be held in May, 2011, in Asunción, and in July 2011 in Brussels.[74]

Despite the difficulties in the negotiation process, the EU has been attempting to promote a more sustainable outcome for the agreement through the bloc's program of "Sustainability Impact Assessment" (SIA). The EU started to apply the SIAs in 1999 under the initiative of former Trade Commissioner Pascal Lamy in the preparations for the WTO Seattle Round, aiming at integrating sustainable development into trade negotiations by developing a new assessment tool. The SIA seeks to identify the potential economic, social and environmental impacts of a trade agreement on both the EU and the partner in the negotiations, thus extending the scope of other models of IA.[75]

This assessment model is now enshrined in a broader commitment made by the Commission for all policy areas,[76] but trade SIAs remain the most sophisticated form of impact assessment, being prepared for all the EU's major trade negotiations. The EU requests studies by external experts on the likely outcomes of a trade agreement and, considering their findings, a position paper is prepared by the Commission identifying points of agreement and responding to disagreements. The position paper considers what further analysis should be undertaken and what policy action should be implemented, and is discussed with Member States at the trade committee, but does not bind the EU's negotiating position, which is based on a separate confidential analysis. Thus, despite the fact that it provides information about expected outcomes and creates a channel for public participation on both sides, its relevance on the final outcome is not easy to determine.

The SIA prepared for the EU – MERCOSUR association agreement assessed how trade liberalization could affect the sustainable development of both regions, and proposes measures for avoiding, preventing or mitigating adverse impacts and enhancing beneficial ones. The assessment was made considering a scenario of full trade liberalization between the parties, covering tariffs as well as non-

[73] Covenant DCI-ALA 2009/19707, available (in Spanish) at the website of MERCOSUR www.mercosur.int.

[74] http://trade.ec.europa.eu/doclib/press/index.cfm?id=686.

[75] P. Ekins and T. Voituriez, *Trade, globalization and sustainability impact assessment: a critical look at methods and outcomes* (Earthscan 2009).

[76] Commission Communication 2002/276 on the integrated impact assessment.

tariff barriers, and the expected outcomes that would arise from it, taking into account a set of criteria on the three spheres of sustainable development.[77] The Final report of this SIA was issued in 2009, consisting of an overview report and five sectorial studies on agriculture, forestry, automobiles, financial services and trade facilitation. The most important aspect of the report was the affirmation that, despite the general support of trade liberalization as a means of growth and development, the expected outcomes are overall positive, but important negative outcomes are also probable if not counterbalanced appropriately, such as negative effects on environmental and employment issues on both sides.[78]

Based on the SIA report, the Commission issued a position paper, supporting the importance of integrating sustainable development as one of the FTA's overarching objectives, to be reflected both in a specific Trade & Sustainable Development chapter as well as in other parts and chapters of the trade pillar of the agreement, through measures such as market access for environmental goods and services, investment, trade facilitation, commitment to implementation of core ILO labor standards and fundamental conventions, as well as multilateral environmental agreements to which they are parties, and to establish a biregional forum to monitor the social and environmental impacts of the FTA. The Commission supports the determination of the strategic objectives of promoting sustainable development elements at a regional level, while also recognizing each party's right to regulate and set it own sustainable development priorities. Finally, while stressing the importance of the SIA, the Commission frequently recalled that the results of the report are also available to MERCOSUR national authorities, which have the direct responsibility to implement these measures.[79] Despite the support of the Commission, the agreement has been facing fierce opposition of some EU member states, above all by France, whose agricultural sector fears the opening of the market to competition of MERCOSUR agricultural exports.

4.2. The Future Association Agreement

As can be seen, the final objective of the EU policy vis-à-vis MERCOSUR is to sign a bi-regional association agreement, which would create the largest free trade area in the world. Despite these concerns regarding sustainable development, as indicated by Cremona, not all the regional trade agreements have a focus on policy objectives such as sustainable development, as it is the case of the Association Agreement with MEROCUR, which rather has as it main focus the trade pillar and market access for the EU.[80] This is precisely what makes it more complicated to conclude, since there are several sensitive issues on both sides in terms of market access. Technically, it would be a mixed agreement on both sides, maintaining the current structure of three main chapters. While the policies in terms of political dialogue and cooperation would probably remain the same, the trade chapter would include not only a Free Trade Agreement in goods and services but also cover, among other things, rules on government procurement, investment, intellectual property rights, competition

[77] In order to evaluate each of the pillars, core sustainability indicators are used: for the economic pillar, Real income; Fixed capital formation; Employment; Environmental: Biodiversity; Environmental quality; Natural resource stocks Social: Poverty; Equity; Health and education. In addition to the nine core indicators for sustainability outcomes, the methodology uses two process indicators which influence the long term economic, social and environmental impacts of trade liberalization: consistency with sustainable development principles and institutional capacity for effective sustainable development strategies.

[78] European Commission/DG Trade, Final report of the SIA EU-MERCOSUR, March 2009; See also: European Commission/DG Trade, 'Handbook for Trade SIA', available at: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf.

[79] EU DG Trade, available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146386.pdf.

[80] M Cremona, 'The European Union and Regional Trade Agreements', (2010) 2 *European Yearbook of International Economic Law* 1, pp. 245-268.

policies, sanitary and phytosanitary issues, technical barriers to trade, protection of geographical indications, business facilitation, trade defense instruments, and a dispute settlement mechanism.[81]

While both EU and MERCOSUR authorities officially reiterate their willingness to conclude the agreement, negotiations face sensitive issues that are not only rooted in problematic policy areas on each of the parties, but also go beyond the sphere of the bi-regional relations. On the one hand, the low level of integration in MERCOSUR and the incompletion of the customs union make the negotiation more difficult.[82] Moreover, while for MERCOSUR the trade share with the EU is more significant, EU's trade with MERCOSUR represents a smaller share of the total trade, which makes incentives asymmetrical for the parties. On the other hand, the most sensitive issues for the trade negotiation coincide with difficult issues for a final agreement at the WTO Doha Round, since both the EU and MERCOSUR countries, especially Brazil, are major players in multilateral trade talks and have conflicting interests on sensitive areas. For the EU, opening the agricultural market and reforming the 'Common Agriculture Policy' is still a controversial issue internally, given the resistance of some Member States,[83] and externally, deemed by developing countries as unfair and harmful for the trade system. On the MERCOSUR side, the industrial sector (automobile, textiles, informatics) and the "Singapore issues" (services, investment and government procurement – areas in which liberalization in MERCOSUR is not completed, with protocols signed but not in force and measures not fully implemented) are problematic areas.[84]

In this regard, while the multilateral trade negotiations are stalled, the interregional alternative is presented as a new way of global governance towards a multilateral system, since it would be WTO compatible. For some, it is deemed as second best alternative, but since the Doha Round has been facing complications, it could as well be a step further, promoting the issues at stake in the large territory covered by the agreement.[85] It is clear that both parties will have to make concessions in order to reach a viable agreement, but in spite of these sensitive areas, many beneficial aspects can also be highlighted. For the EU, the conclusion of the agreement with MERCOSUR would not only provide an improved market access in important sectors, but also create a better structured environment for investment, especially considering that several Member States have important investment markets in South America; it would also encourage the development of another similar regional integration project which, in spite of its different institutional arrangements, has the potential to become a global actor as the EU itself, thus helping to legitimize regional integration blocs as global players and inter-regionalism as a new way of governance that is favorable to the EU itself as an international actor. For MERCOSUR, on the other hand, the benefits would also not be restricted to the trade area – which would be favored, especially in terms of agricultural market access, given that its Member States are important agricultural exporters. The prospect of an agreement with the EU is for MERCOSUR an incentive to the deepening of the integration project and the completion of the common market provisions, both in terms of trade and investment, and also other aspects such as cooperation and improved political bondage. Moreover, it would force MERCOSUR to deal with issues that would be contemplated in the agreement such as harmonization of rules, sanitary and

[81] Taking as example the previous agreements of this kind signed by the EU, such as the association agreement with SICA, signed at the 2010 EU – LAC Summit.

[82] In practice, MERCOSUR is a customs union to date, with liberalization of trade in goods almost completed but many non-tariff barriers and lack of implementation in other sectors still hindering the functioning of the common market.

[83] France has been the member state that is more strongly opposing the agreement, especially due to its strong agricultural lobbying sector.

[84] S Gratius, 'EU-MERCOSUR relations as a learning experience for biregionalism' in W. Grabendorff and R. Seidelmann, *Relations between the European Union and Latin America: biregionalism in a changing global system* (Nomos 2005).

[85] J Faust, 'The European Union's relations with MERCOSUR: the issue of trade liberalization', in M Hänggi and R Roloff, *Interregionalism and international relations* (Routledge, 2006); the author highlights that while interregionalism is still more limited than multilateralism in scope, it goes beyond regionalism and presents an alternative for global governance given the difficulties of achieving a multilateral solution.

phytosanitary standards and, ultimately environmental and sustainable development concerns.[86] In addition, for both parties the agreement represents a strategic political move, affirming their relevance in the region, reducing the influence of the USA and the proposed Free Trade Area of the Americas (FTAA).[87]

Notwithstanding, regarding the effects of the agreement on sustainable development, the outcomes are unclear. From the difficulties presented on the trade area, one can argue that despite the rhetorical commitments of prioritizing the sustainability of both regions, other policy fields still have a higher ranking on the political agenda. Moreover, while the SIA process can be a beneficial aspect as one of the main tools developed in order to evaluate the premise that trade can work to promote sustainable development, two important points can be highlighted in this regard: firstly, the studies prepared for the EU – MERCOSUR negotiations show that the effects of trade liberalization differ, and that beneficial effects towards sustainable development will depend on how these impacts are weighed against each other in practice. Secondly, the outcomes of the study are not binding on the negotiating position of the parties, and thus the extent to which it will influence the final text remains to be seen. The SIA process contributes to the information on which such value judgments may be based, both in the preparation of the negotiating position of the EU and in the general negotiation agenda, but in the end it is the political will of the parties that will define the real sustainability of the agreement.

5. Conclusions

The challenges of global governance require alternative ways of coping with issues of global concern. While the outcomes at the multilateral sphere have been showing insufficient - as discussed above, regional integration projects have proliferated in the past years, not only aiming at promoting regional governance but also playing a role in international relations, attempting at filling this gap between weak enforcement of multilateral agreements and the need of coordinate action among national states. In this conext, sustainable development became a global objective, representing the aim to pursue a development process that is balanced between economic, environmental and social concerns and sustainable over time, for the present and future generations. Nevertheless, as a guiding principle, it remains broad and vague, and the international declarations that state its content have little binding power, posing a challenge of implementation and observance of the commitments it implies.

As this article has tried to show, regional integration can be a way of promoting sustainable development and implementing these commitments, as regional blocs create rules and policies that can be used to reflect the commitments made at the multilateral sphere. At the same time, the implementation of these measures still face may challenges related to effectiveness, policy coherence and political will at the regional level. Analyzing the case of the EU, this regional bloc has

[86] It should be noted that sustainable development and mainly the environmental issue has yet to be further developed in the MERCOSUR context. The preamble of the Asuncion Treaty affirmed that the parties considered integration as a means of achieving development with social justice and, that this goal should be pursued through the effective use of natural resources and environmental protection. In 1992 a "special environmental meeting" was created to work on this issue; in 1995 this was converted into a working group of the Common Market Council (Sub-working group 6) in which Member States inform and evaluate their positions on environmental concerns in the international scenario, aiming at making proposals to safeguard the environment in the context of the bloc, making environmental concerns compatible with the economic and commercial policies. In this regard, in 2001 a Framework Agreement on the Environment was signed in 2001, reinforcing the commitments of the parties on the Rio Declaration and aiming at promoting environmental cooperation and sustainable use of natural resources. In addition, in 2004 a Meeting of the Environmental Ministers of Member States was established in order to create a political channel to the environmental program, resulting, among other things, in the signature of an "Additional Protocol to the Framework Agreement on Cooperation and Assistance on Environmental Emergencies". In spite of these initiatives, much more effort has to be made in order to create stronger levels of regulation, especially considering that the region has one of the greatest biological diversity and natural resources on the planet and severe social problems. See in this regard A Correia Lima Macedo Franca, 'MERCOSUR and Environmental Law" in L Lixinski, M Toscano Franca Filho and M.B. Olmos Giupponi (eds.), *The Law of MERCOSUR* (*op cit*).

[87] S Gratius, *op cit*

incorporated sustainable development as a legally binding principle in its legal order, generating obligations both to its internal policies and external relations. Nevertheless, the concept of sustainable development is defined at EU level in policy documents, which are also broad and non-legally binding, thus making its implementation more susceptible to interference by other policy objectives, and its evaluation more complex.

Considering these observations, some conclusions can be drawn. Firstly, in the field of external relations, sustainable development became the overall objective of policy making in the EU, generating the obligation of promoting measures such as development cooperation taking into account the common but differentiated responsibilities towards developing countries, promotion of environmental protection, good governance, and the use of preventive and integrative procedural tools such as impact assessment studies – showing consistency with the notion of sustainable development agreed at the international sphere. In addition to this commitment to sustainable development, which arises from EU primary law, during the last decades there has been increasing emphasis on interregionalism as a foundation for EU's external relations, and also recognition of the link between regional integration and sustainable development. Nevertheless, this emphasis comes out of a political strategy of the EU, and a tension between legal commitments and political objectives can be perceived in the bloc's external relations, such as in the case study presented here.

In this context, the EU's relations with MERCOSUR are framed around the promotion of sustainable development in the region. This aim is translated into a 'regional strategy plan' that aims at supporting MERCOSUR's regional project as a whole, and has as ultimate goal the signature of an association agreement comprising trade liberalization, political dialogue and development cooperation. This is to say that the EU's support for regional integration as a means of promoting sustainable development is related to the belief that the regional sphere is an important building block towards the goal of achieving sustainable development, but also to both its vision of promoting an international system in which regional actors are legitimized as relevant players, and its concern of expanding market access and thus supporting its own internal market. In theory, there are not necessarily tensions arising from these policy goals, but in practice things can be more complex.

The analysis of the current status of the relationship between the parties and the negotiations of the association agreement show some outputs of the promotion of sustainable development, while also representing tensions between policy objectives: the political dialogue channel created provides a forum for discussion and political coordination, and has been focusing on issues related to sustainability, such as the general theme of the last EU – LAC Summit. This represents an important attempt at building political agreement between the regions and can have a positive impact on both regional and multilateral decision making, even though disagreement on several international negotiations persist between the two regions – i.e. the Doha Round or climate change negotiations – and the evaluation of this impact goes beyond the scope of this paper.

The cooperation chapter has also been active, despite the fact that the aid amount earmarked for the MERCOSUR region is relatively very low. Among other outcomes, the cooperation led to the signature of an agreement financing the development of "eco-norms" in MERCOSUR, which would reinforce the bloc's overall sustainability strategy, and also facilitate the trade relations between the two parties. The final impact of these measures are hard to evaluate, and this evaluation goes beyond the scope of this paper, but it can be said that this cooperation measure is in line with the idea of promoting regional sustainability.

Finally, the trade chapter shows more clearly the potential tensions mentioned above: on the one hand, the difficulty in the negotiation is certainly founded in innumerous factors, but among these the internal policies of the two blocs – regarding agriculture on the one side and industry sectors on the other side – stand out as a major barrier. In this regard, the EU's commitment to promote sustainable development through regional integration, to maintain strengthened relations with other regional parties, and even its own objective to achieve more coherence between all of its policies, seem to be jeopardized by internal political influences, such as the agricultural sector in some member states and ultimately the reform of the CAP. On the other hand, a rhetorical commitment to achieve a

'sustainable development oriented' trade agreement can be observed on the EU side, through the analysis provided by the SIA. Considering the complexity of issues involved on the trade relationship, and the need for more policy coherence, the normative content of sustainable development can help to balance conflicting goals in economic, environmental and social spheres, and the SIA is an example of an attempt to integrate further these areas. The outcome of the SIA process seems positive per se, to the extent that it shows that trade liberalization does not necessarily lead to a more sustainable development of the parties, but rather that important compensating measures must be taken on both sides; moreover, it renders the decision-making process more transparent and inclusive towards civil society. Nevertheless, the practical influence of this instrument is ambiguous, and the impact that it might exert in the final outcome will depend ultimately on the political will (or ability) of the EU to adopt the recommendations made therein.

The case study examined in this paper shows that there are links between regional integration projects, trade measures and sustainable development concerns. From a legal perspective, the scope of this paper was to see how regional integration can generate rules and policies that translate the political commitments made internationally and, thus, supports the enforcement and implementation of those those obligations, being in this sense a 'building block' towards multilateral governance. On the other hand, it can be observed that the political tensions, which dominate the multilateral sphere and often prevent the implementation of international commitments, can also be perceived at the regional level. The strengthening of political commitment to the goals represented by sustainable development, and the enhancement of policy coherence allowing the process to be more effective remain the major challenges.

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Shifting Perspective on the Migration and Development Nexus in the EU: From the Migration Management Approach to the Development Paradigm of Mobility?

Janine Silga

Abstract

The aim of this paper is to trace the origins of the migration and development nexus ('MDN') in the European Union ('EU') policy discourse. As of the beginning this discourse has been essentially shaped by the migration policy which first defined the notion. Two different approaches to the MDN have been identified subsequently in the EU policy framework. The first one is the so-called 'root causes' approach to migration, which aims at curbing 'migration pressure' by using development. The second approach refers to 'co-development' that focuses on the contribution of migrants to the development of their countries of origin. Initially, the 'root causes' approach was favoured when formulating the MDN. However, 'co-development' has progressively become the leading approach.

Subsequently, the EU development policy also paid increasing attention to development-related issues arising from migration. It formulated its own vision of the MDN using the notion of 'Policy Coherence for Development'. According to this concept, for development to be achieved, development policy needs to be coherent with other policies, among which migration. Despite that, the MDN discourse is still dominated by the 'migration management' paradigm. In this respect, the 2009 Report on Human Development is an exception in that it envisions mobility (or migration) as a fully-fledged development question.

1. Introduction

The emergence of a 'migration and development (positive) nexus' (MDN) as an objective of the European Union (EU) migration policy presents a challenge to the still incomplete migration policy and unharmonised migration law.

Firstly, it means that migration objectives cannot be unilaterally defined by the receiving region (in this case, the EU) because the development aspect of the matter implies taking into account the needs and interests of the countries of origin. This also means that the instruments typically used to define rules of entry and stay of immigrants cannot be unilateral. The traditional use of bilateral agreements between States in the field of migration is not questioned here. This practice is not at all new and has been used for years in order to define both the regime of authorisation of entry and stay, and the status of international migrants. What is entailed, however, is the significance that those instruments might acquire as a result of the influence of development objectives on migration management. Indeed, the content of such agreements may be significantly altered by taking into account development objectives.

From a migration management[1] perspective, the MDN refers to circulation or mobility (including both concepts of 'circular migration' and 'brain circulation'[2]) In this context, mobility refers to granting

[1] According to Steven Sterkx, in the EU context, migration management equals ' 'containment' or 'control'', S. Sterkx, 'The External Dimension of EU Asylum and Migration Policy ?: Expanding Fortress Europe?', in J. Orbie (ed.), *Europe's Global Role – External Policices of the European Union*, (Ashgate, 2008), 117-138, at 134. As he puts forward : 'Measures aimed at strengthening the AFSJ [Area of Freedom, Security and Justice] are intended to manage every step of migration and refugee flows, that is, at the source (in countries and regions of origin), in countries of transit , and at the Union's external borders. By studying the content of these measures, it is obvious that management should be read as "containment' or 'control".', 134.

migrants flexible statuses that facilitate their movement back and forth between the countries of origin and destination.[3]

Mobility does not only mean more flexible legal status, it also implies a reinforced and more secure set of rights for migrants, which could also strengthen their access to mobility. However, in this work, our argument is that the current EU legal framework is too rigid to enable mobility and too restrictive in defining specific rights that could actually support such mobility.

On the other hand, from a development perspective, the MDN refers, in the first place, to the 'positive' impact of migration on development ('co-development'), broadly understood: remittances (financial and 'social') and, to some extent, the question of return. This latter point indirectly refers to the opportunities (including legal options) provided not only by the country of destination, but primarily by the country of origin, to allow migrants to make contribution to development (through reintegration). In the second place, the MDN also means addressing the 'root causes' of 'uncontrolled' population movements (this alludes mostly to finding ways of curbing the number of unauthorised migrants reaching the EU). The 'root causes' approach actually points out to a rather controversial aspect, if not concern, of development policy that, in reality, is shared with the traditional migration policy. Indeed, one 'archaic' objective of the EU development policy is the control of movement of population (internal migration),[4] on the basis of the assumption that an unbalanced rural-urban migration is adverse to development.[5] Institutionally, including the 'root causes' approach into development strategy also underlines potential instrumentalisation of development (financial) means and tools for migration management purposes.

The external dimension of the EU migration policy has been extensively analysed by many authors.[6] However, one very important aspect of it, namely the way the EU concretely deals with migratory pressures in the long-run, has hardly been looked at.

In the early nineties the EU was really concerned with the possible increase of migratory flows all over the world essentially due to great economic disparities, demographic evolutions and political as well as environmental instability.[7] This fear of what was then called the migration pressure, lead the Commission to advocate for tackling the causes of these flows systematically.[8] According to the

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[2] Circular migration refers to, '...[a] continuing long-term, and fluid pattern of human mobility among countries that occupy what is now increasingly recognised as a single economic space.', K. Newland, D. Rannveig Agunias and A. Terrazas, *Learning by doing : Experiences of Circular Migration*, Migration Policy Institute, September 2008, 2. 'Brain circulation' is the type of circular migration that applies to highly skilled migration.

[3] Ideally, mobility would mean 'free movement' or 'freer movement', i.e., movement that is not restricted in terms of access to specific countries or region, but this consideration is beyond the scope of this study.

[4] For more insights on the question read: O. Bakewell, 'Keeping Them in Their Place' : the ambivalent relationship between development and migration in Africa, (2008) *Third World Quarterly* **29**(7) 1341-1358.

[5] Demographic considerations may also enter the conceptual realm of control of population movement within the context of development policy.

[6] See C. Boswell, The 'external dimension' of EU immigration and asylum policy, (2003) *International Affairs* **79**(3) 619-638; C. Boswell, 'Evasion, Reinterpretation and Decoupling : European Commission Responses to the 'External Dimension' of Immigration and Asylum', (2008) *West European Politics* **31**(3) 491-512; S. Lavenex, 'Shifting up and out: The foreign policy of European immigration control', (2006) *West European Politics* **29**(2) 329-350; S. Lavenex, 'The External Face of Europeanization: Third Countries and International Organizations', in A. Ette and T. Faist (eds.), *The Europeanization of Migration Policies*, (Macmillan, 2007), 246-264; S. Sterkx, 'The External Dimension of EU Asylum and Migration Policy ?: Expanding Fortress Europe?', *op cit*

[7] 'Despite changes in the patterns of migratory movements, the overall pressures have not diminished and are unlikely to do so. Indeed, developments [which ones?] in the neighbouring countries of the Union are more likely to increase than to reduce the pressures.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, 23.02.1994, 11.

[8] 'On one side of the balance sheet, the concerns about mass movements of people towards Western Europe from the ex-Soviet Union and its previous sphere of influence have not yet materialised (...). On the other hand, migration pressures from the South, particularly from North Africa, have, if anything increased for both demographic and economic reasons. Furthermore, on the Union's own doorstep, the tragedy of the former Yugoslavia has produced large-scale movements of people forced from their homes by development which do not fit patters with which Western Europe is familiar or equipped

Commission, '...[m]igration pressures relate to all actual and potential migratory movements directed towards Europe.'[9] The concept of 'migration pressure' implies that several factors, among which demography, if not controlled appropriately, may lead to undesired migratory flows from different regions of the world. Although this concept undeniably builds on the reality, it also reflects irrational considerations, based on fear and myths of invasion of the European territory.[10]

In the EU policy framework, trimming down migratory pressure has been mostly dealt with by using the migration and development nexus as the main concept.

Although it goes far back in time, the EU only expressly referred to the MDN in the early nineties, when it started developing its own migration policy, first embodied in the comprehensive approach to migration.

The comprehensive and subsequently global approach to migration sets itself three main objectives: acting on the causes of migration pressures (fostering positive links between migration and development), controlling migration fairly and efficiently (preventing and fighting against unauthorised flows of people) and harmonising the treatment of third country nationals internally.

While the last two objectives of the EU comprehensive approach to migration are traditional aspects of migration policy, the first one constitutes an original axis of this policy, in several regards. First, it implies bringing together in a consistent way different policy objectives and practices. Second, it means taking into account the viewpoint of all the stakeholders involved in this process, shifting from a statist approach[11] to migration regulation in order to enforce a multi-layered[12] understanding of the matter. In turn, this perspective entails getting out of the limited scope of assessing migration issues as a purely internal concern or interest. From the legal (regulatory) perspective, this infers a slow movement away from looking at rules governing migration policy as a matter of public order, essentially based on discretionary power of national authorities, in order to adopt a negotiated approach in this respect.

This paper will simply try to analyse the context in which the concept of the MDN emerges at the EU level. In order to attain thus set objectives, we will look at the policy documents drafted by different EU institutions so as to trace back the main steps of evolution of the MDN concept in the EU context.

Currently two different paradigms of the MDN exist within the EU migration policy framework. The first one is the 'root causes' approach, whose objective is to achieve long-term development in migrants' countries of origin that belong to the category of developing countries. Under this paradigm, lack of development is perceived as the main reason for migration - especially for North-South migratory flows. Therefore, the EU institutions regard development as an important, if not the only, solution to reduce migratory flows from less-developed countries to EU Member States.[13]

The second paradigm of the migration and development nexus is the 'co-development' approach, which aims at promoting and supporting migrants' development initiatives towards their countries of origin.

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and which require new and tailored response. Moreover, a combination of modern travel possibilities and the readiness of unscrupulous traffickers in human beings to exploit them has swelled the numbers of would-be immigrants into Europe from more distant parts of the world.', Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *ibid* 7.

[9] Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *ibid* 13.

[10] H. de Haas, 'The Myth of Invasion : the inconvenient realitites of African migration to Europe', (2008) *Third World Quarterly*, **29**(7), 1305-1322.

[11] Immigration law is traditionally considered a bastion of State sovereignty.

[12] Such an approach would involve the main stakeholders : the countries of destination, the countries of origin and the migrants themselves.

[13] V. Chétail, 'Paradigm and Paradox of the Migration and Development Nexus : The New Border for North-South Dialogue' (2008) *German Yearbook of International Law* **52**,183-215.

Although both approaches still coexist in the policy discourse, only the second one has been appraised at the policy level. Indeed, the actors are easier to identify (legal migrants, receiving as well as sending countries) and the objectives are easier to reach in the short and medium-term. On the other hand, the 'root causes' approach requires an in-depth and contextualised analysis of both the actors intervening in the migration process and of forces that may not be easily captured and tamed down by policies. In this sense, the 'root causes' paradigm may otherwise be understood as a 'systemic' approach to migration. Besides, while the underlying 'task' of the 'root causes' approach is to put an end to 'uncontrolled migratory flows',[14] based on controversial theoretical hypotheses, 'co-development' builds on actual initiatives of migrants. Nonetheless, the 'root causes' approach continues to be referred to in policy documents, although its original meaning has evolved to the point that one may question its actual substance. The current version of the 'root causes' approach that seems to be the most faithful to its early definition is found under the notion of 'policy coherence for development', which is an essential concept of the development policy.

Regarding the position of development policy on the MDN, the integration of migration policy concerns in the development policy field may be perceived as the result of an increasingly holistic understanding of development (particularly epitomized in the notion of Policy Coherence for Development). This holistic vision of development process gives an ever-growing space for individuals, as they are both final beneficiaries and primary agents of development.

However, the paradox of bringing together different normative settings (one based on control and the other one on individuals' rights protection) is not so easily solved, and very often contradictions appear in the EU policy discourse, especially in defining the priorities for action at the EU level. The main task of this paper is to clarify the evolution of the MDN as a concept in the EU policy context and to look at its different meanings over time. This task will be carried out by tracing (direct and indirect) references to the MDN in EU policy documents. By doing so, we would like to argue that even though the MDN was not initially a fully fledged policy concept, it has gradually acquired distinctive features. While Part 1 will go through the initial steps of emergence of the MDN within the nascent EU migration policy, Part 2 will focus on its current sense.

2. Historical Overview of the MDN References in the EU Policy Documents -The EU Migration Policy from an Internal Concern to the External Dimension

In the EU context, the migration and development nexus is usually said to have been developed only from the early nineties. Nevertheless, earlier developments were actually taking place. The EU migration policy was initially conceived as incidental to the construction of the internal market and originally, the notion of free movement of persons was conceptually linked to the EU migration policy.

The early discussions on achieving internal free movement of persons gave the opportunity to open up the debate on immigration coming from outside of the EU.[15]

[14] According to Steven Sterkx: 'As [EU] policy documents on the external aspects of asylum and migration indicate, 'uncontrolled migration flows' are considered as a worst-case scenario. Migration into the Union needs to proceed in an 'orderly' or 'regulated fashion.'', S. Sterkx, *op cit* at 134 (n. 1).

[15] '...[S]tarting from the assumption that a migration policy at European level may gradually take shape as an integral part of the move towards European citizenship, the Commission considers it fundamental that : the free movement of persons should gradually become accepted in its widest sense, going beyond the concept of a Community employment market, opening up the notion of European citizenship; the legal status of immigrants from non-member countries should be adapted with the aim of consolidating foreign communities which have acquired the characteristics of permanence, by reason of their length of stay and above all through the existence of the second and third generation; the action taken should aim, at one and the same time, at the removal of obstacles to equal treatment and initiatives in favour of immigrants to catch up and reach a of quality.' Commission Communication (COM(85)48 final) transmitted to the Council on 7 March 1985, Guidelines for a Community policy on migration, pt. 10.

The EU context is specific in that one deep rationale for adopting free movement of people as the core of its construction,[16] was closely tied to the idea that migration would be a factor of internal common development. However, the perspective on the linkage between migration and development internally was quite different from its perception with regard to non-EU member States. Or at least in the way it evolved subsequently. Indeed, from the outset third country nationals were not supposed to benefit from the free movement regime to the same extent as nationals from the Member States, since they were not to eventually become citizens of the European Union. This legal evolution is often referred to as 'civic stratification'.[17] However, a distinction was made between migrants who were supposed to settle down permanently on the EU territory, and newcomers that were virtually non-existent given the ban on immigration decided by many Member States after the beginning of the 1970s economic crisis. Thus, the common immigration policy, was initially construed upon the assumption that there was, officially, no more legal labour migration.[18] And the meaning of the MDN was substantially affected by such a context.

This explains why the migration and development discourse has been conceptually fragmented into an internal dimension, tied to the achievement of the internal market and an external dimension linked to the EU migration policy.[19]

Most of the current debate on the MDN at the EU level is actually focused on migratory flows from developing countries. This tendency of the policy discourse reflects, in turn, the initiatives taking place at the international level. In the latter respect, the MDN has drawn a growing attention in other fora,[20] such as international institutions or national governments.[21] As Christina Boswell explains: 'Since the early 1990s there had been a huge expansion of multilateral activities in the area of prevention and peace-building, ranging from early warning human rights monitoring, institutional capacity-building and post-conflict reconstruction, through various forms of political mediation, to more robust peacekeeping and military interventions'[22]

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[16] As the Commission states : 'The free movement of people, and of workers in particular, between Member States, together with the freedom to provide services and the free movement of goods and capital, are part of the foundations of the Community.' Commission Communication transmitted to the Council on 7 March 1985 (COM(85)48 final) Guidelines for a Community policy on migration, pt. 4, §1.

[17] L. Morris, Managing migration : civic stratification and migrants' rights (Routledge, 2002) . As explained by Eleonore Kofman, civic stratification in the EU is a policy regime, '...[w]hereby rights are granted differentially with a view to enabling or dissuading people from settling and becoming citizens (...). In particular there (...) [is] a widening differentiation in entitlements between denizens, defined as long-term residents, temporary permit holders, those waiting for a decision about their status and undocumented.' E. Kofman, Managing Migration and citizenship in Europe : toward an overarching framework, in C. Gabriel and H. Pellerin (eds.), *Governing International Labour Migration – Current issues, challenges and dilemmas*, (Routledge 2008), 13-26, at 14.

[18] As Steven Sterkx notes, primarily, '…[p]olicies on TCNs are being framed as flanking measures, that is as a compensation for the abolishment of internal border controls and, as such, the free movement of persons within the EU.' S. Sterkx, 'The External Dimension of EU Asylum and Migration Policy ?: Expanding Fortress Europe?', *op cit* at 118 (n. 1).

[19] For interesting insights into the articulation between free movement law and migration law, see S. Barbou des Places et I. Omarjee, *Droit de la libre circulation et droit des migrations : quelle articulation ?*, CEJEC-wp, 2010/4.

[20] It is worth noting that the European Community was aware of the development taking place in international fora with respect to the management of international migration. Read, for instance, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *op cit* (n. 7) Annex IV on 'Recent Developments in international fora'. The Commission notably refers to the European Population Conference (taking place form 23 to 26 March 1993) in Geneva which explicitly mentioned the links between migration and development. Indeed, at point 23 of the above mentioned document, the Commission reports that : 'On migration and development it was recommended that Governements of countries of origin and destination should seek to address the causes of emigration in order to alleviate the massive and uncontrolled international migration flows.' This quotation perfectly reflects the 'root causes' approach.

[21] H. Olesen, 'Migration, Return and Development : An Institutional Perspective', (2002) *International Migration* **40**(5), 125-150. In the first part of his article, the author especially focuses on international institutions concerned with development issues, such as the International Organization for Migration, the World Bank, the Organisation for Economic Co-operation and Development or the United Nations. On this precise matter, read pages 128-134.

[22] C. Boswell (2003) *op cit* (n. 6), 625.

Within the policy framework of the EU, the migration and development nexus emerged at first as an aspect of the future common EU migration policy and especially of its external dimension. Originally, the migration and development nexus was perceived as part of the solution to control migration and prevent the increase of the 'migration pressure'.

Understood as such, the migration and development discourse, does not depart from the classical objectives of immigration policy, since it is primarily conceived as a way to control the composition of the population in one territory by subjecting outsiders to administrative checks and authorisations prior to their entry and stay in this territory.

Such a vision of migration and development is based on finding new ways to control movements of population (if not restricting them) in a softer manner than the traditional use of expulsion mechanisms. This implies to adopt comprehensive approaches towards third countries 'exporting' migrants.

Initially, no clear distinction was made between different types of migration flows as the final goal of linking migration to development concerns was to eventually control movements of population. As a result, sudden and unexpected flows of asylum seekers were as undesirable as uncontrolled flows of economic migrants, doomed to become 'illegal' or 'irregular' migrants. The way the migration and development nexus has been approached in the EU context, i.e. as a 'systemic' issue, reflects the willingness of the EU to build a 'comprehensive' EU migration policy, which includes both traditional and innovative aspects of migration management.

Paradoxically, however, the initial migration policy did not fall within its scope of competence and this was often stressed by the EU institutions themselves. Therefore, the first obstacle faced by the EU institutions was to address the lack of cooperation between the member states in their relations with third countries on matters related to immigration. Indeed, this policy has been to a great extent part of the sovereign scope of competence of each of the Member States (especially regarding authorised 'labour migration').

The second obstacle was related to the second half of the MDN equation. Migration **and** development should not be read as 'migration over development' or 'migration for development'. In the first case, migration policy objectives would prevail over development objectives and priorities. This situation would be even more paradoxical as these objectives have been increasingly generous towards developing countries, especially as far as the human rights dimension of development, which gained a prominent position over the years (at least in the policy rhetorics).

Making migration working for development, on the other hand, would make migrants responsible for the development of their countries of origin, which might conflict not only with development policy itself (this policy being primarily conceived as international cooperation between States). But this imbalanced understanding of the migration and development nexus would eventually mean that migrants should carry the double burden of being loyal integrating immigrants and faithful development-oriented emigrants.

This may partly explain the institutional tensions playing at the time between the DG Development and DG Justice and Home Affairs.

Does it mean, the baby should be thrown out with the bath water? Even though control and security are important features of the migration policy,[23] the MDN may still constitute an opportunity to lessen the prevalence of such features. It may equally contribute to give a more dynamic understanding of the concept of development within the context of the development policy.[24]

[23] As Steven Sterkx contends : 'Policy practice reveals that EU Member States perceive migration – in the sense of uncontrolled flows of migrants and asylum seekers – as a significant security threat to the (…) [Area of Freedom, Security and Justice.' S. Sterkx, 'The External Dimension of EU Asylum and Migration Policy ?: Expanding Fortress Europe?', *op cit* at 136 (n. 1).

[24] There is, indeed, a tendency to often perceive migration, or rather emigration as the consequence of a lack of development. The belief can be examplified in the 1992 on the Development Policy : Communication from the Commission to the Council

In the EU policy framework, the MDN entails both an external and an internal dimensions. The first one is part of the EU external relations with developing countries concerning migration issues, whether it is articulated as part of formal arrangements or not (through negotiations and dialogues). The second dimension deals with empowering migrants on the European territory in order to support their development initiatives directed towards their countries of origin.

From the outset, the external dimension of the future common migration policy is part of the 'comprehensive approach' to migration. This approach deals with three questions: taking action on migration pressures, controlling migration flows and strengthening integration policies for the benefit of legal immigrants.[25] As such, the external dimension cannot be limited to one aspect of the comprehensive approach. Rather, the external dimension is necessarily part of all questions related to migration. It simply indicates a shift from a traditional one-sided vision of elaborating migration policy, to a more open, inclusive and most importantly negotiated understanding of the matter. Within this conceptual framework, the MDN appears within the question of finding innovative, albeit long-term, ways to reduce migratory pressures.

The comprehensive approach[26] was formulated by the Commission in the early nineties, then followed by the Council's first and rather unsuccessful attempt to implement it, through the creation of the High Level Working Group on Migration and Asylum.

Originally, the migration policy was not to take the shape of a comprehensive, all-inclusive policy. Rather, the migration policy dealt with the status of third country nationals immigrants in contrast to more beneficial treatment for immigrants coming from Member States, stemming from the internal market founding principle of free movement of people.[27] This is why most early policy documents addressed the MDN through the lens of 'co-development' since this approach is focused on migrants, and thus, on the rules applying to them in countries of destination.

Interestingly, the move towards the 'root causes' approach was closely linked to the entry into force of the Maastricht Treaty, the three-pillar structure of which seemed to allow for setting ambitious policy objectives, especially at the external level. This was the case, firstly, thanks to the integration of the European Foreign and Security Policy within the sphere of the competencies of the European Union. And secondly, the development policy since this moment has been formally enshrined in the Community treaty, as a policy in its own right.

This also coincided with the emergence of the external dimension of the common EU migration policy, which was inspired by the strengthening of the EU external relations in the Treaty. Therefore, there was an increasing departure from the initial focus on migration as primarily dealing with individuals, to the understanding of migration as a larger phenomenon caused by a plurality of factors going far beyond the ambit of the EU, including global concerns to migration management. This broad objective encompassed two main goals: migration control (long-term action on migration pressures and short-term fight against irregular migration) and the building of a common legal framework for admission of future migrants (including asylum).

(Contd.)
and the Parliament, Development Cooperation in the run-up to 2000 (The Community's relations with the developing countries viewed in the context of political Union)- The consequences of the Maastricht Treaty SEC(92)915 Final. Mentioning the development challenges of the Mediterranean area, the Commission states that : '...[H]ere the major problems are political, environmental and social (emigration).' 16. See also at 2; 31-32 of the Annex to this Communication , VIII/479/92-EN

[25] Commission Communication to the Council and the European Parliament on Immigration, SEC(91)1855 final, 23.10.1991, 2.

[26] For a more detailed overview of the comprehensive approach see: S. Perrakis (Ed.), *Immigration and European Union : Building on a Comprehensive Approach* (Hellenic Centre for European Studies Athens (EKEM), 1995). J. NIESSEN and F. MOCHEL, *EU External Relations and International Migration* (Migration Policy Group, Brussels, 1999).

[27] Commission of the European Communities, Communication of the Commission to the Council, Consultation on Migration Policies vis-à-vis Third countries, 23 March 1979, COM(79)115.

Although the 1991 Communications from the Commission alludes to both the 'co-development' and the 'root causes' approaches (without making explicit references to these concepts), the latter is already referred to as the prevailing overarching approach to controlling migration pressures.

2.1. The Early 'Optimistic' Days: The 1991 and 1994 Communications from the Commission

In 1991 and then in 1994, the Commission issued three Communications[28] that were clearly setting up the bases for building an external dimension to the yet to be common migration policy. The two Communications drafted in 1991 were preparatory documents leading to the adoption of the 1994 Communication, which is, as a result the most important document elaborating for the first time the comprehensive approach to migration at the EU level.

The Commission was supported by the European Council[29] which in 1992 made a declaration on the principles of action governing the external aspects of the migration. As Sterkx underlines, '...[a]lthough these three documents have not sparked any intense debate on the root causes of migration, they should still be seen as the starting points of the evolution towards a comprehensive approach to migration'.[30]

Initially, the MDN took shape as part of the comprehensive approach to migration. This early conception of the future EU migration policy advocated for an all-encompassing policy framework for regulating migration questions at the EU level. Therefore, not only internal issues regarding immigration were taken into account. External aspects of migration, relating to the 'root causes' of movement of people across international borders were also considered relevant, as the notion of 'migration management' became increasingly relevant. The 1994 Communication from the Commission was the first document formulating the 'comprehensive approach to migration'.

The policy recommendations made by this communication also resulted from the Edinburgh Declaration, which set the principles of the external dimension of migration.

2.1.1. The 1992 Edinburgh Declaration

The Edinburgh declaration played a significant role, especially from a political standpoint, in confirming the need to further develop the nascent external dimension within the framework of the future migration policy.

Based on the notion of migration pressures[31], the declaration recommends the need to curb these pressures as they may be detrimental to receiving societies. According to the European Council, there is a strong relation between the perception of migration as a potential security issue or destabilising factor for receiving societies, when not controlled[32] and the need to find long-term solutions to reduce

[28] Commission Communication to the Council and the European Parliament on Immigration, SEC(91)1855 final, 23.10.1991; Communication from the Commission to the Council and the European Parliament on the right of asylum, SEC(91) 1857 final, 11.10.1991; Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *op cit* (n. 7).

[29] Conclusions of the Presidency – Edinburgh, 12.12.1992, Bull.EC 12-1992, pt. I-31.

[30] S. Sterkx, The External Dimension of EU Asylum and Migration Policy ?: Expanding Fortress Europe?, *op cit* (n. 1), p. 128.

[31] The European Council, '...[n]oted the pressures on Member States resulting from migratory movements, this being a major concerns for Member States, and one which is likely to continue into the next decade...' Point VII, Conclusions of the Presidency – Edinburgh, 12.12.1992, Bull.EC 12-1992, pt. I-31.

[32] The European Council, '...[r]ecognized the danger that uncontrolled immigration could be destabilising and that is should make more difficult the integration of Third Country Nationals, who have legally taken residence in the Member States.' Point VI. Conclusions of the Presidency – Edinburgh, 12.12.1992, Bull.EC 12-1992, pt. I-31.

such pressures. This vision of the European Council clearly conceives the 'root causes' approach to linking migration and development as an instrument for migration control, if not migration 'eradication'[33].

As a result, what should be controlled is the movement of people as such: how and why they move, in order to reduce all their incentives for doing so.

The linkage between migration and development (in both its qualitative and quantitative meanings) is indirectly mentioned by the European Council in two principles that should guide and inform the approach of the Community and its Member States. The first one refers to the preservation and restoration of peace, respect of human rights and the rule of law (qualitative development). And the second one refers to the promotion of liberal trade and economic co-operation in the countries of emigration and aid as a means to foster sustainable and economic development (poverty alleviation and job creation).[34]

Although deprived of a real legal significance, the Edinburgh Declaration undoubtedly orientates the conception of the migration and development nexus in future policy documents, especially in the 1994 Communication from the Commission, which will formulate this nexus more explicitly, even if it does not refer to the phrase as such.

Subsequently, the favoured understanding of the links between migration and development will be the 'root causes' perspective. Roughly, this perspective is intended to find long-term solutions to migratory pressures to the EU. The 'root causes' approach has also been qualified by Christine Boswell as the 'preventive' approach.[35] While the incentives for migration from less developed to more developed European countries are numerous, their complexity explains the necessity to develop such a 'comprehensive approach'.

The emergence of the 'root causes' approach to migration management coincides with the perceived opportunity given by the adoption of the Treaty on the European Union, which creates new legal bases in several policy fields: the common foreign and security policy, justice and home affairs, development policy and so on. The early nineties were also significant in enabling the migration and development nexus to emerge, as following the adoption of the Treaty on the European Union, the EU institutions were finally legitimate to spark off debates at the supranational level as to how to tackle migration issues.[36]

This need was initially conceived within the ambit of the 'migratory pressure' concept. In itself this concept suggests that there is an emergency to act, as the 'pressure' should be alleviated. This was significantly expressed in the 1994 Communication of the Commission.

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[33] The European Council, '...[r]ecognized the importance of analysing the causes of immigration pressure, and analysing ways of *removing the causes of migratory movements*.' [emphasis added], Conclusions of the Presidency – Edinburgh, 12.12.1992, Bull.EC 12-1992, pt. I-31, point XV.

[34] Conclusions of the Presidency – Edinburgh, 12.12.1992, Bull.EC 12-1992, pt. I-31, point XVI.

[35] According to her, the preventive approach logically implies a 'logic of prevention' insofar as it, '...[g]enerate[s] proposals for addressing the 'root causes' of migration and refugee flows in countries of origin through more targeted use of development assistance, trade, foreign direct investment or foreign instruments'. C. Boswell (2003) *op cit* (n. 6) 619-638. First quotation : 619-620 ; second quotation : 624.

[36] The need to tackle migration issues at the supranational level '...[h]as found expression in the provisions of the Treaty on European Union which formally designated the subjects as being matters of common interest, to be addressed in the context of a single institutional framework.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policices, COM(94) 23 final, (Foreword –Purpose and Content of the Communication) 1a, *op cit* (n. 7).

2.1.2. The 1994 Communication[37]

The Communication stresses the need for Member States to cooperate, both internally and externally.[38] Interestingly, the need to adopt a common approach to migration issues has in parallel called for the need to increase external cooperation on common matters of migration policies.[39]

2.2. Implementing the Comprehensive Approach: The High Level Working Group and the Action Plans

Following the formal recognition of the comprehensive EU migration policy, the Council subsequently attempted to implement this policy framework in the context of a few selected third countries. In the late 1998, the High Level Working Group on Migration and Asylum was set up and was given the task to draft Action Plans regarding migration management towards selected third countries of origin.

2.2.1 The High Level Working Group Action Plans

The first significant concrete expression of the 'root causes' approach may be found in the action plans[40] drafted by the High Level working group ('HLWG') in 1998 singling out a certain number of third countries as main countries of origin of migrants.[41] The countries selected by the Council were: Afghanistan/Pakistan, Albania and the neighbouring region, Morocco, Somalia and Sri Lanka. In addition, the HLWG assessed the results of the already existing Action plan on the influx of migrants from Iraq and the neighbouring region.[42]

The HLWG was created on 7-8 December 1998 by the Council following an initiative of the Dutch Delegation after the Austrian Presidency drafted its famous strategy paper on asylum and migration. As Steven Sterkx reports, the strategy paper, mentioning the 1991 and 1994 Communication as well as the 1992 Edinburgh Declaration, '...[s]tates that the debate on immigration needs to be picked up again because of the discrepancy between what was claimed at the time and what has actually been

[37] Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *ibid*.

[38] The root causes approach requires a significant involvement of countries of origin : 'It will be necessary to involve the country of origin in this process from the beginning.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *ibid* 19. The Commission focuses on dialogue as the main instrument in this regard : '...[O]nly within the framework of a dialogue with the countries concerned can effective measures be taken.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *ibid*.

[39] 'This [making migration issues a matter of common interest] is as it should be. The deepening of the European Integration process calls for an integrated and coherent response (...), to the challenges which migration pressures and the integration o legal immigrants pose for the Union as a whole. Failure to meet those challenges would be to the detriment of attempt to promote cohesion ans solidarity whithin the Union and could, indeed, endanger the future stability of the Union itself.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policices, COM(94) 23 Final (Foreword –Purpose and Content of the Communication) *ibid* 1a.

[40] As Steven Sterkx affirms, 'The first real instruments for asylum and migration cooperation with third countries were the High-Level Working Group actions plans. In 1998, the Dutch delegation to the Council proposed the creation of a horizontal task force on asylum and migration in order to establish a common, integrated, cross-pillar approach targeted at the situation in most important countries of origin of asylum seekers and migrants. The JHA Council of 3-4 December 1998 endorsed the idea and the General Affairs Council (GAC) of 6-7 December 1998 officially established this cross-pillar task force giving it the name High-Level Working Group on Asylum and Migration (HLWG).' S. Sterkx, *op cit* 120.

[41] S. Sterkx, *ibid* 120.

[42] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999.

implemented.'[43] The Austrian strategy suggested that migration issues should be tackled adopting a cross-pillar approach.[44]

According to the terms of reference of the HLWG, this organ was to carry out the following tasks:[45]

- Set up a list and assess the existing initiatives, such as the strategy paper on asylum and migration, mentioned above, the action plan on the influx of migrants from Iraq and the neighbouring region, and existing country reports, whether established by national authorities or by other institutions, such as Heads of Mission, UNHCR, etc...
- Draw up a list of the most important countries of origin and transit of asylum seekers and migrants. Notably, the distinction between migrants and asylum seekers (potential refugees) is again totally disregarded.
- Explore ways to strengthen cooperation with the UNHCR as well as other organisations, whether intergovernmental, governmental or non-governmental present in the selected countries and/or the neighbouring region. More precisely, cooperation with the UNHCR should regard both the analysis of the situation of the selected countries and possibilities for further cooperation in the countries of origin.
- Establish a plan for each selected country that should include some if not all of the subsequent aspects:
    - An analysis of the causes of migration flows, 'on the basis of on an up-to-date analysis of the political and human rights situation in the country concerned as well as an up-to-date analysis of the migration and refugee problems [sic].'[46] Then, the actions plans should look at the existing possibilities to strengthen 'the common strategy for development between the EC and (...) its Member States and the country concerned and/or neighbouring countries.'[47] 'Last the action plans, should identify the needs for humanitarian aid and rehabilitation assistance, 'including assistance in the reception of displaced persons in the regions'[48] and make propositions as to how to concretely deploy such assistance and aid 'in accordance with existing aid approval procedures.'[49]
    - Make proposals in order to deepen political and diplomatic consultations with selected countries.

[43] S. Sterkx, *op cit* 129.

[44] S. Sterkx, *ibid*. As the author underlines, the strategy paper proposes that : 'Such an approach would not onlt cover the asylum and migration policy under the JHA pillar, but also ‘essential areas of the Union’s forein policy, [... Association Agreements]; structural dialogues [... and so on].' *ibid*.

[45] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, 4-5. Read as well, the summary of these tasks by Steven Sterkx : ‘According to the terms of reference that were endorsed by the GAC of 25 January 1999, the action plans should comprise the following elements : a joint analysis of the causes of influx, suggestions aimed at strengthening the common strategy for development with the country concerned, identification of humanitarian needs and proposals for the intensification of political and diplomatic dialogue with the selected countries, indications on readmission clauses and agreements, potential for reception and protection in the region, safe return, repatriation, as well as on the cooperation with intergovernmental, governmental, non-governmental organisations and UNHCR.' S. Sterkx *op cit* 120.

[46] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, 4.

[47] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, *ibid*.

[48] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, *ibid*.

[49] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, *ibid*.

- Assess the possibility for including re-admission clauses in association agreements or another mixed agreement with the selected country. And similarly, indicate the possibility existing for concluding a Community re-admission agreement after the Treaty of Amsterdam enters into force.

- Assess the possibilities to offer, maintain and improve reception and protection in the region or the possibilities to ensure safe return to the country of origin and if not, the availability of internal settlement alternatives.

- Prepare joint measures in the field of asylum and migration, '...[i]ncluding information campaigns in the countries of origin and transit, as well as combating cross-border crime, with specific reference to police cooperation for an exchange of information aimed at effective fight against criminal organisations involved in illegal immigration.'[50]

- Explore measures promoting voluntary repatriation.

The HLWG had to submit for approval, a final report containing the actions plans on the selected countries 'for the implementation of an integrated cross-pillar approach.'[51]'

When reading the list of elements that shall be included in the Actions Plans to be drafted by the HLWG, a few critical comments can be raised.

First, the focus is clearly on security issues and (irregular) migration prevention. Second, the lack of specific attention that should be given to asylum-related issues is striking. It even seems that the objective here is to prevent refugees from entering Europe and to keep them as far as possible that is as close as possible to their country/region of origin. Third, repatriation is the last important aspect of the elements of the Action plans, whether voluntary or not (thanks to the conclusion of re-admission agreements). Mysteriously, several aspects of the comprehensive approach, as it was originally perceived by the Commission seem to have disappeared.

Indeed, the Commission often stressed the fact that root causes, whatever their nature (including political and social aspects) **could not** be addressed in the short term. Therefore, tackling them required a conceptual separation from short-term objectives regarding immediate migration management concerns. Besides, the Commission constantly reiterated the need to separate the necessarily humanitarian foundations of asylum and the more contingent one of migration policy. One explanation for this 'indiscriminate' look at migration flows in the Action Plans is to be found within the concept of the 'root causes' approach itself. To some extent this rather 'lenient' orientation of the external dimension of the migration policy can be rightly understood by the fact that migration flows themselves were not categorised and that by including involuntary migrants (among whom were asylum seekers), it would seem unfair to adopt a 'harsh' approach towards these migrants.

Finally, the Commission clearly recommended an integration of different policy fields, rather than an instrumentalisation of some policies' tools by other policies' objectives. However, the tasks to be performed by the actions plans clearly suggests that external policies instruments are subjected to/used for migration management objectives, regardless of their own policy field.

Therefore, the approach adopted, although seemingly interesting, is quite superficial and not genuinely comprehensive. The cross-pillar dimension looks rather absent, while it remains based on uninformed assumptions and deprived of an in-depth analysis as was previously required by the Commission in its communications. This understanding of the action plans' outcome is supported by Steven Sterkx'

[50] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, 5.

[51] Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum seekers and migrants, 5264/2/99 REV 2, 22 January 1999, 6.

vision about the 'cross-pillar approach' as it was called for by the Austrian Strategy paper[52] and the subsequent actions plans: '...[t]o a large extent the focus of this cross-pillar approach is directed towards the reduction of migration pressure, the fight against illegal immigration, restricted access to the Union, and the detection and removal of unwanted immigrants through improved control'.'[53] The emphasis put within the Actions Plans on migration management and on related security goals, may explain the initial reluctance in other external policies (especially DG Development) to contribute to their implementation, as well as severe criticisms voiced by some of the selected third countries (and especially Morocco).

2.2.2 The disappointing outcome of the Action Plans

The actions plans drafted by the HLWG are often mentioned as the first failed attempt to implement the comprehensive approach to migration policy. They constitute the first genuine attempt to implement effectively the comprehensive, cross-pillar approach to migration. However, this initiative raised a significant number of criticisms. As Steven Sterkx explains, two major critiques were directed against the actions plans, '…[f]irst, the complete lack of dialogue with the target countries and, as such, of a spirit of partnership, and secondly, the manifest emphasis on security-related measure.'[54] On the latter point, Steven Sterkx goes on to describe that the focus was clearly on the need to find ways for 'controlling and preventing migration into the EU territory, especially [by] the conclusion of readmission agreements.'[55]

The Action Plans show the limits of the comprehensive approach. First, in their external dimension, the Action plans did not reflect a genuine partnership with the selected third countries. Besides, in their internal aspect, the Action Plans blatantly favoured migration management objectives, regardless of other policy fields, that seemed purely instrumental.

This may explain the poor administrative coordination between different Commission DGs. Christina Boswell underlines that despite the 'readiness at the Council[56] and Commission[57] level to recognize the need for preventive approaches (...), the institutional context of policy-making provided a far from

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[52] It is worth noting, however, that the Austrian Strategy Paper on Migration was rejected by the majority of the Member States, given its controversial propositions. However, its influence remained significant, as pointed out by Steven Sterkx: '...[T]he direction that EU asylum and migration policy would take in the aftermath of the Tampere Summit in many ways reflects the ideas and priorities of the Austrian strategy paper.' S. Sterkx, *op cit* 129.

[53] *Ibid*. He goes on to exemplify that : 'Controversial measures [put forward by the Austrian Strategy Paper] include, among others: making economic aid dependent on the third country's efforts to reduce push factors; supplementing amending or replacing the 1951 Geneva Convention; forced repatriation of illegal immigrants to their countries of origin; and military interventions to prevent migrtory flows since they can dramatically **affect security interests** of the Member States.' *ibid* [emphasis added].

[54] S. Sterkx, *op cit* 121 (n. 1) 'The report to the Nice European Council responded to this criticism stressing the need for a long-term comprehensive approach and for genuine partnership based on reciprocity, dialogue, cooperation and co-development (…). It also indicated one of the main obstacles to the implementation of the action plans : the lack of resources to finance the measures proposed.' *Ibid*.

[55] *Ibid.*

[56] See, for example, the Council conclusions concerning the Commission communication on immigration and asylum policies, in which the Council 'expressed its appreciation' of the previously mentioned communication.'Bull. EU 6-1994, pt. 1.4.3. Nonetheless, the priority remains the fight against illegal migration.

[57] All the more so, as, in its 1994 Communication, the Commission noted that : "In its Communication of May 1992 on development co-operation policy in the run-up to 2000 (...) the existing relationship between certain migratory movements and the development co-operation policy [were highlighted].' And '"[T]he best remedy yo those migratory pressures would be the promotion of economic growth in the developing countries. The integration of an active migration policy into general development co-operation policies and external economic relations should be strengthened (...). The effects of such a global approach would, however, be felt only in the long run.' Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 Final, *op cit*, 16, pt. 58. The Communication the Commission refers to is the following : Development Cooperation in the run-up to 2000, SEC(92)915 Final *op cit* (n.24).

favourable environment'.'[58] Development policy officials were especially reluctant to integrate migration concerns into their relations with third countries.[59] Their fear, quite understandable, was that development priorities would be absorbed by or subjected to migratory management concerns. Indeed, on the one hand Justice and Home Affairs officials meeting in the Council of Ministers 'were still largely absorbed with the 'externalization of control' agenda (...).'[60] On the other hand, development and foreign affairs officials 'were keen to avoid what many saw as an attempt to subvert development goals through targeting development to prevent migration flows.'[61] Especially, as until 1999, there was an obvious 'absence of more robust political support from the European Council'.'[62] This approach was closely followed and supported by other institutions, notably the European Parliament[63] and the European Economic and Social Committee.[64]

Following the entry into force of the Amsterdam Treaty, the nascent immigration policy was communitarised and new legal bases were set up to adopt acts under the title IV of the EC Treaty. However, such a communitarisation did not include all fields of migration policy. Interestingly, no reference was made to the 'comprehensive approach', although this notion existed prior to the adoption of the Treaty and was still recurrent in the policy discourse. This is especially true with respect to the regulation of economic/labour migration.[65]

The legal bases essentially dealt with the need to establish a 'common asylum policy', which seemed to be considered the absolute priority. One may wonder whether this could be interpreted as the consequence of the relative absence of legal channels of migration and the need to address the 'abuses' of other non-economic immigration procedures (especially asylum and family migration). Indeed, while some clear legal bases existed to adopt measures to fight against illegal migration and to regulate other 'legal migration' regimes (family reunification, long term residence, etc.), economic migration was still considered the primary competence of the Member States and, as a result, implicitly excluded from the possibility to be further harmonised.[66]

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[58] C. Boswell (2003) 626 (n. 6).

[59] S. Lavenex and R. Kunz, 'The Migration-Development Nexus in EU External Relations', (2008) *Journal of European Integration* **30**(3) 439-457. See also C. Boswell (2003 and 2008) *op cit* (n. 6).

[60] C. Boswell (2003) 626 (n. 6).

[61] C. Boswell (2003) *ibid*.

[62] *ibid* Read, for instance, the declaration of the Maastricht European Council of December 1991, mentioned in the Bulletin of the European Community : Bull. EC 12-1991, pt. I-6. The focus was clearly on the fight aginst illegal immigration. See also the Six-monthly meeting of ministers with responsibility for immigration, reported in the Bulletin of the European Community: Bull. EC 12-1991, pt. 1.4.15. In the conclusions of the meeting, the ministers made no explicit allusion to the external aspect of the immigration policy as suggested by the Commission. Instead, it '...also decided to look further into the question of deportation of illegal immigrants and to endeavour to establish procedures for dealing with critical situations in the event of large-scale migratory surges.'

[63] In a resolution adopted on 18 November 1992 (with reference to the 1991 Commission's Communication), the European Parliament '...[a]rgues that migratory pressures could be stemmed by helping countries of origin to develop their economies.', Bull. EC 11-1992, pt. 1.3.25. Similarly, in another resolution adopted in 1993, the European Parliament indicated that : '..[It] also regrets that the approach adopted by the ministers responsible for immigration takes no account of its previous resolutions and point out that immigration policy should not be considered solely from the viewpoints of internal seucrity and public order but also from that of solidarity with immigrants' countries of origin and the need to comply with the Community's international obligations regarding human rights and fundamental freedoms.', Bull. EC 7/8-1993, pt. 1.2.17.

[64] In an own-initiative opinion on immigration policy (adopted on 28 November 1991), the Economic and Social Committee '...[S]tresses the need to turn migration flows to the account of both countries of origin and host countries and to deal with the causes of immigration. It also calls for the revised version of the Treaty of Rome to establish Community legal competence in the field of immigration.' Bull. EC 11-1991, pt. 1.2.10.

[65] Article 63 of the TEC provided that : 'The Council, acting in accordance with the procedure referred to in Article 67, shall (...), adopt : 3.(...) (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.'

[66] This also explains the failure of the subsequent Commission's proposals to regulate labour migration.

The consequence that followed immediately was the shift of orientation of the external dimension of the EU migration policy: from then on, the focus was rather on how to ensure return of TCNs irregularly present on the EU territory.

Thus, the need to harmonise, or establish minimum standards for determining refugee statuses, rights, recognition procedure clearly was an essential concern as reflected by the Amsterdam Treaty.[67]

The Action Plans initiative was an early sign of the gap doomed to increase even further, between stated policy objectives and their legal translation.

Despite their lack of successful outcome, the action plans should not be disregarded as they highlighted for the first time the inherent limitations and shortcomings of the comprehensive approach to migration.

3. The 'Resurrection' of the Migration and Development Paradigm: Operationalising the Migration and Development Approach through the Co-Development Approach

The Tampere declaration made the first official reference to co-development, but this latter approach was not intended to substitute the 'root causes' approach, as the original idea was to continue developing the comprehensive approach to migration. However, for both contextual and practical reasons, the co-development approach increasingly became the dominant paradigm to operationalise the MDN.

3.1. The Tampere Momentum: The Beginning of the End or the End of the Beginning?

3.1.1 The Tampere Declaration: Consecrating the comprehensive approach to migration while mentioning co-development

The European Council meeting in Tampere was a turning point regarding the emergence of an external dimension of the EU migration policy. As Christina Boswell highlights: '(t)he groundbreaking conclusions of this Special European Council on Justice and Home Affairs stated that justice and home affairs concerns (which include immigration and asylum issues) should be 'integrated in the definition and implementation of other Union policies and activities', including external relations.'[68] More importantly, with regard to the development of a preventive approach, translated in pragmatic terms by the migration and development nexus, the Tampere declaration showed an increasing willingness to foster cooperation with sending as well as transit countries, in order to address the root causes of illegal immigration.

In its Paragraph 11, the European Council declared that:

> 'The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.'

The Tampere European Council is indisputably regarded as the political momentum that implicitly recognised the need to promote positive links between migration and development. Even so, it was the

[67] The fight against irregular immigration remained an important necessary correlative concern.

[68] C. Boswell (2003) 620 (n. 6).

outcome of prior political statements as well as institutional attempts at the EU and the Member States' level.

The Tampere expressed highly optimistic policy goals as far as the building of a comprehensive approach to migration is concerned. Despite the failure of the Actions Plans, the Tampere European Council magnified a generous approach of migration management towards third countries that had never been considered before. To some extent, the Tampere programme was so ambitious that it may now, with a perspective of a hindsight, be called unrealistic. According to Sterkx, '...[t]he ambition and political [optimism] at the Tampere Summit to establish a comprehensive approach to migration were of a passing nature.′ He goes on to argue that while the objectives expressed in the Tampere Declaration aimed at building a balanced approach to the comprehensive approach to migration, not merely focused on migration control and security issues, the policy implementation of this programme contradicted this approach at a later stage.[69]

3.1.2 The follow-up to Tampere: Giving up on initial ambitious goals

Following Tampere, the policy context, in which the MDN was subsequently operationalised evolved substantially. The main priority of the external dimension of the migration policy clearly became security. In this respect, irregular migration was perceived as a threat, insofar as the lack of control on such flows could eventually destabilise the EU. In this context, the MDN was increasingly 'instrumentalised'[70] in order to fulfil security objectives. This instrumentalisation was twofold. First, the MDN was still used in the policy rhetoric in order to justify the adoption of more control-oriented policy goals regarding migration management. Second, the MDN justified the controversial use of financial instruments and tools that were not primarily concerned with migration management, but that were supposed, nevertheless, to contribute to achievement of this objective.

This evolution of the reference to the MDN in the policy discourse is particularly striking when analysing the 2002 Communication from the Commission on the integration of migration issues in the European Union's Relations with third countries.[71] This document is the first one that actually provides an in-depth analysis of the MDN in the specific context of the EU.

A more security-oriented vision of migration management

Before the Laeken European Council, the Evaluation of the conclusions of the Tampere European Council[72] already shows a striking change of tone compared with the Tampere Declaration itself. And this proved to be true as, since the adoption of the Amsterdam Treaty, the systemic approach was gradually abandoned. Following the entry into force of the Amsterdam Treaty, the actual building of the common immigration legal framework proved not to be as easy as expected, for both material (substantial) and procedural reasons. This might also explain why the comprehensive approach was provisionally left behind for it was too broad a framework to be directly implemented.[73]

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[69] S. Sterkx, *op cit* 131 (n. 1). As he goes on to underline, '...[I]n the area of migration, priority is given to readmision, return and the fight against illegal immigration. Concrete measures (...) are concerned with dissuasion at the source –in countries of origin and transit – nd restriction of access to the Union. In the field of asylum and refugee policy, the main priority is increased reception in the region of origin.' 131.

[70] By "instrumentalisation', we understand the misleading use of policy (financial or legal) tools in order to achieve policy goals that were not initially (or officially) intended to fulfil.

[71] Communication from the Commission to the Council and the European Parliament, Integrating Migration Issues in the European Union's Relations with Third Countries, COM(2002)703 final, 03.12.2002.

[72] Evaluation of the conclusions of the Tampere European Council, 14926/01 LIMITE, JAI 166, 6 December 2001.

[73] '...[C]ertain specific matters must be given an **impetus** [not my emphasis] so as to unblock them and to enable formal adoption to take place as soon as possible; this is the case in particular with the proposal for a Directive on family reunification, with the three proposals concerning respectively asylum procedures, minimum standards for the reception of

This document does not mention at all the linkage between migration and development, neither through the 'root causes' nor through the 'co-development' approach, which, however, was one of the main points of the Tampere Declaration.

Such an absence is also notable in the above-mentioned Evaluation of the Tampere Declaration. This clearly demonstrates that the Tampere momentum was already slowly vanishing, imperceptibly paving the way for the instrumentalisation of external policy instruments.

Indeed, while ignoring the MDN, the same document insists on other aspects of migration management that are more control-oriented, as the following quotation shows:

> 'Controlling immigration must be given greater priority in the Union's foreign policy (...). Experience has shown that the implementation of the action plans drawn up by the HLWG can be achieved only in partnership with the countries concerned (...). It must be acknowledged that the innovatory nature of the HLWG's cross-pillar approach has not been without teething troubles, involving either coordination between the various Community bodies and within national administrations or the financial means required to implement the measures contained in the action plans (...). Although relatively modest at the outset (EUR 10 million for 2001), the existence of a specific budget heading for external action regarding migration should make it possible to achieve progress in implementing action plans. The HLWG should continue implementing existing action plans by stepping up the dialogue with the countries concerned as well as with the other bodies involved (international organisations, NGOs) and ensuring good coordination and consistency between the actions to be implemented. One basic lesson to be drawn from experience acquired to date is the fact that no future action plan should be drawn up except in close partnership with the 'target' country.'[74]

Several points of this quotation are worth highlighting. As mentioned earlier, the focus seems to become exclusively the control of immigration. Moreover, this document raises the numerous practical difficulties facing the implementation of the Action Plans and, thus, underlined the inherent problems of the 'comprehensive' approach. The first one is obviously institutional, as the implementation of such programmes requires a high degree of institutional coordination, not only at the EU level, but also with the selected third country, of which cooperation is deemed necessary. The second obstacle of the implementation of the comprehensive approach is financial, meaning that the necessary financial tools may not be available to match the ambitious goals of the comprehensive approach.

The tensed international context also explains the sharp shift of focus of the external dimension from a systemic to an approach based on the instrumentalisation of external policies instruments to tackle issues that were perceived as a real threat to the security of the EU. In such a context, there was an increasing connection between irregular migration and transborder crimes, resulting in a conceptual assimilation of unauthorised migration as an offence *per se*.

Such a perception is clearly shown in the following quotation:

> 'Growing external pressure: it is important first of all to recognise that the growing influence of the European Union has led to a steep increase in the expectations of our partners in the JHA field that do not always correspond to the priorities set by the Union and are not always matched by the means and resources available. **The occurrence of two major crises in recent months has further accentuated that pressure. Faced with the deaths in Dover and the tragedy of the terrorist attacks of 11 September 2001, the European Union proved that it was able to react effectively and swiftly.** Combating illegal immigration networks was, prior to the fight against terrorism, the common theme of external action in the JHA field.

(Contd.)

applicants for asylum and bringing the Dublin Convention and the proposal for a Directive on the status of long-term resident into the Community sphere (...).The catalogue of recommendations for the correct application of the Schengen acquis and best practices is an instrument intended to strengthen and standardise border control, assist candidate States, and **prevent illegal immigration and other forms of crime** [emphasis added]. This account shows that the changeover to the Community pillar has not been enough to give a decisive impetus to work in the asylum and immigration sector. Maintaining the unanimity rule is clearly a serious hindrance to progress. The move to **qualified majority** [not my emphasis] voting, as provided for in the Treaties, would allow proceedings to be speeded up.' Evaluation of the conclusions of the Tampere European Council, 14926/01 LIMITE, JAI 166, 6 December 2001, 5.

[74] (Emphasis added) Evaluation of the conclusions of the Tampere European Council, 14926/01 LIMITE, JAI 166, 6 December 2001, 13.

> Implementation of a strategy and a plan of action against terrorism bring together energies and expertise outside the JHA dimension. Nevertheless, the latter remains a key feature. Coreper and the GAC are fully playing their role in monitoring, coordinating, evaluating and giving an impetus to activities. A subsequent, fuller evaluation of these measures will make it possible to draw any conclusions from the action taken.
>
> The Union's role in the JHA sphere has also become more established amongst the strategic partners: Balkans, Mediterranean countries, Russia and Ukraine, both through the instruments devised (regional programme, action plan, regional cooperation) and through the methods used (funding of MEDA, TACIS and shortly CARDS).'[75]

Following this evaluation, the conclusions of the Laeken European Council[76], confirmed this trend. Indeed, this European Council maintained the focus of the nascent external dimension of migration on the control aspects of migration management, as shown in point 40 of its conclusions.[77]Subsequently, the Seville European Council adopted an even more rigid approach of external aspects of migration management.

Prior to the Seville European Council, in a letter to the Spanish Prime Minister J-M Aznar, leading at that time the Council Presidency until the end of June 2002, the president of the Commission, R. Prodi, expressed its concerns about illegal immigration and connected issues (trafficking in human beings). [78]

Although Romano Prodi seems to insist on the need not to let the 'spirit' of Tampere disappear, the context in which he makes such a statement differs tremendously from the overly optimistic atmosphere that was prevailing when the Tampere declaration was adopted. And this is clearly shown in another paragraph of the same letter further down, which mentions explicitly the linkage between migration and development, which is made in close relation with the objective to deepen cooperation with third countries in matters linked to EU migration management needs:

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[75] (Emphasis added) Evaluation of the conclusions of the Tampere European Council, 14926/01 LIMITE, JAI 166, 6 December 2001, 11.

[76] Presidency conclusions , European Council meeting in Laeken, 14 and 15 December 2001, SN 300/1/01/REV

[77] 'A true common asylum and immigration policy implies the establishment of the following instruments:

- the integration of the policy on migratory flows into the European Union's foreign policy. **In particular, European readmission agreements must be concluded with the countries concerned** on the basis of a new list of priorities and a clear action plan. The European Council calls for an action plan to be developed on the basis of the Commission communication **on illegal immigration and the smuggling of human beings;**
- the development of a European system for **exchanging information on asylum, migration and countries of origin;** the implementation of Eurodac and a Regulation for the more efficient application of the Dublin Convention, with rapid and efficient procedures;
- the establishment of common standards on procedures for asylum, reception and family reunification, **including accelerated procedures where justified**. These standards should take account of the need to offer help to asylum applicants;
- the establishment of specific programmes to combat discrimination and racism.'

Presidency conclusions, European Council meeting in Laeken, 14 and 15 December 2001, SN 300/1/01/REV. It is worth noting that out of the four points quoted, only one deals with discrimination and racism, while the other three points clearly concentrate on migration management, and specifically, on irregular immigration.

[78] 'I very much welcome your decision that in Seville we should address our citizens' understandable **concerns about illegal immigration and human trafficking**. Unless we are seen to be finding effective responses to these issues, it will be increasingly difficult to take forward the necessary debate on how to manage legal migration and the proper respect of our obligations under the Geneva Convention. At Laeken we had to acknowledge that in this area there was an urgent need to **rekindle the momentum of Tampere**. There is no shortage of relevant material on the Council table which, with the right input from the European Council, can restore this momentum. I have in mind, in particular, the Action Plan against illegal immigration adopted recently by the Council.' [Emphasis added]

> 'We should energetically pursue ideas developed at Tampere on how to integrate migration issues into our relations with source and transit countries and to monitor them regularly, bearing in mind that the EU's development co-operation policy and EU market access are effective ways to normalising migratory flows. **The Commission will soon be coming forward with a communication on how to develop links between development and migratory flows.** This is already an important strand in our assistance to third countries enabling us to ensure that they work with us to address **the root causes of destabilising migratory flows** which are the result of push factors (poverty, conflicts, bad governance) and pull factors (the dynamism of the European economy, the demand for workers of all skills). Ratification of the Cotonou Agreement should be a priority in this context, as it will enable us to place **Readmission Agreements** where they should be: as one dimension of constructive overall partnerships.'[79]

As for the Seville Council conclusions,[80] they are even more explicit in their instrumental perception of the MDN as a policy tool that may be used to reduce irregular immigration. This is particularly the case in points 33 to 36 on the integration of immigration policy into the Union's relations with third countries.

Point 33[81] expressly refers to the need to tackle the 'root causes of illegal immigration'. The 'root causes' approach is mentioned in relation to the 'fight against illegal immigration' and not as a part of the systemic approach to the EU migration policy anymore. In this regard, the focus is on finding ways to reduce unauthorised migration (notably by the adoption of readmission agreements or the insertion of readmission clauses in more general agreements) rather than truly solving the 'root causes' from a development perspective. As the Commission rightly points out, '...[d]uring the run-up to the Seville European Council of June 2002 special attention was given to the question of illegal immigration. In this context, Heads of States and Government drew attention to the contribution which the EU's external policies and instruments, including development policy, could make in addressing the underlying causes of migration flows.'[82]

In point 34,[83] the Council stresses the importance to prompt third countries to cooperate on migration and border management, notably by using financial incentives. This constitutes a blatant example of instrumentalisation of external policies (their financial means, in particular) for the sake of migration management.

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[79] (Emphasis added).

[80] Seville European Council 21-22 June 2002, Presidency Conclusions, 24 October 2002, 13463/02, POLGEN 52.

[81] 'The European Council considers that combating illegal immigration requires a greater effort on the part of the European Union and a targeted approach to the problem, with the use of all appropriate instruments in the context of the European Union's external relations. To that end, in accordance with the Tampere European Council conclusions, an integrated, comprehensive and balanced approach to **tackling the root causes of illegal immigration must remain the European Union's constant long-term objective**. With this in mind, the European Council points out that closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby reducing the underlying causes of migration flows. The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration. .' (Emphasis added) Seville European Council 21-22 June 2002, Presidency Conclusions, 24 October 2002, 13463/02, POLGEN 52.

[82] Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, 03.12.2002, 7.

[83] 'The European Council stresses the importance of ensuring the **cooperation of countries of origin and transit in joint management and in border control as well as on readmission**. Such readmission by third countries should include that of their own nationals unlawfully present in a Member State and, under the same conditions, that of other countries' nationals who can be shown to have passed through the country in question. Cooperation should bring results in the short and medium term. **The Union is prepared to provide the necessary technical and financial assistance** for the purpose, in which case the European Community will have to be allocated the appropriate resources, within the limits of the financial perspective.' [Emphasis added] Seville European Council 21-22 June 2002, Presidency Conclusions, 24 October 2002, 13463/02, POLGEN 52.

Finally, both point 35[84] and point 36[85] of the Conclusions clearly refer to conditionality, and, more surprisingly to negative conditionality, as some sanctions may arise from the lack of willingness from third countries to cooperate with the EU on issues regarding its own border management.

The Seville European Council conclusions as well as the following policy documents are examples of the 'schizophrenic symptoms' of the external dimension of the EU migration policy. The use of the adjective 'schizophrenic' seems appropriate with respect to this policy field, because it strengthens the migration and security concerns nexus, while keeping up with the rhetoric on the MDN. In this sense the policy logic of the external dimension of the EU migration policy is somewhat erratic, since security issues related to migratory movements are not necessarily compatible with a more open-minded discourse on the MDN. For instance, human smuggling occurs unquestionably due to the inability of some developing third countries to protect their citizens against smugglers and traffickers and therefore, helping them to prevent such events from happening is theoretically laudable. On the other hand, human smuggling also results from strong border controls, which might, notwithstanding the fact that they may be legitimate, deprive potential migrants of other ways of reaching Europe. Therefore, although the link between irregular migration and financial assistance (perceived as development assistance) might exist, it is not clearly ascertained. Besides, it may even bring more confusion and lead to an instrumentalist use of financial means, supposedly existing for development.

In this sense, the blurring of time frames is the real starting point of the instrumental approach towards development and foreign affairs instruments. Indeed, the early Commission documents clearly distinguished the short, medium and long-term perspectives of migration management, within the framework of the comprehensive approach. The early 2000s policy documents, on the other hand, confused time lines by mixing up inappropriately different aspects of migration management.

The point here is certainly not to deny the connection existing between some types of migratory flows and security concerns. Rather, it seems important to highlight the prevalence that such concerns have slowly acquired over other concerns related to the migration and development nexus, in leading the policy discourse on the external dimension of the EU migration policy.

Initially, the nexus between security issues and immigration may be regarded as mainly due to the conceptual integration of migration issues into the Justice and Home Affairs pillar (Maastricht) and subsequently the Area of Freedom, Security and Justice introduced by the Treaty of Amsterdam. In fact, both Treaties introduced a formal 'crystallization' of the linkage between migration and security issues. The natural consequence of it was the integration of the external dimension of the emerging EU migration policy into the external dimension of the whole field of Freedom, Security and Justice, originally called Justice and Home Affairs. This deeply affected the conceptual framework of the 'comprehensive approach to migration', which increasingly disregarded developmental aspects of the external dimension of migration policy (especially so, as they were never mentioned explicitly in the Treaty but only in policy documents, deprived of strong legal impact).

This shift in normative paradigm, favouring internal security matters over issues of international cooperation, brought the comprehensive or 'systemic' approach to its end. Rather, this approach remained comprehensive in terms of instruments, but the goals set out, took an unquestionably internal orientation and although the 'root causes' approach, persisted to be mentioned in the official rhetoric, it had been substantially diverted from its original meaning, as the 2002 Communication shows.

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[84] 'The European Council considers it necessary to carry out a **systematic assessment of relations with third countries which do not cooperate in combating illegal immigration**. That assessment will be taken into account in relations between the European Union and its Member States and the countries concerned, in all relevant areas. **Insufficient cooperation by a country could hamper the establishment of closer relations between that country and the Union**.' [Emphasis added].

[85] 'If full use has been made of existing Community mechanisms but without success, the Council may unanimously find that a third country has shown an unjustified lack of cooperation in the joint management of migration flows. In that event the Council may, in accordance with the rules laid down in the treaties, adopt measures or positions under the Common Foreign and Security Policy and other European Union policies, while honouring the Union's contractual commitments but **not jeopardising development cooperation objectives**.' [Emphasis added].

The 2002 Communication: the integration of migration issues in the European Union's Relations with third countries[86]: towards the instrumentalisation of 'development' tools for migration management purposes:

The 2002 Communication from the Commission and especially the subsequent 2005 Communication[87] focused on the links between migration and development at the EU level and attempted to phrase them in terms of policy objectives.

In its 2002 Communication, the Commission sets its study in a realistic approach: 'We must assess the problem and agree a clear policy line, but we must also check whether our financial means match our political ambitions.'[88]

This Communication has been drafted in the aftermath of the European Council of Seville,[89] which prompted the Commission to engage into deeper thinking as to the actual meaning[90] and role of the external dimension of migration. The focus was then on migration management and especially on the 'fight' against 'illegal' immigration. Indeed, as a foreword to its 2002 Communication, the Commission recalls the conclusions of the European Council of Seville when: 'Heads of States and Government asked for the integration of immigration policy into the Union's relations with third countries and called for a targeted approach to the **problem**, making use of all appropriate EU external relations instruments.'[91]

The 2002 Communication refers to the external dimension of migration policy as the integration of immigration policy into the EU's external policy and programmes.[92]

3.2. The Emergence of the Co-Development Approach: From Ambition to Pragmatism

The need to focus increasingly on migrants' agency and contribution in fostering development in their country of origin stems from the failure of the initial systemic approach advocated by the EU institutions, which was aiming at reducing migratory movement, as a whole.

In contrast, the co-development perspective is more pragmatic as it takes it for granted that migration, as such can contribute to development and is not necessarily a 'symptom' of lack of development. One may wonder whether this 'resurrection' accounts for the difficulties to adopt a tougher approach with

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[86] Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, 03.12.2002.

[87] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Migration and Development : Some concrete orientations*, COM(2005)390 final, 01.09.2005.

[88] Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, *op cit* (n. 86), 4.

[89] Moreover, the Commission recalls that the European Council requested it to draft a report "'on the effectiveness of financial resources available at Community level for repatriation of immigrants and rejected asylum seekers, for management of external borders, and for asylum and migration projects in third countries'. Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, *ibid*.

[90] According to the Commission the external dimension of the migration policy of the EU amounts to the integration of "'concerns related to migration within the external policy and programmes of the Community' Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, *ibid*.

[91] Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, *ibid*.

[92] Communication from the Commission to the Council and the European Parliament, *Integrating Migration Issues in the European Union's Relations with Third Countries*, COM(2002)703 final, *ibid*.

respect to irregular migration: difficulties to negotiate readmission agreements and subsequently to enforce them on migrants, because of legal hurdles. Another explanation would indicate the greater openness of other policies officials, notably development ones.

Because of the impossibility to adopt a comprehensive approach, that seems far too ambitious for the available means, the objectives of the migration policy in terms of migration and development have significantly been reduced in scope, nowadays, covering essentially, migrants' contribution (voluntarily or not) to the development of their countries of origin.

Explicit[93] reference to co-development was initially made in the Tampere Programme, but it is not before the early 2000s that the notion was actually explored by EU institutions, especially by the Commission, which increasingly referred to it, when dealing with migration and development. As a result, one may conclude that, as things stand, the co-development approach is the prevailing paradigm of the approach regarding the migration and development nexus.

Several factors have contributed to the emergence of the co-development approach:

- First the upsurge of unauthorised migration to the EU made it clear that neither the aborted systemic approach to migration nor the tough repression of 'illegal immigration' were working effectively.
- Second, in the early 2000s, international development was increasingly perceived as a priority at the international level, with the adoption of the Millennium Development Goals and this trend was subsequently reflected in the EU context (the European Consensus on Development).
- Third, a more specific emphasis was put on the linkage between migration and development at the international level, with the increase of regional and global fora especially dealing with the migration and development nexus. These international and regional processes were echoed at the EU level. At the international level, the main development is the high level dialogue for migration and development in 2006, followed up by annual meetings, first in Brussels, then in Manila in 2008, in Athens in 2009, and last in Mexico in 2010. At the regional level, the most notable consultative process is the Euro-African dialogue on migration and development, initiated in Rabat (2006) and in Tripoli (2007) and its follow-up in Paris (2008)[94] during the French presidency (this coincided with the adoption of the European Pact on Immigration that defined important priorities in this regard[95]).

The EU took an active part in these initiatives, as shown in preparatory documents to these events.

In parallel, awareness of the importance of the linkage between migration and development at the international level was also increasingly raised, special attention being paid to the importance of remittances and the fact that they often outweigh in quantity official development aid (ODA).

[93] Indeed, prior to the 1990s, although the notion itself was not used, several elements related to 'co-development' were often referred to.

[94] Those events are mentioned in the Stockholm Programme: *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, Official Journal C 115, 04.05.2010, 1-38.

[95] Council of the European Union (Presidency), *European Pact on Immigration and Asylum*, 13440/08 LIMITE ASIM 72, 24.09.2008. Chapter V of the Pact is entitled 'Create a comprehensive partnership with the countries of origin and of transit to encourage the synergy between migration and development'.

3.2.1 The 2005 Communication from the Commission on migration and development[96] : First attempt to set up concrete objectives

This document is fundamental to decipher the logic underlying the EU action with respect to the migration and development nexus:

In this document, the Commission identifies three priorities for action: remittances, the role of diasporas as actors of home country development and lastly, circular migration and brain circulation.

The main themes in these areas are: return migration (with the issue of the reintegration within the local job market) or more importantly the concept of circular migration that may be of interest for both highly and less skilled migrants.

1) Remittances

The Commission allows itself to use a very broad definition of this term as encompassing 'all financial transfers from migrants to beneficiaries in their country of origin.'97 The Commission distinguishes two ways to enhance the impact of remittances on development and obeying two different time scales: 1) facilitating financial transfers making them 'cheaper, faster and safer'98 and 2) improving their impact on the development of recipient countries. While the first objective may be achieved in the short and medium term, the second one can only be reached in the long term.

2) Diasporas

In its Communication the Commission relates to diasporas as '…[N]ot only the nationals from that country living abroad, but also migrants who, living abroad, have acquired the citizenship of their country of residence (often losing their original citizenship in the process) and migrants' children born abroad, whatever their citizenship, as long as they retain some form of commitment to and/or interest in their country of origin or that of their parents.'

The Commission invites Member States to 'identify and engage diasporas organizations, which could be suitable and representative interlocutors in development policy.' In this latter respect, the Commission heavily relies on the commitments of Member States to achieve most of its support to diasporas' action in their countries of origin. Indeed, diasporas still remain under the scope of the Member States and their immigration policies.

3) Circular migration and brain circulation

'Brain circulation' refers to direct contribution of migrants to the development of their country of origin, as opposed to 'brain drain'. By direct contribution, we understand the fact that the migrant (or member of a 'diaspora') intervenes personally in the process of development. We oppose the notion of direct contribution to indirect contribution (better represented by remittances), as the latter notion does not necessarily infer a well-thought and positive impact on development.

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[96] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Migration and Development : Some concrete orientations,* COM(2005)390 final, 01.09.2005.

[97] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Migration and Development : Some concrete orientations,* COM(2005)390 final, *ibid,* 3.

[98] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Migration and Development : Some concrete orientations,* COM(2005)390 final, *ibid.*

The core idea here is to maximise the development potential of migrants' circulation, as both their sending and destination countries may benefit from it. By brain circulation, the Commission means: '…[t]he possibility for developing countries to draw on the skills, know-how and other forms of experience gained by their migrants- whether they have returned or not- and members of their diaspora abroad.' In fact, the Commission is concerned with the way to remove the obstacles to circular migration. The last aspect, which overlaps heavily with the second one is migrants' mobility.

3.2.2 Migration as part of the Policy Coherence for Development: A development-oriented version of the 'comprehensive approach' to migration management[99]

The objectives of the Development Policy and the integration of migration questions in this policy framework

Despite the increasing amount of objectives that are supposedly part of the development policy, the actual primary objective, that is development itself, is becoming more and more blurred.

As confirmed by the Treaty of Lisbon, the eradication of poverty slowly emerged as the overarching objective of the development policy of the EU.[100] Another feature of the EU development policy is the importance of political conditionality.[101]

Beyond these two prevailing objectives, the list currently seems endless as the EU development policy increasingly tries to match the complexity of the development process itself.

The European Consensus on Development[102] added more objectives to the list, such as: water, energy, agriculture, social cohesion and employment.[103]

Subsequently more 'horizontal issues' intended to be mainstreamed in Community development initiatives were added, such as democracy, good governance and human rights, gender equality, the rights of children, environmental sustainability.[104] Horizontal issues actually refer to basic principles of action in the development field that should always be taken into account when programming or implementing aid, as these principles ensure the consistency of development policy itself.

The mainstreaming of development policy within the broader framework of the EU external relations appears as its salient current feature.[105] And this trend has been maintained by the Lisbon Treaty, in which the broader policy framework of the external action of the European Union covers the

[99] This section builds on the analysis by J. Orbie and H. Versluys, 'The European Union's International Development Policy : Leading and Benevolent?', in J. Orbie (ed.), *Europe's Global Role – External Policices of the European Union*, (Ashgate, 2008) 67-90.

[100] *Ibid* at 78.

[101] *Ibid.*

[102] 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 of the European Union Development Policy: *The European Consensus*, 14820/05, 22.11.2005.

[103] J. Orbie and H. Versluys, 'The European Union's International Development Policy : Leading and Benevolent?' *op cit* at 79 (n. 99).

[104] *Ibid.*

[105] One significant example is given by the abolition of the Development Council: 'The most notable modification at the institutional level was the abolition of the Development Council in 2002. Development issues (...) [being] now discussed in the General Affairs and External Relations Council.' While the authors acknowledge that : 'On the one hand, such institutional reforms might provide opportunities to increase coherence in the Union's international performance. On the other hand, [they underline that] the result might be a marginalisation of development objectives in favour of foreign policy ambitions.' *ibid* at 82.

development policy.[106] Therefore, although it still has its own objectives, the development policy shares most of its features with other external policy fields, which did not use to be the case after the adoption of the Maastricht Treaty, providing for the first time an independent legal basis for the EU development policy.

Migration within the context of development: Policy Coherence for Development (PCD)

Although the comprehensive approach has been abandoned in most of its aspects, one may wonder whether it could not 'regenerate' within the framework of development policy. Indeed, even if there is still no 'policy ownership' of the external dimension of migration by the development policy, the 'discourse ownership' is increasingly taking place, at least to some extent. This renewed interest and attention might explain why the 'root causes' approach was not given up totally after the failure of the Action Plans and went on to be mentioned in the policy discourse.

On the other hand, one should remain cautious as 'discourse ownership' does not automatically mean either that the discourse is different or that there is an actual increase of influence of development officials in setting objectives regarding migration management that would correspond more to the development paradigm of the MDN.

Nevertheless, a revival of the comprehensive approach seems to be taking place within the framework of the development policy through the legally based notion of policy coherence for development.[107] Could it provide for an adequate formulation of the MDN from a more development-oriented perspective? And what about the short-term objectives of the migration policy in this respect?

EU development policy can be best described as a policy field rather than a fully-fledged policy.[108] Indeed, tasks and objectives related to development may be found in the scope of several other policies. Development objectives are extremely varied and are also directed towards a significant number of different actors, both internally and externally.

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[106] Article 21 of the treaty on EU constitutes the normative legal basis of the EU development policy. It is an overaching provision covering all external policies.

Article 21 §1 :'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development ans 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, repect for human dignity, the principles of equality and solidarity and respect for the principles of the UN Charter and international law (…).'

Article 21 §2 d. 'The Union shall define and pursue common policies and actions, and shall work for a higher degree of cooperation in all fields of international relations, in order to : (…) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty (…)'

As for the substantial legal basis of the development policy, it is laid down in article 208 of the Treaty on the functioning of the European Union (ex-Article 177 of the TEC), according to which,

'1. 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. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.'

[107] See article 208, 1. §2 of the Treaty on the Functioning of the European Union.

[108] This exhaustive understanding of development as opposed to development policy can be found in early EU policy documents dealing with the conceptual framework of this policy field, SEC (92) 915 final, *op cit* at 14 (n 24) : 'A common comprehensive approach to development problems transcends the confines of development cooperation policy in the strict sense and should be seen by the Community and its Member States as a way of making good the three [main] shortfalls [of the development policy] (...), regarding coordination, policy linkage and the voicing of policy.'

As a result, the notion that best fits development objectives is 'policy coherence', that is the way in which, development as a non uniform and non-unified policy field articulates its many internal objectives and its links with other policies, albeit non directly related to development.

The concept of PCD can be traced back to the early nineties, especially when development policy was formally enshrined in the Treaty, thus acquiring equal status (as an external policy) with other more traditional policies, such as trade. The definition of its own principles and objectives in a wide fashion allowed for its inevitable connection to other related policies.

In its 1992 Communication on development policy in the run-up to 2000, the Commission laid down the basic principles underpinning the PCD. As it states:

> '...[I]n its own sphere of competence the Community needs to improve the **linkage between development policy and the common policies** (e.g. the common agricultural policy, the common fisheries policy and the common commercial policy), taking full account of their beneficial and/or negative implications for the developing countries. By the same token, development cooperation policy must be formulated and implemented in such a way as to further the objectives of other Community policies (environment, security, **population movements** (...)), as well as achieve its own primary goals (of combating poverty, above all).
>
> Such synergy between Community policies may be generated around a number of specific themes (environment, **population movements**, (...)) that involve issues that transcend or run parallel to the area of application, strictly defined, of a number of common policies or bilateral policies pursued by the Member States.'[109]

It is interesting to note that migration is already mentioned by the Commission (through the mentioning of 'population movements') as one field that is intrinsically linked to development policy. And this is even clearer as, in the same document, the Commission further refers to its own 1991 Communication on immigration.[110]

The concept was then formally adopted in 2005,[111] while the same year the Global Approach to Migration made the migration and development nexus, one pillar of the EU migration policy.[112] The current definition of the concept of PCD takes on the one given by the OECD, according to which, '...[p]olicy coherence for development means working to ensure that the objective and results of a government's development policies are not undermined by other policies of that same government which impact on developing countries, and that these other policies support development objectives where feasible.'[113]

The linkage between migration and development is clearly highlighted in the most recent report of the United Nations Development Programme[114] on mobility and development.[115] The EU conception of

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[109] SEC(92) 915, *ibid* at 14 [emphasis added].

[110] 'The Commission's proposals on immigration offer a useful illustration of such an approach [based on policy coherence]. The Commission's communication on the matter (SEC(91)1855) emphasized the need for greater coordination of national and Community development policy and incorporation of this dimension in future cooperation agreements wherever necessary. It went on to identify certain types of projects that could be promoted under development cooperation policy to help resolve immigration problems. These proposals contributes to a concerted Community approach to this issues.' SEC (92) 915, *ibid* at 15.

[111] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Policy Coherence for Development – Accelerating progress towards attaining the Millenium Development Goals*, COM(2005) 134 Final, 12.04.2005. Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *EU 2009 Report on Policy Coherence for Development*, COM(2009) 461 Final, 17.09.2009.

[112] The Council for the European Union, Global Approach to Migration : Priority actions focusing on Africa and the Mediterranean, 15451/05, 06.12.2005.

[113] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Policy Coherence for Development – Accelerating progress towards attaining the Millenium Development Goals*, COM(2005) 134 Final, 12.04.2005, at 3.

[114] Hereafter 'UNDP'.

development largely echoes the notion of 'human development',[116] as it is reflected in the last Human Development Report dealing with mobility (including international migration). The concept of human development itself is based on the notion of 'human freedoms', alternatively called the 'capabilities approach'. This notion relies on the conception of 'development as freedom', as conceptualised by Amartya Sen.[117] Taking this perspective of development might lead to regard international migration as the dynamic aspect of development.

As stated previously, this vision of mobility is clearly reflected in the last Human Development Report, released by the UNDP. According to it: 'Human mobility can be hugely effective in raising a person's income, health and education prospects. But its value is more than that : being able to decide where to live is a key element of human freedom.'[118]

The Report goes on to add that: '…[M]ost movement in the world does not take place between developing and developed countries; it does not even take place between countries. The overwhelming majority of people who move do so inside their own country (around 740 Million people could be considered as internal migrants).' Thus, the impact of mobility on development goes far beyond the ambit of international migration, as the latter actually stems from internal movement.

Hence, in the context of migration, the capabilities approach can be defined as the process by which individuals are able to choose the way they want to live their lives[119] and the reasoning is that if development is understood as « freedom », then the ability to move is part of development.[120]

According to the last Human Development report, six proposals can be put forward to enhance the benefits stemming from mobility:

1. Liberalising and simplifying regular channels for labour migration.
2. Ensuring basic rights for migrants: equal remuneration for equal work, decent working conditions; right to organise collective bargain; right not to be subjected to arbitrary detention and right to be entitled to due process in the event of deportation; right not to be subjected to cruel, inhuman or degrading treatment and the right to return to their countries of origin.
3. Reduction of migration transaction costs: opening corridors and introducing regimes that allow free movement; reducing the costs of and easing access to official documents, such as birth certificates and passport; empowerment of migrants, through access to information, rights of recourse abroad and stronger social networks; reducing paperwork; regulation of private recruiters

(Contd.)

[115] Human Development Report 2009, Overcoming barriers : Human mobility and development, Published for the United Nations Development Programme (UNDP), Palgrave Macmillan, New York, 2009.

[116] The current normative understanding of development is closely related to the human development paradigm adopted by the UNDP in the early 1990s and according to which, human development is : '…[A] process of enlarging people's choices (…) . [This concept] has two sides : the formation of human capabilities – such as improved health, knowledge and skills – and the use people make of their acquired capabilities – for leisure, productive purposes of being active in cultural, social and political affairs.' Human Development Report 1990, Published for the United Nations Development Programme (UNDP), (Oxford University Press, 1990), at 10.

[117] A. Sen, *Development as Freedom* (Oxford University Press, 1999).

[118] *Human Development Report 2009, Overcoming barriers: Human mobility and development*, Publishes for the United Nations Development Programme (UNDP), *op cit* 1 (n. 116). The Report also stresses that: 'Our attempt to understand the implication of human movement for human development begins with the idea that is central to the approach of this report. This is the concept of human development as the expansion of people's freedoms to live their lives as they choose.' *ibid* at 14.

[119] Human Development Report 2009, Overcoming barriers: Human mobility and development, Publishes for the United Nations Development Programme (UNDP), ibid at 3.

[120] For more critical views on relating the 'capabilities' approach to migration, see S. Deneulin, 'Individual Well-being, Migration Remittances and the Common Goods', (2008) *The European Journal of Development Research*, **18**(1), 45-58. Basing her line of reasoning on the notion of 'Common Good', this author points out that : 'Migration is a form of 'exit' strategy which does not encourage people to 'voice' their concerns regarding the government's incompetence in fulfiling its social duties (...). While the poor improve the well-being of their family and community by migrating because the current development model is unable to incorporate them, they actually contribute to a policitcal, economic and social system which further excludes them.' *ibid* at 51.

to prevent abuses and fraud; direct administration of recruitment by public agencies; intergovernmental cooperation.

4. Improving outcomes for migrants and destination countries (integration policies): provide access to basic services (health and schooling); help newcomers to acquire language proficiency; allow people to work; address local budget issues, including fiscal transfers to finance additional local needs; address discrimination and xenophobia; ensure fair treatment during recession.
5. Enabling benefits from internal mobility: remove barriers to internal mobility; provide appropriate support to movers at destination; redistribute tax revenue; enhance responsiveness.
6. Making mobility an integral part of national development strategies: promote human development at home, countries of origin being primary responsible to address development failures.

These policy objectives concerning the MDN at the international level may be compared with the one formulated at the EU level in the context of the PCD.

In its conclusions on migration for development[121], the Council emphasises that the following points may contribute to foster positive links between migration and development:

1. Organisation of legal immigration and mobility options for nationals of developing countries for education and labour, while taking into account labour markets and reception capacities of Member States respecting their competencies and the principle of community preference.
2. Facilitation of circular migration and voluntary return: portability of social rights, stabilising residence rights in order to allow for more movement between both countries of origin and destination, and to help countries of origin to increase their capacity to « reintegrate » their nationals.
3. Combating brain drain through establishing codes of conduct on ethical recruitment.
4. Promoting transparent, faster and more secure flows of remittances to Migrant’s country of origin and improve the use of legal remittances channels.
5. Promoting a gender balance in EU migration policies and programmes.
6. Further development of cooperation within the framework of cooperation platform instruments and mobility partnerships.

4. Conclusion

The EU PCD might provide a concrete solution to the contradiction between the EU policy discourse promoting the MDN and the primary focus of migration policy on 'combating' irregular immigration, regardless of development objectives.

However, the policy discourse remains 'schizophrenic'. While it acknowledges the positive linkages between migration and development, it does not strongly express the concrete implications that fostering such positive relationships could have in terms of migration management. As a result, even though the concept of PCD enables the EU development policy to integrate migration in its own policy objectives, it still fails to question (control-oriented) migration management, essentially focused on the 'fight' against irregular immigration, insofar as it is non-beneficial for development and especially for human beings from developing countries.

[121] Policy Coherence for Development: draft Council Conclusions on Migration for Development, 15806/09, 12 November 2009.

Another problematic aspect of the MDN in the context of the development policy has to do with the regulation of migrants' rights and status. Indeed, the current focus on 'legality' of migrants (rights tightly linked with legal status) induces an undeniable proximity between MDN and law (or rather 'legality'). This could be problematic for developing a legal dimension of the MDN that would truly be development-oriented.[122] Indeed, although development policy has numerous tools for achieving its goals abroad, it does not have the power to regulate the legal situation of migrants from developing countries internally. This remains within the realm of migration policy and is hardly questioned by development policy. Even in the context of the PCD the phrase 'if properly managed' is commonly used, as a 'warning' to underline that migration will be beneficial to development only if migration policy follows its own policy objectives. Reciprocally, if migration is not properly managed, notwithstanding what this phrase actually means, it will bring no benefit for development.

Unfortunately, the gap between stated policy objectives and actual outcomes is far from being bridged.

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A Critical Appraisal of the EU's Global Approach to Migration (GAM): A Useful Policy Making Instrument in the EU-MENA Context?

Some Preliminary Insights into the GAM's Policy Discourse

Tamirace Fakhoury, Ph.D.[1]

1. Introduction

This paper seeks to analyse the extent to which the EU 'Global Approach to Migration' (GAM) provides a coherent policy-making framework vis-à-vis the Arab Mediterranean countries neighbouring the EU (MENA).[2] Departing from the premises that the GAM is still in an exploratory phase, the paper proposes to capture its effectiveness as an external policy framework by analysing the policy discourse and its implications. [3]

Without the intent of overemphasising policy documents as vehicles for political action, the paper draws upon the analytical interrelationships between policy discourse and policy change.[4] It bases itself on the assumption that the contents of policy discourse affect policy change and that policy discourse is an important constituent of the policy process. Thus, on the one hand, the discourse affects in one way or another how policy frames[5] define a policy issue, ground their objectives, and carve out the policy coherence.[6] On the other hand, it also affects how parties concerned by the policy framework build certain expectations and perceptions towards the policy. In this specific context, the paper argues that the GAM's policy discourse is a constitutive factor that impacts on cooperation dynamics with neighbouring states in migration-related fields.

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[2] With no intent to cover all the Arab world, the paper specifically refers to the Arab countries neighbouring the EU and that are part of the Middle East and North Africa (MENA). These countries are also labelled as the Southern and Eastern Arab Mediterranean countries.

[3] Policy discourse is defined in this paper as the ensemble of normative and methodological elements that the GAM texts ascribe to what the "Global Approach to Migration phenomenon" means. Analysing its implications usually consists in 'understanding the practices that underpin it, which supposes establishing a correspondence between the discourse and the practice, between actions undertaken (or to be undertaken) internationally and the discourse held'. See: G. Colin, *Russian Foreign Policy Discourse during the Kosovo Crisis: Internal Struggles and the Political Imaginaire*, Centre d'études et de recherches internationales Sciences Po, 2004 .

[4] See V. Bhatia and W. D. Coleman. 'Ideas and Discourse: Reform and Resistance in the Canadian and German Health Systems' (2003) *Canadian Journal of Political Science*, 36, 715-739, 720-721.

[5] A policy framework is defined in this text as an ensemble of normative, cognitive and argumentative components that conceptualise a certain policy issue and that prescribe a certain course of action so as to implement this policy issue.

[6] A plethora of literature has tackled policy discourse and how it affects the policy process and policy change. For accounts on how discourse as an approach to policy issues shapes policies and policy implementation, and for readings in different disciplines in social sciences and international politics, see for instance: R. Apthorpe, 'Development Policy discourse', (1986) *Public Administration and Development* 6, 377-389; V. Bhatia and W. D. Coleman. 'Ideas and Discourse: Reform and Resistance in the Canadian and German Health Systems.', (2003) 4 *Canadian Journal of Political Science*, 36, 715-739; G. Colin, *Russian Foreign Policy Discourse during the Kosovo Crisis: Internal Struggles and the Political Imaginaire*, Centre d'études et de recherches internationales Sciences Po, 2004, 1-39; C. Juma, and N.G Clark, 'Policy Research in Sub-Saharan Africa: an exploration', (1995) 2 *Public Administration & Development*, 15, 121-37; H. Larsen, *Foreign Policy and Discourse Analysis: France, Britain and Europe*, London: London School of Economics and Political Science, 1997 ; V. Schmidt, 'Does Discourse Matter in the Politics of Welfare State Adjustment?', (2002) 2 *Comparative Political Studies* 35, 168-93; C. Shore and S. Wright, *Anthropology of Policy, Critical Perspectives on Governance and Power*, (Routledge, 1997); Y. Surel, 'The Role of Cognitive and Normative Frames in Policy-Making',(2000) 4 *Journal of European Public Policy* 7, 495-512.

The major finding underpinning this analysis is that the GAM - as a pivotal policy benchmark in the development of the EU's immigration policy - does not succeed by means of its discourse to ground the transformations it intends to bring about. The discrepancies between the GAM's definition at a thematic level and its contextualisation in geographical terms as well as the methodological contradictions lying beneath its policy discourse are likely to backfire on 'the credibility' of the GAM as an external migration policy framework[7] and generate *unmet* expectations with third parties.

In order to develop this argument, I will firstly discuss why policy discourse is an important component likely to influence the impact of the EU's Global Approach to Migration as a policy framework. Then, in order to concretely capture how the GAM's discourse undermines the GAM's utility as a coherent instrument with its partners, I will focus on one specific case study: the EU-Arab Mediterranean relations.

Although the EU's Global Approach to Migration provides a conceptual matrix for mainstreaming migration governance in different regions, I have chosen to shed light on the case of the Arab Mediterranean countries for the following reasons. On the one hand, some neighbouring Arab countries such as Morocco have become in the last period important dialogue partners for the EU and possess significant leverage.[8] On the other hand, the Arab Mediterranean countries have been an important testing field for the EU's ability to strike a balance between its external migration policy and its security-driven imperatives.[9] Analysing how the GAM discourse redefines the EU's external migration policy in this region, and seeks to bridge the gap between the EU's migration policy and the conclusion of genuine partnership with third parties, can be used to draw significant findings on the effectiveness of the GAM as a new policy framework.

To this end, the study will confine itself to analysing the written discourse and the methodology in the formal documents that lay the foundations of the approach (mainly the European Commission's (EC) communications). I will show how the GAM objectives, features, and instruments as outlined in the EC policy statements, while undoubtedly holding promising potential, are misleading when it comes to assessing discourse characteristics, coherence and expected goals. Additionally, I will argue that the GAM fails to link the apparent objective of its discourse with corresponding policy strategies that may fulfil this objective. Thus, the GAM instruments that are suggested for the Arab Mediterranean region in the policy documents correspond only partially with what the GAM definition propounds.[10] Finally, the paper hints at explanations at the EU level contributing to the ambivalence of the GAM's discourse and suggests ways for consolidating its coherence in the EU-Arab Mediterranean case.

It is worth referring here to some limitations in the study. Thus, the latter, as mentioned above, mainly focuses on the content of the EC communications and does not expand its scope to studying how the different stances at EU level have shaped and impacted the formulation of this discourse. In this regard, the study may give excessive power to the rhetoric of the EC policy documents, which are themselves subject to various political underpinnings and constraints at EU level. To complete the picture, an in-depth study, which evaluates the stances and statements of various EU policy organs, which have played an important role in shaping the GAM, and their incidence on policy change, is

[7] The Communication 'Priority Actions for Responding to the Challenges of Migration: First follow-up to Hampton Court' underlines the following: 'the Commission recognizes the need for a coherent, overall and balanced approach on migration issues, and the fact that setting up a clear and consolidated EU immigration policy adds to the credibility of the EU on the international stage and in its relations with third countries'. See: European Commission, *Communication from the Commission to the European Parliament and the Council. Priority Actions for Responding to the Challenges of Migration: First follow-up to Hampton Court*, COM (2005) 621, 2.

[8] See: J. P. Cassarino, 'EU Mobility Partnerships: Expression of a new compromise', (2009) *Migration Information Source*, 2.

[9] See: O. Doukoure, and H. Oger, 'The EC External Migration Policy: The Case of the MENA Countries', *CARIM Research Report* 2007, available at: http://cadmus.eui.eu/dspace/bitstream/1814/7991/1/CARIM-RR_2007_06.pdf.

[10] The GAM roadmap concerning the Arab Mediterranean countries does not match the promising definition the documents put forward. In fact, there is an ostensible gap between the GAM as a broad normative construct on the one hand and how it is envisaged to be applied in geographical terms.

needed.[11] Despite these limitations, the paper seeks to raise a debate on how the GAM's policy discourse, as put forward by the European Commission, is by itself a powerful pillar of the EU policy-making framework that generates a set of policy definitions, beliefs and expectations regarding how a normative global approach to migration is to be conceived and implemented.

2. Analytical Framing

Far from assuming that discourse, policies and policy implementation are coherent and follow a linear model, the paper draws attention to interplays between policy discourse and policy process, which shape cooperation prospects with third parties. It also ponders how policy discourse and the ideas that are embedded in the discourse may reverberate on policy coherence and policy change. By building a constructional blend of perceptions, expectations, meanings, and envisaged actions, ideas[12] 'enable actors to construct frames with which to legitimize their policy proposals'[13] and project certain anticipated outcomes. Whether these anticipated outcomes are met or not in the policy implementation stage is not the question. The main focus of analysis hinges more on showing that policy discourse is in itself a *meaning-making* constituent and a *contributing* factor in the policy process that enhances or undermines the credibility of a policy frame and fosters or undermines cooperation with third parties.

In this analysis, I adopt Bhatia's and Coleman's analytical framework for 'analyzing political discourse and policy change'.[14] Based on the premises that the way policy discourse articulates ideas can impact policy change, this framework categorizes policy discourse into four different types: rhetorical, instrumental, challenging and truth-seeking discourses. While rhetorical and instrumental discourses are classified as *augmentative* discourses that either aim at reinforcing and justifying prevailing policy frames without altering them, challenging and truth-seeking discourses are *transformative* discourses that aim at bringing about a change in the policy frame either by "persuading" or "seeking consensus".

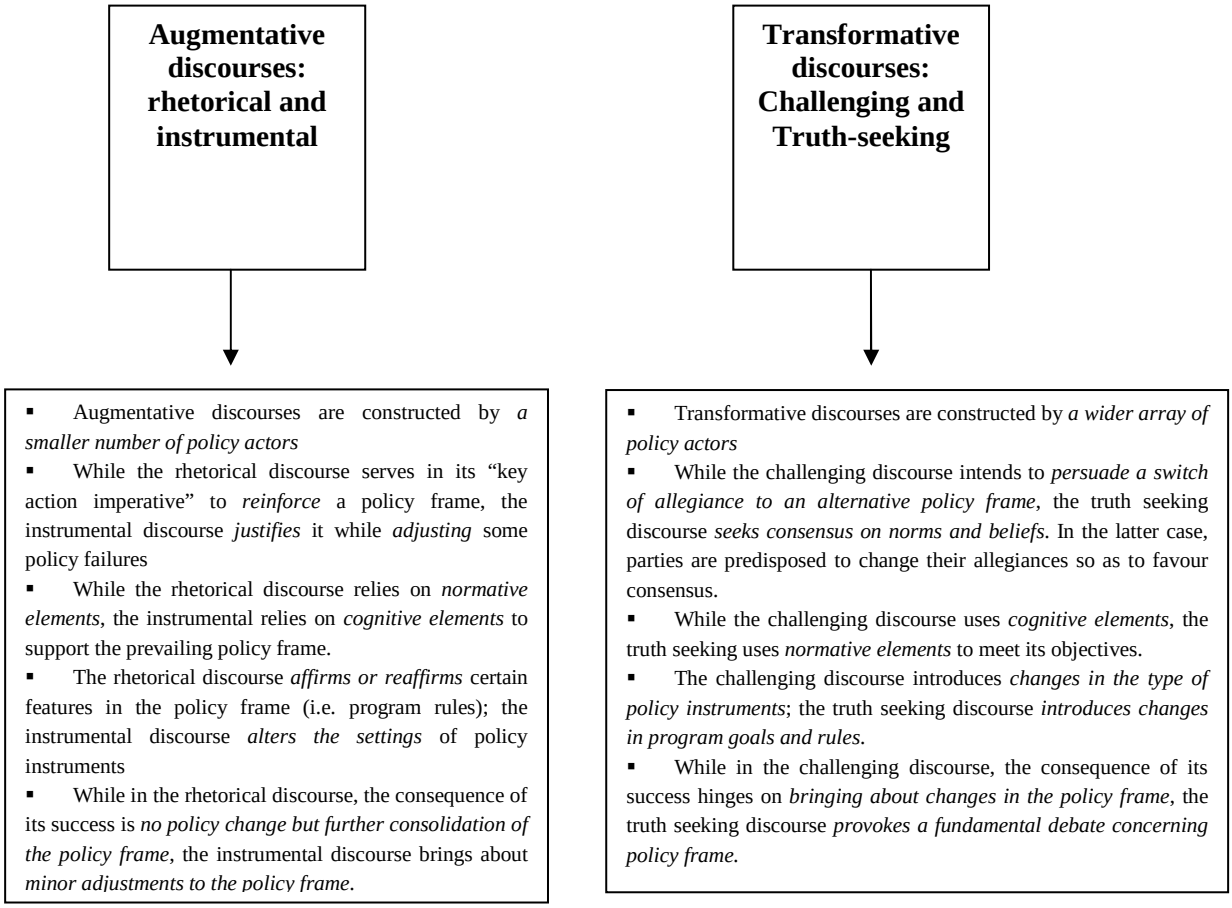
[11] This also includes studying how the policy discourse of the GAM is shaped by perceptional divergences between the European Commission and the European Council on what the Global Approach to Migration entails.

[12] An array of studies in institutional policy analysis has sought to elucidate how ideas impact policy-making processes. Campbell for example argues that ideas 'provide specific solutions to policy problems, constrain the cognitive and normative range of solutions that policy makers are likely to consider, and constitute symbols and concepts that enable actors to construct frames with which to legitimize their policy proposals'. See: J. L. Campbell, 'Institutional Analysis and the Role of Ideas in Political Economy. 3 *Theory and Society* 27: 377-409, 398, quoted in M. Niemelä and A. Saarinen, 'The Role of Ideas and Institutional Change in Finnish Public Sector Reform', Paper prepared for discussion at the annual meeting of RC19 in Montreal, Canada, August 20-22, 2009, 4.

[13] See: Campbell, *op cit*, 398.

[14] These classifications of discourse draw upon discourse analysis at the supranational level, particularly in international relations and EU politics, and they provide a methodology upon which research could build in order to test how "policy ideas are primary contributors to the success or failure of policy change". See Bhatia and Coleman, *op cit*, 737. While the GAM is still undoubtedly in an exploratory phase, this preliminary analysis in fact serves to warns against assigning too many hopes to what the framework can presently yield. It can also be used to identify and subsequently mend the gaps which weaken the coherence of the GAM's policy discourse.

Figure 1[15]



From the premise of this framework, I will show below that the policy discourse of the GAM *intends to be* a transformative discourse[16] which attempts to generate new normative parameters for EU's policy making in migration. Constructed by a wide range of actors at the EU level, aiming to integrate as many stakeholders as possible in the process, and pushed for mainly by the European Commission,[17] the discourse has aimed at reshaping and redefining what the external dimension of EU's migration policy stands for and aims at achieving. Still, while the GAM's discourse in the analysed policy documents puts on the table enlightening objectives, it does not succeed in developing consistent cognitive and methodological relationships that provide the link between the conceptualisation of a global approach to migration as a new policy framework and how the policy discourse intends to put this structure into practice.

[15] Source: adapted from V. Bhatia and W. D. Coleman. 'Ideas and Discourse: Reform and Resistance in the Canadian and German Health Systems.' *Canadian Journal of Political Science*, 36 (4): September 2003, 715-739, 720-721.

[16] I would argue in this paper that the GAM policy discourse has transformative features of a rather truth-seeking nature since it strives to establish consensus on how the EU should redefine the external dimension of its migration policy and marks a watershed with the previous security-oriented perspective. The generic elements of the policy frame at stake in the discourse are rather of a normative nature and aim to reconceptualise the external dimension of the EU's migration policy (see: Bhatia and Coleman, 720-721).

[17] For an account on the role of the European Commission as an agent that has pushed for the 'Europeanisation' and the 'reinvention of the European strategy' in the domain of legal migration, see S. Carrera 'Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU?', *CEPS Working Document*, 2007, 1-20, 3.

3. The Global Approach to Migration as a Transformative Discourse in the EU's Migration Policy?

Adopted by the Brussels European Council in 2005, the Global Approach is defined as the external dimension of EU's migration policy and has been ever since the object of various communications from the European Commission,[18] which have aimed at refining its inclusiveness, coherence and instruments. Enshrined in the Tampere and Hague programmes,[19] the approach is also to be read against the backdrop of *Policy Plan on Legal Migration* adopted by the Commission in the same year.[20]

In its definition, the Global Approach to Migration is presented as a framework based on a *genuine partnership* with third countries seeking to address migration issues in a balanced manner and to devise internal tools at the EU level for dealing with external matters pertaining to intensifying cooperation with third countries.[21]

Upon reviewing the EC communications, one notices that the Global Approach to Migration, as a policy milestone, is presented *as a watershed* in the development of EU's migration policy: 'The Global Approach reflects a major change in the external dimension of the European migration policy over recent years, namely the shift from a primarily security-centered approach focused on reducing migratory pressures, to a more transparent and balanced approach guided by a better understanding of all aspects relevant to migration (…).'[22]

As shown in the following section, EC communications on this external dimension seek to build and consolidate consensus on prevailing beliefs guiding the new policy: the belief that EU's external migration policy should be grounded on an alternative framework i.e. a comprehensive and balanced partnership that encompass third countries. These communications attempt also to devise instruments that give voice to these policy beliefs.

On the one hand, the GAM's policy discourse has a consensual component considering that the approach inscribes itself within a long process of a consensually forged development. Hence, in the light of the Tampere process, there was a growing consensus at the EU level that a common immigration policy should encompass the origin countries' needs and resort to new cooperative mechanisms founded more on an integrative than on a solely EU-based approach.[23]

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[18] European Commission, *Communication from the Commission to the European Parliament and the Council. First follow-up to Hampton Court*, COM (2005) 621; European Commission, *Communication from the Commission to the European Parliament and the Council. The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM (2006) 735; European Commission, *Communication from the Commission to the European Parliament and the Council. Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union*, COM (2007) 247; European Commission, *Communication from the Commission to the European Parliament and the Council. Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies*, COM (2008) 611.

[19] For an account on the development of the EU's common migration policy see for example: A. Venturini, T. Fakhoury and N. Jouant, 'EU Migration Policy towards Arab Mediterranean Countries and its Impact on their Labour Markets', in *Labour Markets Performance and Migration Flows in Arab Mediterranean Countries: Determinants and Effects, European Economy Occasional Papers*, 60 (1), 2010, 159-203; S. Carrera 'Building a Common Policy on Labour Immigration…"

[20] See: European Commission, *Communication from the Commission to the European Parliament and the Council. The Policy Plan on Legal Migration*, COM (2005) 669. The plan puts forward five legislative proposals on economic immigration. It explicitly addresses policy features and legislative measures related to economic migrants such as the conditions of entry and residence of economic migrants, and divides economic migrants into the following categories: highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees. It also encourages circular migration as a strategy that responds to "labour needs in Member States while contributing, through eventual return, to the development of countries of origin and offering skills and other gains to participating migrants." All these features are present in the GAM.

[21] See: European Commission, *Communication from the Commission to the European Parliament and the Council. Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies*, COM(2008) 611.

[22] *Ibid*, 3.

[23] This approach draws upon the importance of developing a global approach that would highlight cooperation among regions. See: A. Pecoud and P. de Guchteneire, 'Introduction: the Migration without Borders Scenario', in *Migration without*

On the other hand, one cannot but notice an underlying persuasive component in the policy discourse as EC communications have attempted to provide throughout the last years 'substantive and methodological improvements' so as to consolidate the merit of this approach and to ground its relevance by reporting to the Council on what it has so far achieved.[24] In fact, the Global Approach to Migration seems to be the fruit of the European Commission battle, as 'promoter of European integration processes', against sceptical voices in the European Union.[25]

Before arguing why this apparently transformative discourse does not succeed in grounding the transformative features it puts forward, and before developing this argument further in the EU-MENA context, I will firstly outline the GAM's broad lines and instruments as presented by the EC communications.

The GAM's Broad Lines and Instruments

With a view to addressing various migration policy areas, the approach adopts a three-pronged track: managing legal migration, curbing irregular immigration, and consolidating the link between migration and development.

This multilayered approach seems to offer a pathway so as to synchronise the internal and external EU policies in the fields of migration, asylum and development aid.[26] By placing equal emphasis on three cornerstones,[27] the underlying rhetoric attempts to carve out a consensus regarding the need to develop legal migration channels with third countries, and the imperative to curb illegal migration whilst providing a nexus between migration and development.

The first follow up to the Hampton Court (2005)[28] provides the cornerstone for analysing the GAM's policy discourse. This communication highlights first and foremost the need for a multilateral path that aims at involving external stakeholders in migration management and delineates the general features of the comprehensive approach, which aims at tackling migration 'as a global phenomenon'.[29] While the 2006 communication on the GAM packs too many policy areas together, which cast confusion on the approach, the subsequent two communications (2007 and 2008) add more clarity. They more precisely define specific tools and policy frameworks upon which the GAM relies. The latest 2008 Communication on strengthening the global approach to migration, partly formulated as a feedback to the European Council's 'call to the Commission to report on what is being done to implement the Global Approach,'[30] suggests improvements to the approach. It focuses more concisely on the practical ways to ensure what is referred to as 'coordination, coherence and synergies' between the EU and third countries.

(Contd.)

Borders: Essays on the Free Movement of People, (UNESCO-Bergahn books, 2007), at 25. See also: European Commission, *Communication from the Commission to the European Parliament and the Council. The first Follow-up to Hampton Court*, COM (2005) 621, 2.

[24] *Ibidem*

[25] See: S. Carrera 'Building a Common Policy on Labour Immigration', 1.

[26] These internal and external EU policies lie in the necessity for synchronisation in the following arenas: creating new legal migration channels with third countries, reinforcing the link between migration and development while fighting against irregular immigration.

[27] The three cornerstones are best delineated in the latest Communication on the GAM. See European Commission, *Communication from the Commission to the European Parliament and the Council. Strengthening the Global Approach to Migration*, COM(2008) 611.

[28] The Hampton Court Meeting was an informal meeting of the EU Heads of State and Government in October 2005. During this meeting, the necessity of developing a comprehensive approach to migration was emphasized. See: European Commission, *Communication from the Commission to the European Parliament and the Council. First follow-up to Hampton Court*, COM (2005) 621.

[29] *Ibidem*, 3.

[30] See COM (2008) 611, Introduction

The main GAM features extracted from the various communications have mainly the normative objective of 'optimising the benefits of migration for all partners in a spirit of partnership'[31] and these features revolve around:

- Pooling information on migration in third countries;
- Establishing a dialogue encompassing migration-related features;
- Adapting the global approach to the specificities of the region and countries;
- Devising specific external instruments that develop legal migration opportunities, dealing with challenges arising from illegal migration and human trafficking while exploring how migration nurtures development;
- Providing instruments that tackle the root causes of migration;
- Encouraging capacity building in third countries so that origin and transit countries autonomously deal with migration pressures including asylum.

In the field of legal migration, focus is placed on the following: empowering information flows and cooperation channels regarding legal migration opportunities with third countries; coordinating with them on specific labour schemes that could address the labour needs of the EU and match available skills in origin countries; strengthening the relation between legal immigration and the socio-economic development in the EU. Consolidating short-term mobility by devising circular migration and mobility partnership schemes are also emphasised.

The specific instruments used to concretise the legal migration component in the GAM are either informative such as disseminating migration profiles or spurring policy-oriented research. They also hinge on multiplying migration dialogue avenues such as the first Euro-Mediterranean Ministerial meeting on Migration (Albufeira in November 2007) and drawing upon parallel geographical frameworks like the European Neighbourhood Policy (association agreements) and the European Mediterranean Framework (action plans). Others consist in devising bilateral partnerships such as circular migration schemes, cooperation platforms, and mobility partnerships.[32] The only hard law instrument so far developed is the Blue Card, which concerns highly-skilled migration.[33]

Other EC communications, written in the spirit of this global approach to migration, have focused on consolidating the link between managing legal flows of migration and labour considerations in Europe**,** and have placed emphasis on the interconnectedness between the management of legal migration channels, labour immigration and development aid between source and destination countries.[34]

In the field of fight against irregular migration, priorities are given to investing in awareness-raising concerning irregular migration, strengthening border management systems, consolidating efforts with a view to signing readmission agreements with the major countries of origin and transit. Capacity building in origin countries is also a major element that reinforces the fight against irregular migration as the GAM foresees assisting national institutions in upholding legislation that curbs illegal migration, and providing technical assistance for border control. To that end, instruments mentioned in

[31] *Ibidem*, 5.

[32] See: *Joint Declaration on a Mobility Partnership between the EU and Moldova*, 2008; *Joint Declaration on a Mobility Partnership between the EU and Cape Verde*, 2008; *Joint Declaration on a Mobility Partnership between the EU and Georgia*, 2009.

[33] See: *Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*, OJ 2009 L155/17.

[34] See: European Commission, *Communication from the Commission to the European Parliament and the Council. A Common Immigration Policy for Europe: Principles, Actions and Tools*, COM(2008) 359 which focuses on various principles grouped under three main headings: prosperity, solidarity and security. The principles focus on the necessity of strengthening the relation between legal immigration and the socio-economic development in the EU, consolidating solidarity among the member states and establishing partnerships with the countries of origin and transit, and lastly, ensuring that the rules governing legal immigration are met and that illegal immigration is tackled.

the GAM range from strengthening the FRONTEX, empowering initiatives that ensure border management (e.g. setting up a Mediterranean Coastal patrols Network), implementing readmission obligations etc. The 2006 communication also explored the possibility of promoting in the future a legislation providing for Sanctions against Employers of Illegally Staying Third-Country Nationals. This initiative which resulted in a proposal of a directive has not been to date adopted.[35]

In relation to the link between migration and development, emphasis is laid on investigating how remittance transfers can lead to sustainable development, consolidating links with migrant groups and Diasporas, acquiring more information on brain drain and finding how to mitigate it. Instruments and ways to promote the migration and development nexus are setting up schemes to reduce the cost of remitting, ensuring efficient use of these remittances, exploring ways to create jobs in developing countries (e.g. the EU programme on Migration and development in Africa), and promoting investments in regions afflicted by excessive emigration etc.

It is important to note at this stage that the instruments used to reinforce legal migration channels are also used to apply the two other components i.e. fighting against irregular migration and reinforcing the link between migration and development. While devising legal migration channels, mobility partnerships also tackle aspects related to border control, regularisation,[36] and readmission on the one hand and development on the other (such as reinforcing Diasporas' engagement in local development). Also, informative instruments such as migration profiles as well as migration cooperation avenues generate information as well as ways of cooperation on how to reinforce legal migration channels, curb irregular migration and consolidate the linkage between migration and development.

Hence, the GAM alludes in its policy discourse to inter-sectoral instruments, which can be unilateral (e.g. migration profiles), bilateral (mobility partnerships), multilateral (ministerial meetings) or international legal instruments (e.g. upholding the UN smuggling and trafficking protocols) which aim to achieve simultaneous progress in different policy areas.

In its geographical application, the GAM seeks to cover Africa, the Mediterranean, the Eastern and South-Eastern regions of the EU, Latin America and the Caribbean.

Notwithstanding the enlightening imperatives of the GAM's discourse, the approach does not yet succeed in contextualising the core ideas it intends to bring forward. In the following sections, I will discuss why the normative discourse of the GAM is likely to create policy expectations that cannot be met in the Euro-Arab Mediterranean area. I will also argue that the clash between the *normativeness* of the approach and its contextual framing contributes to weakening of its coherence and its capacity to bring about policy change in migration management. The EU-Arab Mediterranean context provides an interesting case study for exploration of the link between the 'key-action imperative'[37] of the GAM's discourse and its potential for policy change.

[35] See: *Proposal for a Directive of the European Parliament and of the Council providing for Sanctions against Employers of Illegally Staying Third-Country Nationals*, COM (2007) 249. This proposal for a directive faced opposition as a result of which the directive has not seen the light.

[36] See: *Joint Declaration on a Mobility Partnership between the European Union and Georgia*, 2009.

[37] See: Figure 1.

4. The GAM's Policy Discourse in the Arab Mediterranean Region: The Mismatch between the 'Key Action Imperative'[38] and Regional Grounding

The GAM grounds its utility as a new discourse in EU's external migration policy on the promise of comprehensiveness and 'genuine partnership'. Its definition develops a daring normative link associating the external dimension of the European Union's migration policy with two components: a genuine collaboration with third countries and the 'ambition' of tackling migration sectors 'in comprehensive and balanced manner based on political dialogue and close practical cooperation'.[39] This all-encompassing definition brings together the ingredients of geographical partnership and thematic comprehensiveness in migration matters. It, however, evokes policy aspirations, which the approach sustains with difficulty when it comes to framing on conceptual grounds its relevance in thematic and geographical terms.

With respect to the Arab Mediterranean countries, there is a clear mismatch between the GAM's definitional construct and how the approach suggests embodying its normative potential on both thematic and geographical levels in this region. In fact, it is this discordance between the GAM's definitional components and its regional and thematic framing, which fosters misleading policy expectations and undermines the usefulness of the GAM as a new policy discourse.

Three overarching aspects will be discussed in the following sections to corroborate this mismatch: the unclear geographical classification which makes it quasi impossible to assess whether the GAM succeeds in its rhetoric to claim comprehensiveness in this geographical area, the instruments suggested by the approach and their thematic and geographic relevance, and, last but not least, methodological flaws at the root of the very approach.

4.1 Blurred Geographical Typologies

The regional classifications, adopted by the various policy documents and encompassing MENA countries or Arab Mediterranean partner countries, are blurred, inconsistent or too broad to claim specificity.

The Arab Mediterranean partner countries (MENA) are generally tackled as 'the Mediterranean',[40], and 'neighbouring countries'[41] or as part of 'Southern migratory roads'.[42] The North Africa receives attention under 'Africa' and 'the Mediterranean'. Eastern Mediterranean countries are sometimes addressed as Middle Eastern countries and sometimes as 'neighbouring countries'.

These broad and changing regional typologies from one policy document to the other impede a clear interpretation of how the GAM has contextualised its approach vis-à-vis its Arab Mediterranean neighbours or whether from the very outset it intends to disregard regional specificities by privileging broad geographical blocks. Many examples corroborate this confusion.

[38] See: Bhatia and Coleman, *op cit*, 717.

[39] 'The Global Approach to Migration can be defined as the external dimension of the European Union's migration policy. It is based on genuine partnership with third countries (…) and addresses all migration and asylum issues in a comprehensive and balanced manner…it illustrates the ambition of the European Union to establish an inter-sectoral framework to manage migration in a coherent way through political dialogue and close practical cooperation with third countries.' See: *Strengthening the Global Approach to Migration*, COM (2008) 611, 2.

[40] See: COM (2005) 621.

[41] *Ibidem.*

[42] See: COM(2008) 611.

In the 2005 communication,[43] which focuses on the GAM objectives in the Mediterranean area and Africa, the scope of the Mediterranean area is nowhere defined. While an important section is allotted to discussing 'dialogue and cooperation with Africa and in particular Sub-Saharan countries of origin', another focuses on 'work with neighbouring countries'. Whereas the latter section seems to tackle migration management aspects related to some MENA countries (e.g. Morocco, Algeria), it is not clear to which Arab countries in the Mediterranean the GAM intends to give precedence and why.

This of course suggests that not all Arab Mediterranean partner countries are currently *priority stakeholders* for the GAM and that some countries in the Mediterranean are relegated at the expense of others for reasons of expediency.[44] In fact, what is clear is that in all policy documents, the North African countries of the MENA bloc receive more attention than the Eastern Mediterranean countries since North African countries are tackled in both sections: Africa and the Mediterranean. Conversely, the Middle East does not arouse much interest. It is at times mentioned so as to acknowledge that it has not received much attention.[45] Alternatively, it is treated as a backdrop for the Eastern and South-Eastern regions of the EU. For instance, in the 2007 Communication focusing on the Eastern and South-Eastern regions of the EU (Turkey, Russia, Balkans, and Caucasus), Middle Eastern countries (Lebanon, Syria and Jordan) are briefly taken into account because 'migratory routes' necessitates considering 'countries of origin and transit further afield.'[46]

On the one hand, this vagueness may be perceived as advantageous in such sense that it denotes flexibility in the GAM's dealings with different regional blocs. On the other hand, it puts into question the extent to which the GAM as a policy framework is tailored to the particularities of origin countries and their specificities as it propounds[47] or whether it can really claim comprehensiveness on the basis of geographical generality. Further, this lack of sharpness creates confusion as to which regional and thematic criteria the approach uses in order to differentiate 'the relevance of the global approach in geographical terms'.[48]

For an onlooker (a researcher or a policy-maker), it is hard to extricate a coherent interpretation of how the GAM discourse positions itself in the Arab Mediterranean and the extent to which it could be used by these source countries as a reference document to define expectations.

4.2 The Clash between the GAM's 'Enlightened' Objectives and its Supporting Structure

This section argues that while the thematic relevance of the GAM's discourse assumes a transformative stance, its geographical grounding in the Arab Mediterranean is far from upholding these transformative aspects. Generally speaking, the GAM's 'relevance' in 'geographical terms' matches only partially the normative potential underlying its definitional components and partly corresponds to its 'relevance' at the thematic level'.[49]

[43] See: COM (2005) 621.

[44] This reflects whether these countries or regions are considered to be of prime importance in the management of outward migration to the EU (i.e. the extent to which they are important countries of origin or transit with respect to the EU). In this case geographical comprehensiveness is undermined at the expense of policy priority in dealing with respective regions.

[45] COM(2008), 11.

[46] COM(2007) 247, 3. This communication refers to these countries as a part of the Middle East whereas in other policy documents more general categories such as "neigbouring countries" (COM (2005) 621, 7) are used. Note that the Council designates this region as incorporated in the "Mediterranean" (see Council of the European Union, *Council Conclusions on Enhancing the Global Approach to Migration* 2873rd Justice and Home Affairs Council Meeting, Luxembourg, 5 and 6 June 2008).

[47] The 2008 communication outlines its intent to "focus on the geographical aspects" and propounds " a more differentiated approach to cooperation gearing it to the specific context of the various regions and countries." See COM(2008) 611, 3.

[48] COM(2008) 611, 9.

[49] COM(2008) 611, 3 and 9.

Regarding whether the EC communications succeed in developing a policy framework linking the problem definition with a coherent supporting structure,[50] an analysis of textual contents indicate that methodological structures and relationships are incompletely developed to clarify how the policy issue at stake (i.e. implementing the Global Approach to Migration) will be consistently articulated, in which policy strategies it will result, and which justifications guide these strategies. For instance, while discussing its thematic relevance, the GAM packs ambitious claims and instruments which are overlooked when it comes to tackling the GAM's geographical contextualization. An example is the rather misleading reference to mobility partnerships in the section grounding the GAM's thematic relevance.[51] This section seems to ascertain the relevance of pilot Mobility Partnerships in establishing 'an overall framework for migration management with individual third countries' and cites the two concrete examples of Moldova and Cape Verde. Yet, in the subsequent section dealing with the relevance of the GAM in geographical terms, there is no methodological correspondence between the aforementioned instrument and the criteria that could justify its application at the regional level. There again, the communication refers to the mobility partnership signed with Cape Verde with no further substantiation.[52] Does this mean that mobility partnerships are 'selective' tools, more tailored to some individual countries rather than others, and if yes, why? The GAM remains silent on the criteria that enable contextualising its thematic tools.[53]

This reference to instruments and examples with no methodological grounding results in the GAM discourse going back and forth between normative goals (e.g. the possibility to perceive mobility partnerships as 'overall frameworks for migration management with individual third countries') and a description of what the GAM has achieved so far and can achieve in the future (e.g. the mobility partnerships signed with Moldova and Cape Verde). In the final analysis, the boundary is blurred between the GAM policy discourse *as a normative potential* and the GAM policy discourse as a *policy practice*.

In the sections pertaining to the GAM's geographical framing, the predominant instruments suggested for the Arab Mediterranean region mainly pivot around launching and consolidating frameworks for cooperation as well as implementing arising and previous commitments.[54] Bilateral channels aiming at optimising cooperation are also targeted.[55] These non-institutionalised instruments have as a goal to promote the political dialogue on migration. While allowing for a breadth of cooperation possibilities, they are no 'hardcore' instruments.

More defined geographical instruments such as the association agreements arising out the Euro-Mediterranean Partnership[56] (EMP association agreements) or the action plans of the European Neighbourhood Policy (ENP action plans) are mentioned in 2005[57] as providing the basis for further cooperation in migration-related issues with neighbouring countries including Arab countries.

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[50] For an account on how "problem definition" and the development of "a causal story" which develops the policy issue at stake are important for policy analysis, see: Bhatia and Coleman, 717.

[51] COM(2008) 611, 4.

[52] COM(2008) 611, 9.

[53] The unclear context in the EC communications regarding why certain countries have been selected to test certain instruments cast doubt on which aspects become crucial prerequisites for implementing certain policy strategies identified by the GAM. This unclarity at the same time leaves the door ajar for infinite cooperation possibilities.

[54] For example, we mention the commitments of the first Euro-Mediterranean Ministerial Meeting on Migration in November 2007, the 2006 Tripoli Africa-EU Conference, the 2006 Rabat and the 2008 Paris Euro-African Ministerial Conferences on migration and development and their declarations and plans of action, the first Euro-Mediterranean Ministerial meeting on Migration, held in Albufeira in November 2007 etc.

[55] COM(2008) 611, 10.

[56] Arising out of the Barcelona Process, the Euro-Mediterranean Partnership (EMP) has sought to foster and consolidate through regional and sub-regional projects and association agreements links of cooperation, economic and political reform between the EU and Southern and Eastern Mediterranean countries.

[57] COM (2005) 621, pp. 7-9.

The latest 2008 Communication is yet even less outspoken on the instruments applicable to the MENA countries. Evoked tools to assess the contextualisation of the GAM in the 'Southern migratory routes' and those concerning the Arab Mediterranean countries mainly encompass non-institutionalised political frameworks (the Ministerial Conference of Tripoli, Euromed Ministerial Meeting…). More assertive instruments addressing at least a part of the MENA countries are not mentioned. While this might be the result of the European Commission's keenness on developing coherence between its discourse and what it can achieve, some issues are worth highlighting.

The first remark relates to the nature of the instruments that the GAM proposes for the region and their degree of novelty. As argued above, these instruments prevalently consist in devising or building upon avenues for political dialogue. Still, critically speaking, one needs to separately analyse these migration processes and avenues in order to understand their added value or why they are chosen in the policy documents as suitable tools in line with the GAM's spelled out objectives. Compared with previous non-institutionalised frameworks stemming from the European Mediterranean Partnership, it is not clear how the GAM roadmap with respect to the Arab Mediterranean countries adds new benefits or sustains a 'genuine partnership' – at least in its political rhetoric. Analytically speaking, the GAM fails in this regard to back its *transformative discourse* with 'transformative' instruments. On another level, in the absence of more daring instruments or sharper contextualisation, it is difficult to appraise the Global Approach as a new migration discourse with respect to the Arab Mediterranean countries.

From this point of view, it is worth debating whether the GAM itself as a policy framework is in fact *extraneous* to the neighbouring Arab countries and the extent to which the GAM's political statements carry along novel content with respect to the Arab countries.[58]

In this regard, the GAM discourse seems to stem more from an EU need for a functional rhetoric linking the intrinsic and extrinsic migration components rather than from the necessity of empowering origin countries in the policy reference documents.[59]

4.3 General Methodological Contradictions within the GAM Policy Discourse

Notwithstanding these remarks, some general reservations pertaining to the approach itself have to be taken into account so as to ponder the usefulness of the GAM as a new policy discourse towards the Arab Mediterranean. These reservations hinge on the nature of comprehensiveness that the GAM's rhetoric purports and on the congruence between the inter-sectoral framework that the GAM would like to implement and the instruments it proposes. Both aspects cast shadow on the GAM's ability in its policy discourse to provide a coherent link between the problem definition and the policy strategy designed to address the issue at stake.

4.3.1 The disputable scope of comprehensiveness

Upon analysing the GAM's policy documents, one notices that the GAM normative gist is to establish transversal comprehensiveness on thematic and geographical grounds in an inter-sectoral perspective. Still this comprehensiveness remains blurred: does it illustrate EU's willingness to develop policy actions with different regions in the three fields of legal migration, illegal migration and development?

[58] The GAM has undoubtedly given impetus to the European Mediterranean Partnership and its policy frameworks. Still, the mechanisms of the latter inscribe themselves into an independent path going back to the Barcelona Process. The policy documents do not clarify why these instruments are novel carriers for the GAM's transformative discourse on migration in the EU-Arab Mediterranean context.

[59] See: S. Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe', in J. Orbie (ed.) *Europe's Global Role: External Policies of the European Union*, Ashgate, 2008, 133.

Or does it claim to account for third parties' interests in the migration process, provide a linkage between migration and development and tackle the root causes of migration? [60]

Should the latter objective be the case, the GAM's ability, in its reference documents, to provide for a transversal problem-solving track linking migration and development as well as remedying the root causes of migration is poorly developed. Furthermore, well-defined instruments that encompass these objectives are precariously defined, unevenly accounted for and partially missing with regard to all regions in the policy statements.

Moreover, the GAM policy documents do not give much space to the role of sending countries or do not elaborate on how the latter are supposed to enrich the pluralistic spirit of the approach. Hence, while third countries are pictured as key actors in the GAM's normative definition[61] and thereby acquire legitimacy to address the policy issue at stake, not much is written on how these key actors are supposed to intervene or affect the development of policy strategies in the sections on the geographical relevance of the Global Approach.

This brings us back to the earlier argument as to whether the GAM's suggested multilateral approach is in fact a disguised 'unilateralism' insofar as the underlying focus on cooperation in the external migration dimension has been induced by the recognition that devising adequate migration policies within the EU are not possible if external aspects are bypassed.[62]

4.3.2 The overlapping instruments of the GAM

The GAM policy discourse suggests the possibility to ensure progress in the three different policy areas – of legal migration, illegal migration and development aid while using instruments that encroach upon this progress.

In other words, policy documents attempt to separate the three dimensions by distinctly tackling their features yet establish cross-cutting instruments for their application.[63] This ultimately reinforces the three components' interdependence, and confounds the boundaries regarding how collaboration or lack of collaboration with origin countries in one policy area could impinge on collaboration prospects in other areas.

Research has so far expressed doubt as to whether convergent progress in the three dimensions can be achieved.[64] Restricting migration casts shadows on cooperation and development assistance. Further, the implementation of the comprehensive approach has so far focused more on ensuring restriction of access to the European Union rather than investing in developing the external aspects of migration. These elements suggest of course the incompatibility between the normative objectives of the GAM's policy discourse and policy actions on the ground. For the sake of this paper, it suffices to say that they foster policy expectations, which will most likely be not lived up to.

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[60] Although this paper does not cover the policy statements of the European Council, it is nonetheless telling that in its conclusions regarding a comprehensive European Migration policy in 2006, the Council, underlines the following: "the migration and development agenda will be intensified by increasing coherence between the Union's various policies, including their financial instruments, with a view to addressing the root causes of migration." See: Presidency Conclusions of the Brussels European Council, *A Comprehensive European Migration Policy*, December 2006.

[61] See: COM (2008) 611, 1.

[62] S. Sterkx, 'The External Dimension...', *op cit*, 130.

[63] See: COM(2008) 611 which explicitly separates the three migration policy areas and states different objectives for each area.

[64] See: B. Hayes and T. Bunyan, 'Migration, Development and the EU Security Agenda', in *Europe and the World: Essays on EU Foreign, Security and Development Policies*, (Bond, 2003); M. Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development', (2008) 3 *European Integration* 30, 323-342, S Sterkx, 'The External Dimension...' *op cit*.

Additionally, there is an uneasy relationship between the GAM's attempt to connect wilful cooperation in migration issues with tacit cooperation in security measures. The policy discourse promises 'genuine partnership' while relying on instruments that presuppose linking on the ground the partnership with conditionality. For instance, a mobility partnership opens up new legal migration opportunities but rests on the *element of consent* in cooperation on readmission obligations. [65]

Whilst the paper does not claim to discuss how EU immigration policies entrench security issues in migration cooperation, it seeks rather to raise a debate as to how these contradictions in the policy discourse contribute to undermining the GAM as a coherent instrument with Arab Mediterranean countries. The GAM's definitional objectives do spur various anticipations by identifying third countries as equal partners in the problem ownership. Still, the *causal story* linking these objectives to strategies based on conditionality or selectivity shatters these expectations.

5. Reframing the Global Approach to Migration?

The GAM's policy discourse unravels contextual and methodological inconsistencies leading to blurring expectations and widening the gap between the policy issue at hand and policy outcomes. If so, does this mean that it should be discarded as a policy reference capable of enhancing cooperation in migration-related matters?

The answer to this question is quite complex. The GAM's political discourse reminds us of the unavoidable trichotomy between policy-setting, policy-making and policy implementation.[66] Deriving from a pragmatic development of the EU policy,[67] the GAM as an agenda-setting vector is mainly an attempt to provide the missing link between external and internal challenges. While embedding the EU external migration policies in a lofty normative wrapping, it is also indicative of the delicate institutional balance within the EU.

Whereas the European Commission has conferred on the GAM quite a daring ideational power, the European Council perceives this approach more in terms of 'an adequate 'solution' that tackles many policy areas and provides the link between migration and employment. The Commission has profited from this 'political contextualisation' of the approach to further corroborate the significance.[68]

This discrepancy, however, between the attempt of the European Commission to present the GAM as a transformative discourse[69] and the need to contextualise it in a functional framework in order to persuade other parties at the EU level of its relevance weakens the power of the discourse and its ability to bring about policy change.

Moreover, it is worth reminding that the GAM's oscillation between the need to separately address each external policy area[70] and its reliance on crosscutting policy instruments reinforcing these areas' interrelatedness is a reflection of an internal EU paradox in migration management: the EU's inability to concomitantly accommodate the challenges arising from organising migration while attending to security and development imperatives.

Whilst adding to the fuzziness of the GAM's discourse, these breaches end up reflecting the very thematic and institutional difficulties hampering from the outset the 'genuine partnership' that the GAM conjures up in its definition. In the final analysis, discourse and methodology inconsistencies in

[65] See: S. Carrera and R. Sagrera, 'The Externalisation of the EU's Labour Immigration Policy: Towards mobility or insecurity partnerships?', *CEPS Working Documents*, 2009; Cassarino, 'EU Mobility Partnerships'.

[66] See for instance: R. Sutton, 'The Policy Process: an overview', *Working Paper, Overseas Development Institute*, 1999.

[67] See: Cassarino, *op cit*.

[68] See: Carrera, 'Building a Common Policy', *op cit* 6.

[69] See again: discourse characteristics in Bhatia and Coleman, 2003, 720-721 or figure 1 in this paper.

[70] See: COM (2008) 611.

the GAM policy discourse provide a relief valve through which the tensions between the European Commission and the EU member states[71] are played out and an escape door through which policy makers acquire more room for maneuver in policy implementation. The other side of the medal is that this fuzziness underscores the credibility of the GAM's discourse with third countries.

Even though the aim is not to take the GAM's policy discourse at face value and overvalue it as driver for policy change, it is worth considering whether endowing more credibility and coherence to the 'transformative' discourse of the GAM could consolidate it as a policy reference benchmark between the EU and its neighbours. Improving the GAM's discourse consistency and the correspondence between its thematic and geographical relevance could hence contribute to empowering third parties as 'genuine' interlocutors - at least in the policy rhetoric exchange- thereby making convergence in policy expectations more likely.

In the case of the EU-MENA context, divergent priorities on each side of the Mediterranean have so far hampered a common outlook on migration challenges. Whereas EU countries focus on joint responsibility and control of migration flows, the origin countries of the Arab Mediterranean plead for increased mobility. Further, some neighbouring Arab countries such as Morocco and Mauritania have expressed clear scepticism regarding the externalisation of EU's migration policy and its security connotations.

A relevant question in the EU-MENA context is whether the GAM, in its quest to fashion its approach to origin countries, necessitates alternative tools[72] with respect to the Arab Mediterranean, tools that directly tackle the root of the policy divergences so as to clear the way for a 'genuine partnership'.

It is so far not tested how and whether avenues for political dialogue proposed by the GAM are adequate to untangling the sources of divergences in the EU-Arab Mediterranean context or whether these avenues replicate the patterns of previous policy processes which have not yielded the intended results (e.g. the Barcelona Process).

The policy discourse coherence in the Global Approach could be thus enhanced by suggesting initiatives that consolidate the link between the GAM's ambitious definitional constituents and its grounding in the Arab Mediterranean region. For instance, proposing instruments such as bilateral and regional consultative processes (BCPs and RCPs), which intently reflect in conjunction with neigbouring Arab countries on how the GAM's normative potential could be concretized, would enhance the credibility of the GAM's policy discourse and would also endow legitimacy to origin countries as partner countries in this *transformative* discourse.

Another way out of the impasse regarding the inconsistency between the GAM's *normativeness* and what it can really achieve on the ground is to revisit the GAM's policy discourse through a process guided by induction and learning. A suggestion is to monitor in further studies the extent to which the instruments laid out by the GAM with regard to the Arab Mediterranean have so far materialised into

[71] By this, I specifically allude to the tensions between the EU Commission and the EU member states. While the European Commission has in the last years emphasised developing a common labour migration framework, EU member states have resisted communitarian policies which would circumscribe national decision-making. For instance, in 2001, the Commission adopted a proposal for a Directive dealing with "the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities". Yet, the directive has not seen the light.

[72] Even upon pondering the relevance of the GAM's general instruments in the Arab Mediterranean world (mobility partnerships, circular migration schemes…), one is prone to deduce that they are currently irrelevant or respond only partially to migration exigencies. Mobility partnerships, for instance, are presently not on the political menu in the EU-Arab Mediterranean context. These instruments of cooperation entail reciprocal engagements on issues of cooperation in migration-related fields (e.g. provide avenues for matching supply and demand of labour and energizing legal migration channels) yet they also necessitate a certain degree of policy convergence regarding ways to combat irregular migration (e.g. enforcing readmission obligations).

Other instruments derived from the GAM such as circular migration and the Blue Card partially address economic migrants' profile, and do not pave the way for a holistic approach that deals with all economic emigrants including the low and the medium-skilled who are not seasonal workers in the EU-MENA context. See: A. Venturini, T. Fakhoury and N. Jouant, *op cit*.

the policy goals that the approach sets out to achieve. More concretely, the gains and failings of current bilateral experiences and non institutionalised avenues for migration dialogue should be consistently assessed with the aim of appraising whether they are in line with the objectives of the GAM discourse.[73] Lessons drawn from an appraisal of the GAM's accomplishments within the last years could help develop policy strategies that soften the discordance between its normative scope and its relevance as a credible policy document in the Arab Mediterranean context.

On a broader level and beyond the EU-MENA case, for the GAM to succeed as a transformative discourse that anchors a consensually-based novel outlook on migration management among concerned parties,[74] the generic as well as the regional instruments that the GAM discourse proposes should correspond to its 'key action-imperative'.[75] In the lack of such correspondence, the Global Approach to Migration as an ideational vector of change will probably remain mere political rhetoric.

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[73] The assessment of what has been achieved since the adoption of the GAM in the Arab Mediterranean could give insight into which complementary or additional instruments the approach should further incorporate with a view to developing harmony between its normative ambitions and policy strategies.

[74] That is the EU actors and third countries affected by the policy framework.

[75] Reference to the discourse characteristics outlined by Bhatia and Coleman, *op cit*, 720-721 that are based on decoding 'the content of the policy frame for the issue in question', 719.

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DEVELOPMENT AND HUMAN RIGHTS

EU Reflection of the Human Rights and Development Nexus – Imitating or Innovating the International Methodology?

Karolina Podstawa

Abstract

The Nexus between Human Rights and Development has been developed since 1970s; and the rights approach to development, as the most advanced manifestation of this nexus, has been gradually elaborated by academics and practitioners. Under the auspices of the United Nations it took the name of Human Rights Based Approach to Development (HRBAD). It was supposed to constitute a core methodology for development activities centred on human beings and their rights. In theory, the European Union, as the biggest donor and allegedly a normative power, should have embraced this methodology, made it visible in its political and legal instruments – especially in the view its commitment to human rights present as the core of its foreign policy. This paper examines to what extent the UN-stemming methodology, regardless of its deficiencies, has penetrated the Union's legal and political environment in the area of development cooperation. It attempts at answering the question whether the Union has taken the opportunity to 'improve' the HRBAD and to go beyond mainstreaming of human rights into the political and legal rhetoric. The scrutiny leads us to an inevitable conclusion according to which the HRBAD as a political impetus has remained largely unnoticed by the European development policy creators. This is not to say that the European Union has remained indifferent to the concept of the rights approaches to development. The EU, in fact, did incorporate the ideas behind those approaches into its legal instruments before the UN initiative took place and made them a constant element of its governance and legal approaches. Yet, similarly to the UN, it has outsourced the enforcement of the methodology to third parties (NGOs) failing, at the same time to develop sufficient scrutiny mechanisms and thus to respond to the call for accountability of its own actions.

1. Introduction

The European Union legal and political system does not function in a vacuum. As a regional organisation of states, the Union has the potential and capability, not only to incorporate the rules binding upon traditional international law and political actors, but also to contribute to international discourse and practice. The awareness of this potential, as well as the historical heritage of European states, have made some believe that it is the Union's (and earlier on – the Community's) responsibility to be a leader in various policy fields[1] – to promote and protect human rights[2], to create modes of international cooperation which take into consideration not only EU's interests but also widely

[1] See, especially the political science proposals as to what kind of power the European Union can be: Ian Manners & Københavns Universitet Center for Freds-Og Konfliktforskning, *Normative power Europe : a contradiction in terms?* (COPRI 2000);Helene Sjursen, 'The EU as a 'normative' power: how can this be?', (2006) 13 *Journal of European Public Policy*, ;Andrew J. Williams, *The ethos of Europe : values, law and justice in the EU* (Cambridge University Press 2010)..

[2] Philip Alston & Joseph Weiler, 'An 'ever closer union' in need of a human rights policy : the European Union and human rights', in Philip Alston (ed),*The EU and Human Rights* (Oxford University Press, 1999), Katrin Kinzelbach & Julia Kozma Kozma, 'Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights ', (2009) 10 *Perspectives on European Politics and Society*, 603

understood common goods[3], to share experience, in short – to set example *in abstracto* and *in concreto*.

Development cooperation is, most probably, the most emblematic area in which the EU has been pursuing this goal. However, the efforts to incorporate human rights concerns in its instruments (similarly to widely understood foreign policy) date back to the late 1970s and have mainly taken a criticised radical form of conditionality (associated generally with other policies and not only the EU development cooperation). The efforts to create a coherent nexus between human rights and development are a more recent idea, elaboration of which has been parallel to that on the international level. The nexus has proven difficult to establish in one accepted form, In fact, the OECD, has identified four forms of human rights' inclusion in the practice of donors and their agencies. These include implicit human rights work within the practice of an agency,[4] human rights projects,[5] human rights dialogue,[6] human rights mainstreaming,[7] human rights-based approaches.[8] The Human Rights Based Approach constitutes, therefore, the more advanced, self-conscious mode of establishing the link between human rights and development; more importantly it goes beyond the prevailing concept of mainstreaming, lying at the core of the UN reform of past 15 years. The HRBAD proposes significant innovations in the manner both development and human rights are conceptualised. Ultimately, it adds to development practice the means of addressing root causes of ills of the global order and offers a possibility of introducing long lasting solutions with the legitimacy of the process emphasised by accountability principles. Moreover, human rights regime gains an additional, explicit instrument for implementation of human rights; whilst being politically put forward as true underlying principles not necessarily reserved to lawyers and their realm.

The Human Rights Based Approach to Development cooperation (the HRBAD) as elaborated by the UN agencies, should provide, therefore, an excellent opportunity for the EU to take up the challenge. The methodology, focusing on delivering the development aid from the perspective of rights, on empowering rights holders against duty-bearers and on duty bearers to carry out obligations in response to right-holders as well as focusing on the process of aid's delivery, should be a perfect tool for the polity adding to its legitimacy, transparency of its actions and international presence. From this point of view, the field of development cooperation at its intersection with human rights policy provides probably the best area in which the polity exports its normative environment – theoretical approach to economy (neo-liberal), conceptual approach to the state (democracy and the rule of law)

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[3] In various policy fields, the EU has apparently assumed a leading role in a number of areas such as the realm of the environmental or trade policy. For environmental policy, see for example: José Manuel Durão Barroso, *Speech: Leading by Example: The EU and Global Governance at the Conference on Global Governance at* http://www.europa-eu-un.org/articles/fr/article_8708_fr.htm, Sebastian Oberthür & Claire Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges', (2008) 43 *The International Spectator*.

For discussion on the EU's role in international trade policies see: Andreas DÜR & Hubert Zimmermann, 'Introduction: The EU in International Trade Negotiations', (2007) 45 *Journal of Common Market Studies*.

[4] 'Agencies may not explicitly work on human rights issues and prefer to use other descriptors ("protection", "empowerment" or general "good governance' label). The goal, the content and approach can be related to other explicit forms of human rights integration rather than "repackaging". OECD, *Integrating human rights into development : donor approaches, experiences and challenges* (OECD 2006), 35.

[5] 'Projects or programmes directly targeted at the realisation of specific rights (e. g. freedom of expression), specific groups (e. g. children) or in support of human rights organisations (e. g. in civil society). *Ibid.*

[6] 'Foreign policy and aid dialogues include human rights issues, sometimes linked to conditionality. Aid modalities and volumes may be affected in cases of significant human rights violations.' *Ibid.*

[7] 'Efforts to ensure that human rights are integrated into all sectors of existing aid interventions (e. g. water, education). This may include "do no harm" aspects.' *Ibid.*

[8] 'Human rights considered constitutive of the goal of development, leading to a new approach to aid and requiring institutional change.' *Ibid.*

and underlying values inherent for those systems (human rights). At the same time, the methodology is ready made to implement as usually the most common form of assistance are projects directly targeted at particular recipients, in a particular context, concentrating very often on particular rights.[9]

The aim of this paper is to analyse to what extent the EU has taken on-board the nexus between human rights and development, therefore the rights approach to development corresponding to the methodology that is being developed by the UN. If so the focus will be place on whether the EU has managed to take the methodology any further accepting its double-hat as a standard-setter not only towards recipients of its policy, but also as a model member of the international community. For this purpose the UN HRBAD methodology presence will be analysed in political, legal, and implementation instruments in turn, and, subsequently, their impact will be traced down to the EU legal and operational framework.

2. Human Rights and Development – The UN Normative and Operational Innovations

2.1 Setting the Background – The Origins and the Development of the HRBAD

The creation of the nexus between human rights and development policies is a relatively recent notion going back to the pioneer publication of Amartya Sen: 'Development as Freedom' which laid down foundations for subsequently, formally developed nexus.[10] Yet, the roots of the concept can be already found in the UN Charter. Amongst other purposes of the UN, Article 1 of the Charter mentions achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination on the grounds of race, sex, language or religion.

Nevertheless, as it is well known, until the 1980s development had been approached from a purely economic perspective - its ultimate goal could be brought down to the attainment of positive economic indicators – what mattered was economic growth at all costs, followed by redistribution of gains from growth. At the same time, the main development actors – World Bank, International Monetary Fund and the UNICEF - devised the so-called 'needs approach' to development according to which the goal of any development process is to try and fulfil basic needs of the poorer countries of the world. The approach is also referred to as charity or benevolence and as such has been criticised for being patronising towards aid recipients and lack of participation on their part in the process leading to development cooperation being inefficient.

Since the 1980s both the scholars and practitioners have been taking into consideration the so-called 'human factors' evoked in the context of the development discourse. The UN Global Conferences (Copenhagen, Vienna, Beijing, Cairo and other) brought to the centre human beings who ever since were supposed to stand at the core of development practices. Since 1990, the UNDP has been preparing its Reports on Human Development contributing to the change of discourse.[11] In 1993 at the World Conference on Human Rights in Vienna the right to development was endorsed in the final document. In the view of the changed optics, development actors – acting in their capacity as donors - have initiated to innovate the rhetoric of their policies and strategy statements. This gradual evolution, which was taking place, has not won much of an acclaim in the development and academic environment. Peter Uvin,[12] for example, described it as repackaging of the old wine into new bottles.

[9] OECD, *op cit*, 18.

[10] Amartya Kumar Sen, *Development as freedom* (Oxford University Press 1999).

[11] All Human Development Reports are available at: http://hdr.undp.org/en/reports/.

[12] Peter Uvin & Ebrary Inc., *Human rights and development*, in Ebrary. (Kumarian Press, 2004)., p. 50. Paul J. Nelson & Ellen Dorsey, *New rights advocacy : changing strategies of development and human rights NGOs* (Georgetown University Press 2008).

Regardless of substantial value present in such repackaging, it marked the awareness of the conceptual existence of the nexus and the practically existing gap in development and human rights policies.

The final step in the elaboration of the HRBAD was the result of the UN human rights reform initiated by Kofi Annan in 1997 aiming at mainstreaming human rights into various policies of the United Nations, and against the background of the 2000 Millenium Development Goals.[13] In this context, the currently prevailing concept integrating human rights and development was elaborated by the agencies – the Human Rights Based Approach to Development.[14]

When discussing the HRBAD, a mention must be made about the right to development proclaimed in the 1986 UN Declaration on the right to development. However, though the very existence of the right to development must be perceived as a step towards the elaboration of the HRBAD, inasmuch it creates the basis for the concept of participation and local ownership of the development process, yet it has been criticised for remaining only within the realm of 'high-levelled' human rights and not achieving much in terms of altering the development discourse and practice.

Paul Gready, referring to Donnelly's contribution[15] and Uvin's landmark publication[16] summarises this failure in the following terms:

> The right to development has a meta-narrative, or a vision of a new international economic order. It advocates international cooperation and creates an expanded range of rights-holders and duty-bearers. Its strengths are that it is conceptually visionary (if not always clear!) (...) and has provided a political rallying point; its weakness is that practically it has achieved next to nothing. It is treated with suspicion by donors and with profound scepticism by many scholars. It is a non binding declaration and will remain so.'

These are, thus the visionary nature of the right to development as of human rights that, according to Gready make it inutile for the purpose of practical application to development practice. The HRBAD, being a conceptual tool and a methodology, does not carry the burden. What is more, it allows for building a bridge between two disciplines/policy fields rather than forcing to re-invent the whole area of development practice. For the above reasons, the focus of this paper is placed on the HRBAD rather than a value added or UN presence of the right to development.

2.2 Defining the HRBAD

As Peter Uvin wrote in his 'Human Rights and Development':

> '(...) development and rights become different, but inseparable aspects of the same process, as if different strands of the same fabric. The boundaries between human rights and development disappear, and both become conceptually and operationally inseparable parts of the same process of social change. (...) All worthwhile processes of social change are simultaneously rights based and economically grounded and should be conceived of in such terms'.[17]

[13] UN, Millennium Development Goals, at: http://www.un.org/millenniumgoals/.

[14] The introduction of the HRBAD to the development practice seems to be bringing home the concept of human rights to where it initially belonged – to the basis of any policy undertaken by the UN or any other development actors. After all the end recipient of any sort of development aid feels the same about the change taking place in his/her life regardless the heading under which the help was provided. (See also: Craig Scott, 'Reaching beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"', (1999) 21 *Human Rights Quarterly*.

[15] Jack Donnelly, 'The 'right to development': How not to link human rights and development', in Claude Emerson Welch & Ronald I. Meltzer (eds), *Human rights and development in Africa* (State University of New York Press, 1984).

[16] Uvin and Ebrary Inc. at 40-43.

[17] *Ibid.*, 122.

Indeed, at least in conceptual terms, this seems to be true with respect to the HRBAD methodology, though exact meaning of this notion is far from being clear. The working definition[18] is drawn from the 2003 UN Inter-Agency Understanding[19] though the lack of clarity of the concept remains an issue.[20]

According to this document, the primary goal of any development cooperation is to further the realization of rights with sufficient attention given to them during the development process[21]:

> 1. 'All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
>
> 2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
>
> 3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.'

Paragraphs 1 and 3 of the Understanding definition focus on the interdependency between two areas – the development and human rights. As mentioned beforehand, the concept of development viewed as a tool for further realisation of rights is a relatively new one. The HRBAD contributes to concretisation of what is required for the rights approach to development as a concept and as instrumental check-list when developing concrete actions both in headquarters and in the field.

The first paragraph refers to the 'human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments' – they are to be present at every stage of the development and assistance processes. It is important to note, that it is not supposed to be a mere acknowledgement of the awareness that the UDHR is an underlying value document for the UN actions. Instead, the UN agencies when realising development objectives are to point to specific rights which are at stake in a particular process.

The third paragraph emphasises that the goal of the development activities is the empowerment of the individuals (either through fulfilling their needs, educating them or facilitating the creation of civil society), whilst at the same time building up the capacity of the duty-bearers (understood in broad sense depending on a particular right and context i.e. states apparatus, but also the elderly or parents) to meet their obligations (and, therefore, working on institutions building, transferring the know-how, pushing for establishment of democracy and human rights and in other contexts – on education, health service quality etc.). It is important to note that the broad understanding of duty bearers goes beyond the scope of what international legal human rights regime understands under the notion and pursues in

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[18] Under 'working definition' I mean the starting point for implementation of the notion within the UN Agencies. See, in particular: United Nations Population Fund, 'A Human Rights Based Approach to Programming - Practical Implementation Manual and Training Materials', in *Gender, Human Rights and Culture Branch of the UNFPA*, Technical Division (GHRCB); Harvard School of Public Health 2010).

[19] United Nations Development Programme (incl. United Nations Capital Development Fund and the United Nations Volunteers), United Nations Conference on Trade and Development, United Nations World Food Programme (which works frequently in competition with the FAO), United Nations Population Fund and United Nations Human Settlements Programme. United Nations, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN ', (United Nations, 2003); for more on the nature of the 'understanding' see below.

[20] See for instance the doubts of Mr Babadoudou (Benin) at the 20th Meeting of the Third Committee of the UN GA: General Assembly United Nations, Third Committee, 'Summary Record of the 20th Meeting, 22 October 2008', (United Nations 2009), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/563/91/PDF/N0856391.pdf?OpenElement. See also the OECD discussion of various perceptions of the human rights – development nexus as developed by agencies: OECD, *op cit*, 30.

[21] United Nations, *op cit*.

its instruments.[22] In the HRBAD arrangement rights-holders ability to exercise their rights, formulate claims and seek redress, if necessary, is a correlative to duty-bearers who are supposed to carry out obligations in response to rights-holders (be it either as a result of an imminent positive or negative action, or in the process of progressive realisation of human rights; states obligations are furthermore conceptualised by the UN as those to respect, protect and fulfil).

The second 'revolution' brought about by the HRBAD as defined by the Understanding is inward-looking. The second paragraph of the Understanding focuses on development actors themselves and their manner of conduct. This has become an important issue due to organisation of development community - it is broad and involves many actors. These are public (states, international organisations) and private entities (NGOs); the former dealing with both programming, providing finances and scrutinising the spending, though in many cases also acting directly in the field. The latter are involved only in responding to programming, implementing the programming objectives with the use of available funds. Both – public and private actors – have been criticised for the lack of scrutiny of their activities, and frequent abuses of development principles in the field. The HRBAD, therefore, provides the tool to respond to those criticisms. The inward looking should allow for reconceptualization of the notion of accountability of development actors themselves. Yet, the HRBAD does not add to defining the notion itself. The Understanding states clearly only that:

> 'Human rights principles guide all programming in all phases of the programming process, including assessment and analysis, programme planning and design (including setting goals, objectives and strategies); implementation, monitoring and evaluation.'

And it adds further on:

> 'States and other duty bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.'

The lack of the reference to the possible accountability of development agencies and their agents seems to be a serious shortcoming of the HRBAD. It is to a certain extent understandable that the mode in which the human rights concerns are addressed in the course of the development process should remain an internal agency matter. It is afterwards the development agency's duty to structure the work within the agency in such a manner that the objectives of the HRBAD are fulfilled. Furthermore, apart from blatant abuses on the part of the agents in the field, it is hard to imagine a scenario in which an agency (or the NGO to which agency's tasks were outsourced) could be held accountable and by whom. One can hardly imagine rights-holders, neither duty-bearers in a recipient state as active entities in such situation. The only external scrutiny could come from the UN itself, or one of its member states' agencies. The former case is yet again a case of an internal institutional arrangement; whilst the latter would call for the determination of the forum, which would most probably be the UN one.

Nevertheless, the HRBAD has allowed for interpreting principles of accountability out of its definition. The International Human Rights Network, having evaluated negatively the lack of the reference to accountability of agencies for not observing the HRBAD formulated principles underlying accountability in the following manner:

> 'Accountability should encompass both process (how decision are taken, policies formulated etc) and result (impact on human rights of policies/practice/budgets/programmes). Thus, the principle requires that policies are reinforced by appropriate procedures that:

[22] That it not to say that there exists a common understanding in the theory of human rights as to who the duty-bearers are. The responsibility of state and state institutions is beyond doubt, whilst that of individuals and civil society organisations is more disputed. For more – see: Orend Brian, *Human Rights - Concept and Context* (Boradview Press 2002), Chapter 5: 'Who Bears Which Duties?'; Thomas Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* (Polity 2008).

> a) Systematically identify performance in applying the principles of HRBA; and
>
> b) Ensure accountability for gaps or omissions through legal, administrative, political means as appropriate. This includes procedures for the management of staff, performance appraisal – all the way through to accountability to the rights holders themselves and to the Member States in whose name it acts.'[23]

It seems that the lack of clear accountability mechanisms of the HRBAD is the weakest of the points of the HRBAD. Many reasons for such step can be pointed to, one of them being a political nature of agencies and the competition which is going on between them. Another reason is also the operational/practical incapacity of development agencies to implement this approach which could have automatically given rise to them being held accountable.[24]

The HRBAD to a large extent follows Uvin's proposal on the nature of the nexus.[25] Development serves the attainment of human rights objectives whilst human rights assist in reaching development goals. This elegant manner of blurring the borders seems to be appealing and logical. It has been, however, instantly criticised by both communities – that of human rights and that of development practitioners and theorists.[26] For it seems to be disregarding the de facto 'division of labour' amongst development and human rights actors in which the former deal with social-economic rights whilst the latter with civil and political rights. In fact the 'division of labour' as in Adam Smith's theory is to contribute to the attainment of efficiency of the development process. And indeed, it is claimed, that the rights approach to development trades short-term project efficiency for the attainment of broader goals that are the offspring of the blurring of the borders between the two policy fields. Unlike in needs approach to development, the focus here is on the long-term sustainable results which, just as the mentality of the development community, require time to settle in. As the result, it is submitted, the elaboration of the HRBAD has not changed this arrangement – it has changed the rhetoric of development cooperation in an attempt to bring it closer to the traditional, confirmed at the 1996 Vienna Conference approach to human rights as universal, inalienable and indivisible attributes of every person. It is to be hoped that this approach has not yet undergone change, for the HRBAD contains the operational response to the UN developed concept of human rights which has become unsustainable from the field-work point of view.

On the surface of it, therefore, the HRBAD is a logical consequence of the previous occurrences in the conceptualisation of development and its links with human rights. Yet, if done in rhetorical terms only, it does not lead to substantial changes in the practice of development. At the same time, the blurring of the borders of development and human rights policies strikes directly the interests of the two communities financed from two different sources and specialised in 'delivering' two different types of assistance, conveniently disregarding each other's work, yet doing so as the result of practical, pragmatic, historically justified[27] approaches. It is, therefore, up to development actors and especially the donors to design the financing and programming schemes in such a manner as to incorporate the linked approach into the development design and practice.

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[23] International Human Rights Network, *Human rights based approaches to development in EU external aid policies at* http://www.ihrnetwork.org/hr-based-approaches_180.htm.

[24] See: Mac Darrow and Louise Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', (2009) 103 *American Journal of International Law*, 446.

[25] See: fn. 17.

[26] E. g. Peter Uvin in his *Human Rights and Development* suggests improvements of financing system, but still the responsibility rests in hands of development agencies rather than in hands of governments which predominantly finance them. Peter Uvin, *Human Rights and Development, op.cit.*

[27] See: the division between the social and economic v civil and political rights as the rights whose promotion was undertaken by various regimes before the end of the Cold War - civil and political rights belonging to the domain of the Western powers whilst social and economic were underlined by the Soviet Block.

The value-added of the HRBAD should be, therefore, assessed on three different levels. The first one has to be the rhetorical restatement of practice – after all the change should be rooted in the re-conceptualization of the policy field in line with what the UN has elaborated which in turn, allegedly, corresponds to what legally and politically is feasible. The second level is incorporation of the rhetoric into the legal instruments used in the development practice of donors. Development policy legal regulation (similarly to human rights policy) is characterised by one particularity – namely, the legal instruments employed are somewhat scarce as we are dealing here with foreign policy field. General provisions will be found in international bilateral and multilateral agreements, financing will be regulated unilaterally within the limits of a budget of a donor, whilst enforcement will be left to the agencies and to a great degree outsourced to NGOs. Given this legal design, the UN advocates to members of the development community an inward looking approach. It is up to the agencies (or as in case of the European Union – the European Commission's DG Development – EuropeAid) to ensure that the nexus of development and human rights is observed in all three aspects.[28] The following part of this study offers the general overview of the UN instrumental incorporation of the rights approach to development cooperation.

2.3 The Presence of the HRBAD in the Rhetoric of Development Cooperation

Eight years have passed since the agencies have agreed on what exactly the altered approach to development cooperation actually means. The agreement, publicised as the Statement of Common Understanding,[29] has never been adopted as the official document of the General Assembly or the Security Council (for more on the nature of the Common Understanding – see below), it has, therefore, had the nature of the working document addressed internally at the agencies and the bodies of the UN. Since the agencies gave birth to the meaning of the HRBAD, it is important to trace the rhetoric thereof in order to see whether this approach has been embraced, and the extent its value-added has been noted. As Paul Gready observes:

> 'Firstly, (the RBA) can define and help to shift the terms of the terms of the debate. For development it means reframing it as an entitlement, secured largely through a political and legal contract with the state. For human rights this entails genuinely rather than rhetorically embracing economic-social rights and rights indivisibility, as well as increasing its reach beyond the legal domain and a narrowly defined human rights community. If RBA helps to shape development and human rights in these ways it will have made a very valuable contribution, by sharpening their progressive edge. Further, this makes clear that the value added goes both ways, rather than suggesting the human rights arrives at the door of development bearing gifts. One word of caution is necessary: reshaping of the debate is still in its infancy, and contested by powerful constituencies within development and human rights – in short, its success is far from assured or necessarily deserved.'[30]

The contribution of the rights-based approach to development is, therefore, not to be underestimated even if it is to take place solely on the rhetorical level. Obviously defining the notion was the first step to its presence in the political discourse and to this end served the 2003 Statement of Understanding.

As it was indicated above, the political process, the elaboration and the application of the Human Rights Based Approach to Development has been the offspring of the reform initiated by Kofi Annan in 1997; the reform which took to mainstreaming human rights into the activities of the United Nations Organisation. Paul Gready in his analysis of rights-based approaches to development, noting the

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[28] Thus the adoption of the Common Inter-Agency Understanding in 2003 as to what is actually understood under the notion of the HRBAD.

[29] See: the United Nations Development Programme, United Nations Conference on Trade and Development, United Nations World Food Programme, United Nations Population Fund and United Nations Human Settlements Programme.

[30] Paul Gready, *Rights-based approaches to development: what is the value-added?* Development in Practice *at* http://0-www.informaworld.com.biblio.eui.eu/10.1080/09614520802386454, at 737.

general perception of human rights being in crisis (manifested by the need to mainstream them and incorporate again into the main body of the UN policies), pointed to the new meaning and function of human rights (to which he refers as to the 'globalization driven second human rights revolution'):

> '(...) [H]uman rights has to engage with and is used by a wider range of actors; is locked into new kinds of relationships and governance structures (e.g.: NGO-government relations characterised by partnership *and* advocacy and critique); and is forging new understandings of human rights indivisibility (civil-political and economic-social rights, process and outcomes, engaging multiple levels from the local to the global, top-down and bottom-up approaches, public and private spheres, individual and collective rights, service delivery or emergency responses and structural change) – and in the context of these three changes, is characterised by a struggle *over* the meaning of rights and *for* new rights regime.'[31]

Ultimately, the mainstreaming exercise could be understood as introducing the rights-based approaches to various policy fields. Gready concludes that, as the result, human rights should not be perceived as being in crisis – they are more facing a paradox – of the 'coexistence of profound challenges alongside expansion; and within the expansion, appropriations and counter-appropriations of its meaning.'[32] Rights-based approach provides, therefore, the example of the ongoing appropriation and counter-appropriation process, though it needs to be noted that it is of mutual character.

This is a broader state of human rights context in which Annan's reform set off. Importantly, it was soon complemented by development and institutional commitments introduced as the result of the Millennium Declaration.[33] This parallel process of improving the UN's operations and repositioning the UN on the international stage should, in theory, be a perfect venue for the rights-based approaches to various policies (and, thus, the mainstreaming) to be instituted. In particular, given the focus on poverty, the rights-based approach to development appears a perfect tool for reinvigorating the development action of the UN (which is perceived as diminishing in its volume and importance). And the results of political discourse area appear to be indicative of the UN's approach as that of an organisation to the reconceptualization of the development cooperation as proposed by the HRBAD. This section tracks the occurrence of the HRBAD in the political commitments undertaken as a result of three Millennium Development Goals oriented summits which took place in 2000 (the Millennium Summit), 2005 and 2010.

The first of the documents is the original 2000 Millennium Declaration which sparked off the reform of the UN and mobilised international community to combat thus identified negative phenomena. It has been adopted as the result of the Millennium Summit and it precedes the Statement of Understanding by three years. The Millennium Declaration alongside with the usual confirmation of the values and principles (freedom, equality, solidarity, tolerance, respect for nature, shared responsibility) the UN sets objectives for itself relating to (i) peace, security and disarmament; (ii) development and poverty eradication; (iii) protection of environment; (iv) human rights, democracy and good governance; (v) protecting the vulnerable; (vi) meeting the special needs of Africa; and (vi) strengthening the United Nations. Seven time-bound targets to be achieved by 2015 by the new, global partnership became known as the Millennium Development Goals. The predominant target being eradication of poverty and hunger[34], ensuring universal primary education[35], ensuring gender

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[31] *Ibid.*, 736.

[32] *Ibid.*

[33] United Nations, Resolution Adopted by the General Assembly 'United Nations Millennium Declaration, A/55/L.2', (United Nations 2000), at http://www.un.org/millennium/declaration/ares552e.htm.

[34] Target 1.A: Halve, between 1990 and 2015, the proportion of people whose income is less than $1 a day; Target 1.B: Achieve full and productive employment and decent work for all, including women and young people; at: http://www.un.org/millenniumgoals/poverty.shtml.

[35] Target 2.A: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling; at: http://www.un.org/millenniumgoals/education.shtml.

equality[36], reduce the mortality rate of children below the age of 5[37], ensuring protection of mothers' health[38], combating HIV/AIDS[39], ensuring environmental sustainability[40] are to be attained. It would not take a great an effort to frame the goals in rights terms rather than as economic targets to be reached within the specified time limit. However, the Millennium Declaration remains mute to the possibility of the development cooperation being framed in different terms than that of what is often referred to as charity/benevolence or needs approach. Instead, it underlines the commitment to good governance (para. 13) and right to development:

> 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.'[41]

Simultaneously, the Declaration includes the commitments to human rights (principally civil and political ones, participation, freedom of speech, violence against women, and capacity building). It is clear that the Millennium Declaration depending on the context uses two different discourses – those that traditionally used to belong to the development community, and that of the human rights community. There is no sign that the discourses are to be bridged in any manner. The rights-based approach to development at this stage has not been introduced. Instead – there is right to development which yet again vests power in human rights for the resolution of states and world economy failure, failing, however, to achieve much since it is flawed similarly to the human rights as a tool.

The clear change of discourse is visible in the Final Document of the 2005.[42] There, the members of the UN emphasise the interconnectedness of various pillars of the UN:

> '9. (...) We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.
>
> 10. We reaffirm that development is a central goal in itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.
>
> 11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.'[43]

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[36] Target 3.A: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015, at: http://www.un.org/millenniumgoals/gender.shtml

[37] Target 4.A: Reduce by two thirds, between 1990 and 2015, the under-five mortality rate; at: http://www.un.org/millenniumgoals/childhealth.shtml.

[38] Target 5.A: Reduce by three quarters the maternal mortality ratio; Target 5.B:Achieve universal access to reproductive health; at: http://www.un.org/millenniumgoals/maternal.shtml.

[39] Target 6.A: Have halted by 2015 and begun to reverse the spread of HIV/AIDS; Target 6.B: Achieve, by 2010, universal access to treatment for HIV/AIDS for all those who need it; at: http://www.un.org/millenniumgoals/aids.shtml.

[40] Target 7.A: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources; Target 7.B:Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss; at: http://www.un.org/millenniumgoals/environ.shtml.

[41] United Nations, Resolution Adopted by the General Assembly 'United Nations Millennium Declaration, A/55/L.2'.para 11.

[42] United Nations, 'Resolution Adopted by the General Assembly - 2005 World Summit Outcome, A/res/60/1, (United Nations 2005), at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement.

[43] *Ibid.*, paras. 9 – 11.

Unlike in the Millennium Declaration, the members of the UN have noted the necessity of linking various areas of the activity of the UN – especially in the view of the turbulent post 2001 political context. Interestingly, the UN has noted the role the High Commissioner for Human Rights should play in the process:

> '124. We resolve to strengthen the Office of the United Nations High Commissioner for Human Rights, (...), to enable it to effectively carry out its mandate to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building (...) and we support its closer cooperation with all relevant United Nations bodies, including the General Assembly, the Economic and Social Council and the Security Council.'[44]

Therefore, the office of the UN High Commissioner was to take on the challenge of focusing on the long term capacity building, however, with due regard being paid to other development priority areas. The Summit Final Document refers also to the mainstreaming of human rights in all areas of the UN action (para. 26). It emphasises stronger policy coherence and the fact that 'the main horizontal policy themes, such as sustainable development, human rights and gender, are taken into account in decision-making throughout the United Nations'.[45] Another feature that appears is the approach enforcing the participation of the ultimate recipients of the aid in the development process.[46] Yet, the rights approach to development does not appear even once as the methodology of development practice.

Finally, the last political declaration to be analysed from the point of view of the presence of the HRBAD is the 2010 Summit Final Document.[47] What we find there, is yet again even stronger confirmation of the interdependence of the various UN policy fields (para. 13)[48] What is emphasised is the holistic approach to the pursuit of the Millennium Development Goals (para. 15).[49] Also this document emphasises policy coherence for development (para. 41) and the principle of participation (paras. 36 and 43). Ultimately, what is introduced is the accountability principle not only of the national and international systems of governance (para. 23(n)) but also with reference to the accountability of the development actors in the course of the development process:

> 'We take note of the lessons learned and the successful policies and approaches in the implementation and achievement of the Millennium Development Goals and recognize that with increased political commitment these could be replicated and scaled up for accelerating progress, including by: (n) Working towards greater transparency and accountability in international development cooperation, in both donor and developing countries, focusing on adequate and predictable financial resources as well as their improved quality and targeting'[50] (emphasis added).

Finally, the document emphasises the importance of the human rights as an integral part of the work for the achievement of the Millennium Development Goals (para. 53).[51]

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[44] *Ibid.*, para. 124.

[45] *Ibid.*, para. 169.

[46] *Ibid.*, paras 172 - 175.

[47] United Nations, Resolution Adopted by the General Assembly - 2010 World Summit Outcome, A/res/65/1, (United Nations 2010), at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf.

[48] '13. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights **are interlinked and mutually reinforcing.** We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential for achieving the Millennium Development Goals.' (emphasis added).

[49] '15. We recognize that all the Millennium Development Goals are interconnected and mutually reinforcing. We therefore underline the need to pursue these Goals through a holistic and comprehensive approach.'

[50] United Nations, Resolution Adopted by the General Assembly - 2010 World Summit Outcome, A/res/65/1, para. 23(n).

[51] '53. We recognize that the respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals.'

This brief analysis shows that the rights based approach to development has not entered completely the discourse of the UN; though it would be an overstatement to say that it does not exist there. The analysis shows the gradual inclusion of the principles of the HRBAD – accountability and the rule of law targeted at the development community, participation and inclusion as well as equality and non-discrimination – in the language of political statements made at the UN level. Especially the 2010 Summit Document emphasises the lessons learnt from the ten years long process of the working for the achievement of the Millennium Development Goals. The lessons learnt involve the change in the approach to the development process – the indicators (being obviously at this stage unfavourable for the MDG community) have been overshadowed – what is emphasised is the process which through employment of principles already makes the difference; the difference is not solely an offspring of attainment of the world-wide statistical goal.

In the light of the above and for the purpose of further analysis, two conclusions must be drawn. Firstly, the absence of the direct reference to the human rights based approach to development is indicative. It can be explained by the lack of agreement as to the exact meaning of this approach as well as the inability of predicting its consequences. In any case, however, it confirms Gready's statement on infancy of the debate on the rights based approach to development and the multitude of voices heard in this debate. Secondly, it confirms the inward targeting of the approach – it is somewhat independent of the political processes – it is the community scrutinising itself from this point of view and self-imposing a different, more difficult and complex methodology; on its own responding to political commitments. In this context, the reference to the accountability in international development cooperation gains on importance at least in terms of legitimacy of the whole development endeavour.

2.3 The HRBAD and the Law

As it has been stated above, the HRBAD has not yet found its way to the formal UN legal development framework. Due to the inability to reach conclusion on its exact meaning and the lack of will to subsequently and extensively implement the idea behind the human rights and development nexus, the translation phase of the political commitments into legal instruments and obligations has not yet gone through.[52] For this reason, it is inutile to look for it in the formal resolutions by means of which the ongoing reform process of the UN is conducted. In fact, arguably, apart from the very vague 2005 consensus on the need to mainstream human rights in the activities of the UN, little has been agreed on in terms of modalities of such operation. Though, there is no general definition of what mainstreaming might mean, it can be intuitively understood as bringing the neglected areas considered as cross-cutting ones to the focus of attention at every level of this policy making. Given that human rights, especially in the violent contexts of regime abuses or that of deeply rooted constitutional structure of states, remain by all means a political issue, the agreement on the extent to which they can be mainstreamed has not been achieved. Ultimately, as described by Louis Arbour and Mac Darrow, they have been 'crossed off and cut out'.[53]

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[52] Louis Arbour and Mac Darrow give examples of the TCPR and SWC negotiations to reach agreements on translation of specific commitments into specific actions. Arbour, *op.cit.,* 482-483. This gap has been noted and many scholars postulate the exploitation of potential of the legal human rights commitments in the practice of development pointing to the widely described value added of such approach: Siobhán McInerney-Lankford, 'Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective', (2009) 1 *Journal of Human Rights Practice*, ;Brigitte I. Hamm, 'A Human Rights Approach to Development', (2001) 23 *Human Rights Quarterly*, 1005 – 1031; Gready, *op cit* ;Maxi Ussar, *The Human Rights-based Approach: A more Effective Framework for International Development Policies in New EU Member States* Policy Paper *at* http://www.minorityrights.org/10768/briefing-papers/the-human-rightsbased-approach-a-more-effective-framework-for-international-development-policies-in-new-eu-member-states.html, contributors to Philip Alston, et al., *Human rights and development : towards mutual reinforcement* (Oxford University Press 2005).

[53] Arbour, *op cit,* 448-449.

It seems that, from this point of view, the HRBAD in the form in which it has been developing since 2003 can be considered a response to the political and legal impasse. As such it does not provide answers to all questions, neither solutions to all problems. Above all it suffers from the lack of the UN wide consensus as to the form of the bridge between human rights and development which at the moment of crisis might impair the purely economic and relief development process. Put in a more straight-forward manner - if development activity is dependent on the consent from the local government, the lack of consent might lead to cutting off the development cooperation. On the other hand, operating with the consent of the government that abuses human rights diminishes the legitimacy of the donor or agency.[54] This somewhat conditionality bound concerns have been faced by the HRs and development actors working in the field (Arbour and Darrow provide a number of examples of full and lack of support for resident coordinators on the part of the UN[55]), yet no sustainable solution has been elaborated so far. That is why the HRBAD, with conceptual foundations incorporated by political declarations which are more and more favourable for its principles, allows the agencies to work out their own way of pursuing the human rights and development objectives with human rights and development means, yet in a very flexible, project oriented manner.

The very Understanding is very indicative thereof. Adopted in 2003 as the result of the Inter-Agency Workshop, it sets out general principles on the content of the human rights based approach to development.

In the absence of the HRBAD in legal instruments of the UN, the true potential of the HRBAD should present itself at the ultimate level of its application – in the implementation phase. Therefore, the final area for analysis brings us to how the agencies have developed and incorporated the concept of the HRBAD into their own practices.

2.4 The HRBAD Implemented

The OECD in its report has rightly pointed out that the integration of human rights into development requires facing a number of challenges; including the weak human rights capacity; the aid effectiveness process, and the institutionalisation of human rights considerations into development practice. In fact the latter of the challenges seems to be the most important at this stage as it is the source for the fulfilment of the other two:

> '(...)aid agencies need to deepen their institutionalisation of human rights considerations, looking at their systems, procedures and staff incentives and allocating adequate resources to better translate their policies into practice. Several factors contribute to success in this area: a supportive international and domestic political context; senior-level commitment, accountability and communication; a strengthening of staff capacities and incentives provision of new tools and procedures; and adaptation to a decentralized context. (...)' [56]

The OECD, therefore, named the areas with reference to which actions must be taken for the internal implementation of the HRBAD. Only through addressing them, the policy coherence in this area as well as the aid effectiveness can be achieved, not to mention the internal capacity building for the purpose of the addressing human rights concerns by agencies. We have analysed the 'supportive international and domestic political context'. The implementation process of the HRBAD concerns the remaining factors outlined by the OECD that belong to the realm of internal management of the agencies. Senior-level commitment, accountability and communication; a strengthening of staff capacities and incentives provision of new tools and procedures; and adaptation to a decentralized

[54] See also: *ibid*., 447.

[55] *Ibid.,* 451 – 461.

[56] OECD, *op cit*, 21-22.

context. The institutionalisation of the all of them should appear with referents to three types and levels of implementation of human rights dimension into development processes: projects, country programmes, and global initiatives.[57] [58]

The institutionalisation of the development human rights nexus has begun with establishment by Kofi Annan in 1997 the United Nations Development Group – one of the pillars of the Chief Executives Board designed to coordinate the work of different agencies of the UN working on social and economic issues.[59] It is under the auspices of the UNDG that the major effort for ensuring coordination, coherence and efficiency of the 32 UN agencies have been mainly conducted. The underlying goal is to strengthen the UN national Resident Coordinator and the UN Country Teams role in order to enhance the perception of the UN agencies acting as one in a single country and to enhance the accountability for actions attributed to a single officer. Within this context the UNDG has been the leading body to develop the HRBAD to be adopted across the UN agencies and has been responsible for the research and subsequent Inter-Agency Understanding on the HRBAD adopted in 2003.

It was the UNDG that has developed, firstly the Action 2 programme,[60] which has subsequently been transformed into the human rights mainstreaming mechanism (UNDG-HRM). The concept behind the UNDG-HRM has been explored in the document of 12 November 2009 entitled 'Delivering as One on Human Rights – a proposal to institutionalise human rights mainstreaming in the UNDG'[61]. The initiative has been established as the response to demands on the part of the Resident Coordinators and Country Teams as to the better guidance on rights-based approaches to development in the absence of specific operational provisions as present i.e. in the Triennial Comprehensive Policy Review (TCPR). Hence, the discussions have been initiated under the auspices of the Secretary's General Policy Committee which lead to a policy decision on his part confirming the centrality of human rights in the UN activities and in development context relations with partner states. The Secretary assigned further role to the OHCHR[62] and the UNDG Chair to further explore modalities for enhancing the coherence in the mainstreaming of human rights on the operational level. As the result of the work of the Inter-Agency Workshop on Implementing a Human Rights Based Approach[63], and lessons drawn from previous practices, a new agreement has been made on the institutionalisation of subsequent efforts – including training activities, strengthening accountability traces etc.

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[57] *Ibid.*, 40. For example, HURIST, the UNDP-OHCHR Global Human Rights Strengthening Programme, had as objective strengthening human rights dimension in the UNDP. Subsequent evaluation concluded that the HURIST contributed significantly to creating the UN HRBAD.

[58] *Ibid.*, 38-39.

[59] The origins of this body reach 1946 when the Economic and Social Council in resolution 13 (III) requested the Secretary General to create a body of a standing committee of administrative officers that was supposed to deal with coordination of the activities undertaken by the UN agencies. It was established as the Coordination Committee, whose name was subsequently changed to the Administrative Committee on Coordination (ACC).

[60] See at: http://www.undg.org/index.cfm?P=1393.

[61] See at: http://www.undg.org/docs/11744/UNDG-proposal-on-HR-mainstreaming.pdf.

[62] United Nations Office of the High Commissioner for Human Rights, 'Claiming the Millennium Development Goals - a human rights approach', (United Nations 2008), http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf.

[63] The Third workshop took place between 1-3 October 2008. It had the following objectives: (1) To take stock of where the UN system and its development partners have come to in conceptualizing and implementing a human rights based approach to development cooperation, at programming and policy levels; (2) To consider how a HRBA can further strengthen the foundations for UN system-wide cooperation, in the context of newly agreed 'five key programming principles and thematic issues' that must be applied for UN common country programming as provided in the 2007 CCA/ UNDAF guidelines; and (3) To propose elements and options for interagency coordination arrangements on human rights mainstreaming. Source and further documents available at: http://www.undg.org/index.cfm?P=763.

> '(...)[A]id agencies now need to push for the integration of human rights into thinking and practice around new aid effectiveness processes, instruments and modalities of aid delivery. Techniques that contribute to the Millennium Development Goals (MDGs) include linking the goals to specific human rights standards, drawing on the Millennium Declaration, which makes explicit reference t human rights; and adopting human rights based approaches towards meeting the MDGs.' [64]

The HRM is supposed to address each of the components of the 2003 defined HRBAD and to promote specific actions to be undertaken by the agencies under the umbrella of the UNDG. With relation to all the three approaches behind the HRBAD, the specific actions refer to providing policy guidance, distributing the pilot training courses, as well as the UN developed management systems and tools, strengthening capacity on local and regional level. The only area of the initial HRBAD architecture that has not been addressed in the proposal of the UNDG-HRM was the accountability dimension of the individuals and the agency. All in all the UNDG is driven by two strategic objectives – that of maximising impact on country level whilst at the same time developing the UN capacity of maximising impact on country level.[65] It is under the UNDG-HRM that initiatives for the rights based approaches were undertaken to be further processed for the use of particular agencies consorted under the UNDG. Within those initiatives the UNDG provides Guidance Notes on Guidance note for UN country teams on Special Procedures and Treaty Bodies (May 2005), Guidance note for the UN country teams in establishing theme groups or other appropriate mechanisms on human rights (May 2005). Above all, the UNDG elaborated the training package of June 2007 for all agencies[66] that has subsequently been implemented by each of them in turn. Finally, it is the UNDG that is behind the creation of the portal for practitioners on human rights approach: http://hrbaportal.org/.

The examples of the agency specific human rights based approach manuals are numerous. It is enough to mention the UNDP documents and training package 'A Human Rights-based Approach to Development Programming in UNDP – Adding the Missing Link',[67] or that published recently by the United Nations Populations Fund ('the UNPF') – 'A Human Rights Based Approach to Programming - Practical Implementation Manual and Training Materials',[68] Both manuals involve elements of the HRBAD as defined by the 2003 understanding. For example, there is a call for Rights Sensitive Participatory Assessments[69] which would take into consideration the perception of right-holders on the situation in the place of their inhabitation. On the level of analysis, the UNDP is supposed to take into consideration the obligations resting on duty-bearers to protect, respect and fulfil[70] particular rights

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[64] OECD, *op cit*, 21-22.

[65] UNDG, UNDG Strategic Priorities for 2010-2011; see at: http://www.undg.org/docs/11368/UNDG-Strategic-Priorities-for-2010-2011.pdf.

[66] UNDG, HRBA Common Learning Package (CLP), see at: http://www.undg.org/index.cfm?P=1447.

[67] UNDP, 'A Human Rights-based Approach to Development Programming in UNDP – Adding the Missing Link ', in (United Nations, 17 May 2006), 11.

[68] United Nations Population Fund, *op cit*

[69] The United Kingdom's Department for International Development has been working on Rights Sensitive Participatory Assessments Methodologies. They were also used in Uganda - "Uganda Participatory Poverty

Assessment" and South Africa - "Speak Out on Poverty Hearings". *Ibidem*, 11.

[70] The father of tripartite typology of obligations of human rights actors was Asbjørn Eide who introduced the concept when serving as Special Rapporteur to the UN Sub-Commission. See: United Nations, The Right to Food as Human Right, 7 July 1987. He presented the three obligations resting on duty-bearers in the following terms:

'The obligation to respect requires the State to abstain from doing anything that violates the integrity of the individual and infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs.

and to look from perspective of those rights on the development practice. The UNDP, for instance, pointed to the fact that most probably devising a new methodology is not necessary; they indicate that under the auspices of the UN what was referred to as "meaningful participation" has already been developed.[71] Interestingly enough, the documents do refer to the accountability principle, yet in very vague terms. The UNDP emphasises the role of accountability for achievement of human rights and development goals, however, inwardly looking, points only to the assessment as providing the criteria of accountability.[72] The 2010 Manual of the UN looks more into the accountability of the actors in the development process, specifying what accountability means at different stages of the development process.[73] The general development of the accountability framework has been conducted by the United Nations Evaluation Group ('the UNEG') that brings together units responsible for evaluation of the UN actions. The UNEG has developed standards and norms for evaluation[74] as well as the peer-review methodology within international organisations.[75] The UNFP and the UNDP refer their standards of accountability to the norms of the UNEG.

In sum, the elaboration of the human rights-based approach to development has been left to the UN agencies who have been developing them on the both UN level under the umbrella of the UN Development Group thus contributing to the UN policy coherence for development. At the same time, the work of policies adjustment to the needs of particular agencies (shown by the UNPF manual that has focused on the gender and culture programming with the focus on the HRBAD) has been ongoing. Simultaneously, the UN has been conducting its own internal reform developing its own internal use of accountability and standards of evaluation – this time elaborated under the umbrella of the UNEG – and focusing on the internal accountability characteristic of internal management structures. The question obviously remains, whether this level of fragmentation contributes to the attempted attainment of objectives.

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The obligation to protect requires from the State measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the prevention of infringements of his or her material resources.

The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts.' (See: Asbjorn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach', (1989) 10 *Human Rights Law Journal*, 36-51, 37)

[71] UNDP/CSOPP Documents in collaboration with UNDP International NGO Training and Research Centre (INTRAC), Empowering People; A Guide to Participation, 1998.

[72] *Ibid.*, 11.

[73] 'Accountability systems require: clear roles and responsibilities; transparent decision-making processes and decision criteria; access to information; and effective mechanisms to demand accountability.

Accountability should be established at the different levels of programming. It requires enforcement and the opportunity for recourse where duties are not met. This requires building the capacity of duty-bearers (e.g. the government) so that systems of accountability and redress exist, as well ensuring that you and your organization are accountable to the people and governments that you serve. However, for accountability to be effective, it needs to be demanded. Therefore a human rights-based approach also requires an analysis of the capacities needed for rights-holders, especially the most disadvantaged, to claim their rights effectively.' United Nation Population Fund, *op.cit.*, 80.

[74] Available at: http://www.uneval.org/normsandstandards/index.jsp?doc_cat_source_id=4.

[75] Available at: http://www.uneval.org/papersandpubs/documentdetail.jsp?doc_id=945.

2.5 The HRBAD at the UN – Final Observations

The overview of the HRBAD methodology as present in the UN discourse, law and implementation mechanisms leads to a number of conclusions which will inform subsequent analysis of the EU practice.

Firstly, the closer scrutiny of the documents presented here as examples of the HRBAD in the implementation phase leads to a somewhat surprising finding. In the vast majority of documents, apart from basic textbook guidance on how to use the human rights at various stages of programming, one will find two chapters – the first one presenting the international human rights regime; and the second one focusing on the value-added of the rights-based approach to development, convincing the practitioners to the use of this methodology. This confirms the earlier quoted statement by Gready – the rights-based approach discourse is in its infancy, and in the stage of its creation. The statement is true to an extent in which the boundaries between earlier mentioned levels of engagement of human rights with development become very blurred with concepts very often escaping methodologies of thorough analysis. [76] The OECD distinction, even if deemed as inaccurate, is only a sample of confusion of what the nexus might mean and which of its facades correlates to the currently promoted approach to development. From this point of view the HRBAD as the most advanced methodology distinguishes itself well against other forms of inclusion of human rights into the development cooperation. Yet, it remains a process-in-the-making and as such is treated by actors contributing to its elaboration. It remains to be seen whether the experimentation phase undertaken by the agencies and the UNDG will succeed in convincing the development practitioners as to the value of incorporation of the human rights-based approach.

This leads us to the second conclusion. So far, so good – over the eight years the development community of the United Nations has taken the commitment to the HRBAD seriously which is somewhat surprising given the lack of the constantly present strong political and legal incentive to do so. At the same time, the lack of the reliance on the legal and limited reliance on political instruments signifies that the introduction of the HRBAD is paramount to the internal change of the development community and the development paradigm. One could risk the hypothesis that the institutionalisation of this conceptual change, facilitated by the creation of the UNDG, is more the act of the internal organisation governance, rather than introduction of the high-level politically burdening commitments. The lack of legal international law instruments have been swapped for internal management strategies to be evaluated in line with the general accountability principles for international organisations. Obviously, it is too early to determine whether the approach has actually changed the practice or whether the UN development organisms have only undertaken the process of repackaging.[77] In any

[76] See: The UNDP Report on Human Development which points to the following as goals: launching national independent assessments of human rights, align national laws with international human rights standards, promote human rights norms strengthen a network of human rights organisations, promotes a rights-enabling environment. Out of the four thus indicated goals only the last one brings the added value of HRBAD to the light, yet it refers to the end-product of the development process and partially the process itself. See: UNDP, 'Human Development Report 2001', in (Oxford University Press, 2001), 112. The analysis of the added value of the HRBAD can be found apart from the UN manuals in *i.a.* Thomas W. D. Davis, 'The Politics of Human Rights and Development: The Challenge for Official Donors', (2009) 44 *Australian Journal of Political Science*, Gready, *op.cit.* , Andrea Cornwall & Celestine Nyamu-Musembi, 'Putting the "rights-based approach" to development into perspective', (2004) 25 *Third World Quarterly*, ;Hamm, *op.cit.*

[77] The OECD noted also the threat of repackaging of any intervention as a rights-based one just because a part of the HRBAD is being employed: 'Such interventions need to be related to specific state obligations in order to be categorised as contributing to realisation of human rights.

The UN Interagency Common Understanding of a HRBA offers a useful framework for elements which are *unique* and clearly linked to the human rights framework, and others which are *essential* but shared with other perspectives and more commonly found in development. Unique elements include using recommendations of international human rights bodies and mechanisms, assessing the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations, and developing strategies to build these capacities. Essential elements include, for example, recognising people as key actors in

case, the practice of development as undertaken by the UN would need to undergo a very close and elaborated scrutiny by academics in order to determine whether the window dressing has actually taken place. Yet, if the hypothesis proved to be true, we would be witnessing the first case of critical transformation of the role of human rights going beyond the international human rights protection regime, being not only instrumental for achievement of various policy goals, but providing also foundations for other policies in general. Therefore, the HRBAD would be a pilot project for any other policy, and the assessment thereof would prove critical for further establishment of human rights approaches not only on international, but also national and local levels.

This, thirdly, allows for development of the coherence amongst various policies stemming not only from conceptual uniformity as developed by the agencies work, but also the mode of elaboration of guidelines, manuals and evaluation patterns.

Those general conclusions set a background to the subsequent analysis of the presence of the HRBAD in the EU development practice. In the second part the trickling down effect of the UN policies will be analysed with the view that the EU as the organisation is a separate entity from the UN, bound with the latter secondarily *via* the membership of the EU Member States in the UN. In this respect, the EU remains independent inasmuch it creates its own approaches and commitments frequently going beyond what the international community would require.

3. Human Rights and Development – The EU Normative and Operational Follow-up to the UN Methodology

Whenever acting outside of its borders, the Union proudly announces its goals and objectives pointing always to the international sources for specific policies' objectives and the forms they take. It is particularly true for areas in which the EU did not use to have competence (i.e. competence was acquired alongside with the widening and deepening of the Union) and/or in which it enjoys shared competence with its Member States. In those areas (e.g. development, environment, human rights, intellectual property etc.) the EU underlines international obligations and commitments stemming from international political forums (to which its Member States are parties or the Member States and the Union as an organisation), adding thus to legitimacy of its, frequently extensive, actions and regulations in the field.

The formulation of the development policy and the incorporation of human rights concerns therein has been one of the source from which the EU draws legitimacy for its actions in the external realm. This is true for both policy fields, the human rights one which has been a EU matter since 1992 and the development one which has been pursued alongside with the EU Member States throughout the EC and the EU's existence. In incorporating human rights concerns the EU is, therefore, to a certain extent constrained to act; with constraints reflecting not only its legal setting, but also the distribution of interests and focal points in external policies of the EU Member States.[78] Especially, when contrasted

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their own development (rather than as passive recipients of commodities and services), and valuing participation, empowerment and bottom-up processes, generally considered good programming practices.' OECD, 60-61.

[78] The OECD when summarizing the rationale of agencies' actions states: 'Donor agencies do not endorse rationales put forward for working on human rights and development to the same degree. Some agencies point to legal constraints. For example, some are concerned that there may be conflicts with their mandate if they work explicitly on human rights and cite states' legal obligations. (...) Legal constraints are often related to political ones. Domestic political environments in donor countries may be less conducive to grounding aid in an international human rights framework. For example, Sweden's global policy, which requires that a "rights perspective" be integrated into all aspects of foreign policy (including aid) contrasts with that of the United States where there is a more selective endorsement of the international human rights framework (...)

Even in such circumstances, aid agencies have still been working either on aspects of the human rights agenda (either narrowly on civil or political rights, or without using an explicit human rights language), or are currently considering how to adapt their policy frameworks. Processes of stocktaking or mainstreaming of human rights work (without an overarching policy) are some of the entry points.', *ibid.*, 31-32.

with the UN environment, the analysis of the EU's development policy needs to take into account two specific characteristics of the EU.

Firstly, in the area of the development policy the EU wears a double hat. On the one hand, the EU acts as independent donor and norm creator within the realm of its own development policy. And as such, it is not legally bound to the UN approach to development. Not being a member of the UN, its status at the UN has for a long time been passive. Only recently, as the result of the Resolution A/65/L.64 Rev.1, it has become a special observer with a right to vote and express its opinion.[79] On the other hand, due to the treaty-based design of the EU, as well as the duty of cooperation and the proclaimed commitment to the policy coherence for development, it performs the same function as the United Nations Development Group towards its Member States and their aid agencies and the EuropeAid. It should, therefore, play the role of coordinator of approaches, looking for best practices and trying to incorporate them at the European unifying and coherence-seeking level. In performing those two functions the EU is, however, limited by the will of its Member States and subsequently by the legal design of its competences and the instruments which are available to it in pursuing goals of the development policy.

Secondly, the EU, though similar to the UN inasmuch as it is a donor and norm-creator, is, in fact an organisation of a different, substantially more varied character. The Treaty distinguishes twenty-four policy fields in which the EU is active. This has a number of implications. Firstly, unlike the UN, the external policies of the EU in the areas of trade, agriculture, environment may, in fact frequently do, even if not in an open manner, conflict with the goals of the development policy. This may not be completely true for the area of human rights policy, yet the conflict becomes visible if viewed from the perspective of the human rights conditionality present in any external EU collaboration instrument. Secondly the incorporation of new approaches (like those elaborated by the UN concerning its three pillars) is a longer and less visible process which focuses largely on maintaining horizontal coherence amongst those fields. In the course of the past ten years during which the UN has developed its current policy framework, the EU was facing a multitude of challenges – these were connected with, but not limited to, global security threats, financial crisis etc. and encompassed a wide variety of policy fields. It is understandable, therefore, that the internal coherence of the system is desirable and looked after. Therefore, it could be claimed, the EU's innovative potential lies more in its common practice of addressing the policy fields in such a manner as to achieve a certain level of both internal (thus horizontal and vertical with the MS) and external coherence (thus fitting the EU in the international realm).

These preliminary observations lay the foundations for the subsequent analysis and refer to the underlying enquiry whether the EU is an imitator or an innovator to further questions related to the UN developed framework for the HRBAD. And thus firstly, we need to ask - does the EU follow the UN approaches? If so, what type of instruments are employed? Is the EU simply changing the rhetoric of its policies, or does an actual change in instruments and law follow? If there is a change, what is the extent of innovation (if any) created by the Union? If there is no change, how is the development on the UN level visible in EU policies and implementing devices? Can and, if so, to what extent the UN related claim for having two – normative and operational - agendas[80] be justified in the case of the EU?

In order to answer the outlined questions, similarly as in the case of the UN, the rights approach to development will be traced on the level of policy declarations; law and implementation (thus

[79] United Nations, Resolution adopted by the General Assembly on Participation of the European Union in the work of the United Nations, A/RES/65/276, (United Nations 3 May 2011), at

http://www.unbrussels.org/images/pdf/2011/A_RES_65_276.pdf.

[80] There is an ongoing discussion in the UN institutions and especially in the UNDP about the extent to which the UN is capable of making its normative claims visible in its work in the field. For more on the subject see: Arbour, *op.cit.*

operational level). This type of analysis will help in defining the role of the Union as that of a mere imitator – an actor following edicts issued at the international level; or that of an innovator – a true standard setter in the fields which, supposedly, are its priority.

3.1 The Political Discourse on the Rights-based Approach to Development

The recent years have marked a breakthrough in the EU development policy. The European Consensus on Development[81] has been regarded as a great step forward allowing the EU and its Member States to finally speak with one voice. It was preceded and complemented by the 2005 Communication of the Commission 'Policy Coherence for Development'[82] which emphasised the need for synergies in eleven areas[83] with no mention of human rights. Subsequently, the 2009 Communication of the Commission ' Policy Coherence for Development - Establishing the policy framework for a whole–of–the-Union approach'[84] was adopted. All of those documents refer to the prioritisation of particular policy areas and ensuring their coherence within the EU system for the purpose of development policy goals attainment.

For example, reiterating the Millennium Development Goals, the European Consensus on Development took the eradication of poverty as its aim. It emphasises the general principles of the EU external action - partnership and dialogue with third countries will promote common values of: respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, the rule of law, solidarity and justice. Subsequently, the Policy Coherence for Development Communication emphasises the role of partnerships. The EU institutions have emphasised the EU's commitment to multilateralism as an effective means of introducing changes.[85] The development policy of the Union, as off adoption of the European Consensus, is supposed to be based on the following principles: ownership[86] and partnership; political dialogue; participation of civil society; gender equality; commitment to fragile states.[87] Human rights in the EU development policy appears as one of the four 'cross-cutting issues'[88] thus corresponding to a high degree with the structure of the Millennium Development Goals.

Similarly to the UN documents, the official policy statements do not refer explicitly to the concept of the Human Rights Approach to Development. As mentioned above, human rights are described more as the cross-cutting issue of all external policies of the European Union – including that on

[81] Council European Parliament, 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 of 24 February 2006: "The European Consensus" - The European Consensus on Development, OJ 2006 C 46/1.

[82] European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 12 April 2005 - Policy Coherence for Development - Accelerating progress towards attaining the Millennium Development Goals, COM(2005) 134 final.

[83] Trade, environment, security, agriculture, fisheries, social dimension of globalization, employment and decent work, migration, research and innovation, information society, transport and energy.

[84] European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions of 15 September 2009, Policy Coherence for Development - Establishing the policy framework for a whole–of–the-Union approach, COM(2009) 458 final.

[85] Ibid., 3.

[86] Which, in the UN terms refers to participation.

[87] *Ibid.,* 3 – 5.

[88] Apart from human rights, the cross-cutting issues on the EU level feature: environmental sustainability, gender equality, combating HIV/AIDS.

development and trade – and, thus, the fundamentals of any EU external action. Though they are mentioned explicitly in the European Consensus on Development, the content of what 'cross-cutting' means has not determined.[89] Instead, firstly, in paragraph 53 of the document, the general commitment is defined: '(...) the Community will promote democracy, human rights, good governance and respect for international law, with special attention given to transparency and anti-corruption'.[90] Subsequently, the document echoes the human rights reform conducted on the United Nations level: in all activities, the Community will apply a strengthened approach to mainstreaming the cross-cutting issues, including, therefore, human rights. The cross-cutting issues are understood as objectives on their own and vital factors in strengthening the impact and sustainability of cooperation (para. 101). In the context of human rights, this statement the usual focus of the debate on what is the role of human rights in relation to development policy objectives.

The overview of the most important documents referring to the development practice of the European Union, demonstrates that the rights-based approach to development has not found way explicitly to the EU approach towards the development. The two quoted mainstreaming innovations on the EU level have not even mentioned the elements of the HRBAD. There is no call for distinguishing rights holders and duty-bearers; human rights thought of cross-cutting character are only addressed from the governance perspective under the European Initiative for Democracy and Human Rights - they are not mentioned in the context of other eleven areas identified in 2005. The issues of accountability of development actors, nor the focus on the process, have been mentioned. On the face of it, it should be stated that the European Union has largely neglected the appearance of the rights-based approach to development. Yet, given the earlier made observations as to the need for maintaining coherence of development with other policy areas of the European Union, the political discourse presents itself in a more complex manner.

Partially anticipating the discussion of the section devoted to implementation phase at the EU level, it can be said that the EU system of aid delivery has intrinsic elements in which rights-holders and duty-bearers are recognised as the pre-condition; it is the system in which aid is delivered through sector and project approach, each of them realised within the country strategy. In delivering the development aid particular emphasis is placed on the involvement of civil society organisations which are not only implementing aid, but which with time have won the position of development partners.[91] Thus each process of delivering aid to a particular state starts with identifying target groups, and corresponding civil societies organisations which are eligible for participation in a particular call. In the EU practice there has been always the emphasis on partnership and participation of local communities (referred to as local ownership of a project) in the process of aid delivery which is confirmed by a variety of communications issued by the European Commission and political declarations as quoted above. Thus the first constitutive element of the human rights based approach to development understood as identification of rights holders and duty bearers and creating the link with existing concrete human rights commitments is not completely absent from the EU development discourse. The wide range of actors eligible for participation in funding include local authorities, NGOs, local associations; in a

[89] Threatening substantial notions with being, in the word of Louise Arbour and Mac Darrow, 'crossed off and cut out'. See:*op.cit.*, fn 53.

[90] Article 3(5) (Ex. Article 2) *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.*

[91] Valentina Bettin, 'NGOs and the development policy of the European Union', in Pierre-Marie Dupuy & Luisa Vierucci (eds), *NGOs in international law : efficiency in flexibility?* (E. Elgar, 2008); European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Local Authorities - Actors for Development, SEC(2008)2570, in 2008.

word, any form of societal organisation involved with working in the field for a specific community.[92] Here we see both rights-holders and duty-bearers working on a concrete right area. [93] What is missing is the reference to a concrete right which is usually not specified by the call, but at the same time guarantees flexibility and enables the participating actors to define the most pressing, from their perspective, right to be addressed. It requires active role on the part of grant beneficiary. On the other hand, the human rights informed process and accountability are the parts truly missing in the EU discourse of the development cooperation. This having said, it has to be recalled, that this part of the HRBAD has been left to the internal regulation of the UN agencies and subsequently has been moderately developed in the UN political discourse.

3.2 Incorporation of the Rights-Based Approach to Development in Legal Instruments of the EU

The European Union has undergone an extensive process of a constitutional reform in the past ten years resulting with the adoption of the Treaty of Lisbon. This, unlike in the case of the United Nations, could have made it possible for the European Union to incorporate new approaches, lie down basis for further developments in many areas including human rights and development as well as creation the nexus between the two.

As far as the human rights policy of the European Union is concerned, it has, undoubtedly gained on weight internally with the upgraded status of the Charter of Fundamental Rights and the accession of the EU to the European Convention of Human Rights. At the same time, in the external sphere – thus pertaining to *inter alia* the development policy – the status of human rights remained unchanged. Obviously, the impact of the former field on the external one cannot be underestimated inasmuch fundamental rights constitute general principles of the EU law, and are present in the external dimension of the Area of Freedom, Security and Justice, whilst the EU becomes accountable for its acts before the European Court of Human Rights. Nevertheless, the direct change of treaty provisions has not been significant as far as the concrete Treaty provisions are concerned.

What is interesting, however, is the relationship between human rights and objectives belonging to the sphere of development policy. Article 3(5) TEU (ex Article 2) makes a reference to the EU which is to 'uphold and promote' its values in relations with the wider world, whilst contributing to sustainable development of Earth, eradication of poverty and protection of human rights, aside from participating in the attainment of peace and security and upholding the UN principles. The same bases are identified subsequently in Article 21 TEU providing the general 'value' framework for the Union's action – framework which is to underlie any external EU policy. There are two observations to be made. Firstly, what we see in the Treaty of Lisbon is the sign of equality between contribution to eradication of poverty (thus, the development goal), protection of human rights, and security objectives. The close tie reflects the three pillars of the UN (peace and security, development and human rights)[94] which historically have never been predominant spheres of the EU activity. The 'underlying values' and 'contribution to' approaches echo this historical fact. Effectively, the EU through its endeavours does not strive for ensuring that the objectives of peace and security, development, and human rights are to be completely fulfilled – it is rather focused on making sure that efforts on its part are visible even if not totally successful and/or efficient. As such, the EU positions itself as a follower in those extremely important areas. Such conclusion is specifically confirmed in the area of development policy where

[92] For examples see the Funding Website of DG Development and Cooperation - EuropeAid: http://ec.europa.eu/europeaid/work/funding/index_en.htm.

[93] See: Guidelines on good practices on Principles and Good Practices for the Participation of Non-State Actors in the development dialogues and consultations, in Commission Communication Governance In The European Consensus On Development Towards a harmonised approach within the European Union COM(2006) 421 final.

[94] Arbour, *op.cit.*

the Treaty imposes on the EU the obligation to comply with the actions of the UN and other competent international organisations (Article 208(2) TFEU: 'The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.').

As far as the internal design of the EU and Member States competences is concerned, Article 4(4) TFEU leaves no doubt as to the nature of competences in the area of development policy – they are shared. What is more, the Treaty clearly states that the competence is not a pre-emptive one: exercise of that competence shall not result in Member States being prevented from exercising theirs (Article 4(4) TFEU second sentence). Further, the Treaty states in Article 208(1) TFEU that (t)he Union's development cooperation policy and that of the Member States complement and reinforce each other. It seems natural that the duty of coordinating those policies should rest on the Union, especially that already in the Treaty text points to the role it has assumed in pursuing its development policy – it is the role of eradication of poverty in the long terms[95] which provides a clear signal to Member States about how the complementarity of efforts should be developed. Article 210 TFEU (ex. Article 180 TEC) gives some more indication on how the complementarity of undertaken actions should be approached:

> '1. In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.
>
> 2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.'

The clear duty of cooperation of Member States and the EU with respect to the development policy – human rights is thus closely connected with the vertical coherence of the policy, which in the area of development has become the true challenge, not likely to be met in the near future.[96]

Finally, the Treaty indicates the political and legal instruments which can be taken for the attainment of the development objectives. The country programmes are to be the framework for the cooperation to be achieved through international agreements and measures to be adopted under the ordinary legislative procedure (Article 209 TFEU). One should imagine that given Article 21 TEU commitment to human rights in external sphere of activities, the commitments and measures should take into account those instruments. It is true that human rights are visible in instruments used in the EU's foreign policy; their use is varied, yet, explicitly, they are far from referring to the rights approach to development. Specific legal instruments adopted by the European Union are usually multi-purpose, aiming at achievement of many goals connected with various policy fields. We are talking here of international agreements of all kinds – those setting up framework for cooperation,[97] pertaining to particular areas of cooperation (i.e. trade and investment); unilateral measures adopted usually in the form of regulations – those concerning modalities of cooperation[98] and financial instruments[99]. The

[95] It is true at the same time that the prioritization of this particular area of development policies (following the UN example) will have no more than political implications as soon as one refers to policy and legal documents which stress interdependencies of poverty eradication policies with all imaginable aspects of development policy. In the end it seems that poverty eradication is both a means and a goal to achievement other development policy goals.

[96] See for instance: Maurizio Carbone, *Policy Coherence and EU Development Policy* (Routledge 2009).

[97] Example from development area: Cotonou and CARIFORUM agreements: Partnership Agreement between the Members of the African and Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part made on 23 June 2000, OJ 2000 L 317/3;Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, of 15 October 2008, OJ 2008 L 352/3

[98] Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission

last group of instruments remains outside of the purely legal realm and belongs to the soft law area used especially in the European Neighbourhood Policy – referred to as 'action plans'. Human rights commitments are included in those elements either in a form of conditionality clauses of international agreements[100] or GSP+,[101] or the so-called governance approach to human rights as visible in the EIDHR and action plans. As the International Human Rights Network[102] reports, the use of the human rights language instruments by the European Union in its documents is not always explicit enough, accurate and consistent.

With reference to the analysis of accountability on the EU level, the same problem appears as with respect to the United Nations. Also at this level there is not much that can be said about what this accountability may mean. Does it mean political and managerial accountability of development actors in the field? If it is to be a political accountability, then to whom? The EU towards its Member States? If so – it does exist and is even reinforced to the Member States being able to file the claim before the European Court of Justice with reference to the instruments being adopted. Obviously it is a completely different problem whether there is an appeal to such a strong, legal accountability in practice, whether the European Union and its Member States are interested in developing this type of accountability. After all, the internal struggle between the Union and its Member States about the scope of their competences and the limits thereof might make the accountability of actors very

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Regulations (EC) No 964/2007 and No 1100/2006 eg OJ 2008 L 211/1 – the GSP system is under review; in this form it is supposed to remain in force until 1 January 2004.

[99] Example: Regulation (EC) No 1889/2006 of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/1.

[100] In this context best example is provided by the Cotonou Agreement both in its preamble: *REFERRING to the principles of the Charter of the United Nations, and recalling the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees*, and the human rights clause (Article 9):

> *1. Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.*
>
> *2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women* (emphasis added).

[101] The Generalised System of Preferences conditions participation of the special incentive scheme upon the adoption by beneficiary states of a series of UN/ILO conventions of human rights included in Annex III of the Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007. The list of conventions includes: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Convention on the Prevention and Punishment of the Crime of Genocide, Convention concerning Minimum Age for Admission to Employment (No 138) etc. It may be worth noting that the participation in the scheme is dependent on the application of an interested state for the scheme to be granted to them and on the review of the European Commission which analysis not only whether a given international convention was ratified, but also the manner it was implemented (in the view of recommendations and opinions of relevant bodies). On this basis the Commission may refuse to grant preferential treatment to a given state or withdraw it temporarily. This system of conditionality has been approved by the WTO.

[102] Network, *op.cit.*

difficult or even impossible to put in place. Nevertheless, the legal system which would enable such accountability is already in place which makes the EU more advanced than the UN on this level as well. The ready-made example of a strong accountability of the Member States is provided by the use of the word "shall" in the above discussed Article 210 which indicates the obligation of Member States to contribute to the coordination of policies and implementation also on international level. Within internal sphere therefore the Member States can be held accountable as independent actors for the participation in the development policy of the Union. It seems that the same obligation may be applied to the European Union on the part of the Member States, yet so far it has not been invoked before the European Court of Justice and remains therefore the hypothetical possibility.[103]

To sum up, the European Union legal development environment, especially upon the entry into force of the Treaty of Lisbon, has been altered to incorporate changes developed on international stage. As shown, it has been reflected by inclusion of eradication of poverty (the MDG) into the direct objectives of the Union action. On the other hand, the EU external human rights policy has remained largely intact, not even mentioning the rights-based approach to development. At the same time, though, it cannot be denied that principles of the HRBAD can be traced in the EU approach to pursuing the development policy goals.

3.3 The Human Rights-Based Approach to Development as Present in the Implementation Phase of the EU Development Policy

Unlike the UN, the EU implements its development policy through project realised in the field by external actors. Those projects are financed through the range of financing instruments which complement one another. These are: Development Co-operation Fund, Instrument for Stability and the EIDHR. The 2006 EIDHR is particularly of interest in this context, as it has been designed specifically for attainment of human rights objectives. At the same time, its existence proves that the European Union perceives its development policy as separate, though complementary from the human rights policy, even if implementation phase remains similar. Let us briefly test whether at least in the implementation phase, as it was the case, any initiative has been taken in order to explore the HRBAD.

The identification of the duty-bearers and rights-holders proceeds through designing of projects – they are focused on particular state, with specified goal to be achieved. The goal with reference to human rights is usually broadly defined (i.e. human rights in Myanmar) whilst the eligibility criteria is sketched so as to include wide range of private and public actors (municipalities, provinces, departments and regions, non state actors, human rights defenders, international organizations etc.). The identification of particular right connected with a particular treaty does not occur in the EU context. Neither does focusing on human rights aspects of the development process. Furthermore, we can speak of the accountability of the EU and its actors only inasmuch as monitoring, evaluation, quality control, and reporting are concerned. Furthermore, the budget reporting takes place before the Court of Auditors and the Legislative Authority which makes EuropeAid accountable towards the EU with reference to the transparency and the timeliness of its expenditure. There is not much to be said about the human rights accountability – conditionality mechanisms, though working in theory both ways, have not added much to the actual process and accountability spheres in the area of development policy.

Furthermore, what is missing, is the internal debate on what approach should be taken. The current framework in place is, undoubtedly, a result of the past ten years of experiences and debates on as to

[103] The duty of cooperation burdening the Member States of the European Union has been subject of the case law of the ECJ, and the basis on which they were forced to comply with external policies of the EU. See cases.

On the other hand, none of the Member States have reversed the duty of cooperation to make the EU undertake specific actions; there is also no treaty basis for such claim.

the European Consensus on Development, and broadly Millennium Development Goals, are to be achieved. The internal EU debate focuses on the coherence and building up the exchange of information amongst development community within the EU – this is where the problematic area of the EU lies. Unlike in the UN, there is no training or capacity building facilitation for the EuropeAid itself.

Regretfully, therefore, it needs to be stated that the HRBAD has not been taken very much on board by the European Union inasmuch the implementation phase of the policy is concerned. It could be due to the manner in which aid is predominantly delivered by the EU (namely via projects implemented by external actors), nevertheless, as we have learnt from the UN experience, the key to implementation is in programming and working with local actors. On the other hand the EU does program with participation of those actors – it involves NGOs and treats them as partners in designing projects, taking on board their ideas as to the manner in which the process is conducted.[104] By making its funds available to local authorities and drafting projects in a relatively wide manner, it makes the development process flexible and allows for tailor-making of aid responsive to particular needs of particular community (identifying in any case rights-holders and referring to duty-bearers). Thus, yet again, the evaluation is not straight-forward.

4. Conclusions – Imitations or Innovations?

The Human Rights Based Approach to Development presented as a methodology of development cooperation could be perceived as a first step to merging of the two policies in their operational form – a process conducted in velvet gloves as the UN itself is suffering from the multiplication of actors dealing with related policy fields, guarding their own competences and modes of action. It comes as no surprise then, that eight years after its adoption, the HRBAD has disappeared from the advertised areas of activity of the UN - though the HRBAD training has been maintained and incorporated into agency's work. It is beyond the scope of this paper whether introduction of this methodology is a daily routine of development agencies actions, or whether it is simply paying lip service to the pressure on the part of human rights policy. Nevertheless, as the conceptual framework, it does introduce a completely different and difficult from practical point of view mode of pursuing development and human rights goals.

The European Union, at the same time, has been modestly consolidating the development and human rights steps forward, whilst facing its own demons and inefficiencies. As Steven R. Hurt notes in his article reviewing lately published studies of the EU development policy:

> '(t)he EU's development policy has in recent years become explicitly more uniform in approach. Relations with the Mediterranean region, ACP states, Latin America and Asia are all built on three main pillars: development assistance (aimed at poverty alleviation and democracy promotion), bilateral trade agreements, and political dialogue. This approach fails to take sufficient account of the particular circumstances that exist in different parts of the world. Although the EU may have moved in recent years to a development policy closely resembling the Post-Washington Consensus this does not overcome the weaknesses of adopting a 'one-size-fits-all' approach.'[105]

Whilst it may be true that the 'one-size-fits-all' approach is not the ultimate answer to the question for the efficient development policy, it may be the answer to the call for coherence. Nevertheless, it could be perceived as the 'EU way' towards a different approach to development cooperation. The 'one-size-fits-all' minimal threshold approach to principles envisaged in the HRBAD may be the most advanced

[104] Bettin, *op cit.*

[105] Stephen R. Hurt, 'Understanding EU Development Policy: history, global context and self-interest?', (2010) 31 *Third World Quarterly*, 163.

coherence as there may be achieved in the complex internal and external structure of EU policy making.

Overall, though the EU has not taken on the UN methodology explicitly, there are hints that it is processing elements of the approach. Whilst it is true, as the IHRN report indicates, that there is still a lot to be done, one must not forget that the EU's actions in this respect are of double nature – the EU is at the same time a donor implementing UN methodology, but as a regional organisation of states tries to do it its own, European way. In this respect we need to consider the strivings of the EU as innovative. It could have simply adopted the nomenclature of the HRBAD and tried to implement it as yet another layer of hitherto existing policies.

Considering the Union's institutional and legal design, one needs to point to updated policy objectives in the European Consensus on Development. In this respect it did not simply imitate the methodological approach delivered by the UN – it has transformed it so that it may fit EU's own internal design. This is generally true for most of the principles of the HRBAD with the exception of those referring to the focus on the process. Unfortunately the lack of clarity as to the manner in which particular actions undertaken by specific actors reflect the HRBAD methodology makes it impossible to evaluate this aspect of EU's actions. The only available information can be drawn from policy papers and the manner in which programming has been devised, and the latter, is deficient from human rights point of view.

As far as the innovative approach is concerned, it is difficult to observe and evaluate the manner in which the EU has furthered the conceptualisation and implementation of the HRBAD. It would require an in depth analysis of forms of participation, inclusiveness and accountability employed in the framework of various, often highly differentiated projects in the field. What is more, it is extremely difficult to pin down the practical meaning of those principles, and even more difficult to evaluate their application given the number of various actors operating in the field. The guidelines for the development process as included in the HRBAD are of prime importance, yet there have not been any guidelines, indicators developed allowing for final evaluation of projects from the point of view of participation and inclusiveness. Finally, the complexity and multi-layers of the development process make the accountability of all actors participating in the development process very dispersed. In this context speaking of participation, inclusiveness as of right – and the right which can be claimed – does not seem to bring much into the development discourse or practice. The ultimate result will be the same regardless of whether the right can be claimed or not – after all how can an individual or a group of individuals influence field officers of an agency which did not take into consideration their participation when providing any sort of development aid? How will they know that they have this type of right? Of course, in a long term, having instituted the environment which will be participation-friendly such behaviours may become more common, but this is a far reaching forecast not fully true even for developed societies of Western democracies. In the view of the above, despite the fact that the EU might have done more with respect to empowering local actors in the process of development, it is trying to do something which is within its reach – hence the development of the civil society programme under the auspices of the DG Development and the emphasis on local ownership as a concept underlying most of the actions conducted by the EU in the field.

Finally, there needs to be one last comment made with reference to the general innovativeness of the EU approach. The HRBAD, despite all the efforts made by the UN to make it distinct from the previously elaborated methodologies of conditionality, positive support and altered, human rights oriented, rhetoric, has not introduced many actual changes to development process. Whilst it is true that repackaging the old 'needs' talk into new bottles of 'rights' talk should, at least in theory, bring about the change in approach following which more attention will be paid to human rights considerations throughout the process of delivering aid. Even if it does, then how different this is from changing simply and solely rhetoric and not practice? How should HRBAD goals be achieved if legal instruments applied reflect other approach to development than that of rights (despite claiming to do otherwise), not to mention the long-term impossibility of applying different instruments (e. g. in case

of the Cotonou Agreement, the conditionality approach applied therein will last until the termination of the agreement and thus until 2020)? In this respect the concepts of local ownership of projects as developed by the EU should be emphasised as the most conceptualised form of participation and inclusion of local society into the development process.

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