

# The Application of Human Rights in African Caribbean and Pacific-European Union Development and Trade Partnership

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### A. Introduction

The Africa Caribbean Pacific-European Union (ACP-EU) Development and Trade Cooperation Relationship is currently regulated by the Cotonou Partnership Agreement.<sup>1</sup> This agreement, which has been described as “the only one of its kind in the world”<sup>2</sup> is based on the three pillars of politics, trade, and development between the EU and its Member States on the one hand and a group of developing countries<sup>3</sup> on the other. The primary aim of the Cotonou Agreement is “to promote

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<sup>1</sup> The Agreement was signed on 23 June 2000 and came into force on 1 April 2003. It replaced the Lome Conventions which had regulated the ACP-EU relationship for over 25 years. The full text of the Cotonou Agreement is available in OJ L 317, 15 December 2000 [hereinafter the Cotonou Agreement]. For an overview of the Cotonou Partnership Agreement see THE EUROPEAN UNION AND THE DEVELOPING COUNTRIES: THE COTONOU AGREEMENT (O. Babarinde/G. Faber eds., 2005); S. D. Salama/C. M. Salama, *The New EU ACP Partnership Agreement*, 14 J. INT'L DEV. 899 (2002); Karin Arts, *ACP-EU Relations in a New Era: The Cotonou Agreement*, 40 COM. MARK. L. REV. 95 (2003); Bernd Martenczuk, *From Lome to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective*, 5 EUR. FOR. AFF. REV. 461 (2000).

<sup>2</sup> The ACP-EC COURIER 19 (September 2000), special issue.

<sup>3</sup> The ACP group was founded in 1975 with the signing of the Georgetown Agreement. The ACP group is composed of the following Countries: Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cook Islands, Cote d' Ivoire, Democratic Republic of Congo, Djibouti, Dominican Republic, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue Palau, Papua New Guinea, Rwanda, St Kitts and Namo, St Lucia, St Vincent and the Grenadines, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Solomon Islands,

and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic environment.”<sup>4</sup> In the accomplishment of the above objective, the Cotonou Agreement shall be centred on poverty eradication, the gradual integration of the ACP countries into the world economy, and sustainable development. Significantly, the Cotonou Agreement draws a direct link between human rights and development and makes respect for human rights, democratic principles, and the rule of law essential elements of the partnership.<sup>5</sup> The link with human rights in the context of the ACP-EU partnership, which is seen purely as a trade and development relationship, has been controversial. Advocates of this linkage point to the fact that respect for human rights principles will help achieve the objective of the ACP-EU relationship, which is the economic, cultural, and social development of ACP States. Antagonists, on the other hand, see the inclusion of human rights considerations as a pretext for interfering in the internal affairs of ACP countries and a disguised form of protectionism. These seemingly irreconcilable views are well entrenched and have from time to time stalked the negotiations and implementation of the ACP-EU Development and Trade Cooperation. Only recently, the ACP Council of Ministers in the context of the negotiation of the Economic Partnership Agreement (EPA)<sup>6</sup> have expressed their anxiety over an alleged statement credited to the EU that trade sanctions may be imposed against any ACP State that violates human rights, an essential element of the EPA.<sup>7</sup>

Against this backdrop, this paper will aim at unravelling the role played so far by human rights considerations within the ACP-EU partnership in order to explore the prospects of its application in a partnership that is increasingly moving in the direction of trade liberalisation as an instrument for achieving the economic, cultural, and social development of ACP countries. In accomplishing this objective, a brief historical account of the incorporation of human rights considerations into

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Somalia, South Africa, Sudan, Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, and Zimbabwe. It is worthy of note that Cuba is a member of the ACP Group but is not a signatory to the Cotonou agreement.

<sup>4</sup> Cotonou Agreement (note 1), Article 1(1).

<sup>5</sup> Cotonou Agreement (note 1), Article 9. Article 9(3) makes good governance a fundamental element of the Agreement and any breach will attract the measures stipulated in Article 97.

<sup>6</sup> When negotiations are successfully concluded, it is expected that the EPA will regulate the trade relationship between the ACP countries and the EU, effective as of 2008.

<sup>7</sup> Trade Negotiation Insight, 6 (July 2004), available at: [http://www.ictsd.org/tni/tni\\_english/TNL\\_EN\\_3-4.pdf](http://www.ictsd.org/tni/tni_english/TNL_EN_3-4.pdf) (last accessed 23 May 2005).

the ACP-EU partnership will be sketched. In section C the status of human rights within the Lome/Cotonou regime will be discussed with the aim of determining whether the promotion and protection of human rights as guaranteed by the United Nations Charter,<sup>8</sup> the 1948 Universal Declaration of Human Rights,<sup>9</sup> and the principal international human rights covenants is a core objective of the Cotonou regime or merely an instrument designed to achieve other principal objectives, such as economic and social development. Section D deals with the actual practice of how human rights have been integrated within the ACP-EU relationship, while section F provides a critique of the current practice of mainstreaming human rights within the partnership. The final section will explore the prospects of applying human rights in the emerging trade relationship to be regulated by the EPA.

## B. Background

The EU Constitution 2004 makes human rights one of the founding values of the EU and also an objective of the EU's Common Foreign and Security Policy.<sup>10</sup> Indeed, human rights form a constant feature of EU external relations and since the 1990s a human rights clause has been systematically included in the European Community (EC) bilateral trade and cooperation agreements with third countries.<sup>11</sup> This clause is currently applicable to over 120 countries with which the EC maintains bilateral agreements.<sup>12</sup> The EC's concern for human rights in its external policy began to emerge in the late 1970s as a result of atrocious violations of human rights occurring in African countries such as Uganda, the Central African Republic, Equatorial Guinea, and Liberia. In response to flagrant human rights violations, the EC adopted a policy of partially suspending its development aid to offending

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<sup>8</sup> Adopted 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945 [hereinafter UN Charter].

<sup>9</sup> 10 December 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), reprinted in: 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter UDHR].

<sup>10</sup> See Title I and V of the EU Constitution 2004, OJ C 31, 16 December 2004. The EU Constitution has not yet entered into force.

<sup>11</sup> European Human Rights Report 2004, 49, available at: <http://ue.eu.int/uedocs/cmsUpload/ENHR2004.pdf> (last accessed 22 May 2005).

<sup>12</sup> D. C. Horng, *The Human Rights Clause in the European Union's External Trade and Development Agreements*, 9 EUR. L. J. 677 (2003).

African governments under the Lome Convention and re-channelling aid through international charitable organisations.<sup>13</sup>

The ACP States criticised the EC action of suspending aid under the Lome Convention, proffering the following arguments to substantiate their point. Firstly, the Lome regime was mainly a forum for economics and trade. Human rights issues had no place in an agreement on trade and economic cooperation. It was the United Nations, and not the EC, which had the necessary competence in the area. Secondly, human rights have been used as a Cold War instrument and could be easily amenable to manipulation. Thirdly, EC countries also violated human rights and they placed too much emphasis on civil and political rights whilst discriminating against economic, social, and cultural rights. Furthermore, the living and working conditions of ACP nationals residing within the EC often failed to meet the minimum standard established under international law. Lastly, human rights references within the Lome relationship constituted interference in the internal affairs of ACP countries. The last point was particularly sensitive to many African countries, which had recently become independent after decades of colonisation. The ACP countries feared a misuse of human rights for protectionist purposes as well as any link capable of sparking-up feelings of paternalism or neo-colonialism.<sup>14</sup>

The apparent attempt by the EC to link the human rights records of ACP governments to aid continued to plague the implementation of the Lome Convention I and the negotiations for subsequent conventions. However, two important events eventually influenced the resolution of this matter. The first was the adoption in June 1981 of the African Charter on Human and Peoples' Rights<sup>15</sup> by a great number of the African members of the ACP group. The second was the end of the Cold War in 1989. The renewal of the Lome Convention coincided with this momentous event in world affairs. Thus at the negotiations for the Lome Convention IV (Lome IV) the inclusion of human rights references into the convention itself was hardly contested. While the preamble to Lome IV contained references to some of the main relevant human rights instruments, Article 5(1) of

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<sup>13</sup> For a detailed historical account see KARIN ARTS, *INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT COOPERATION: THE CASE OF THE LOME CONVENTION* (2000), particularly chapter 5 [hereinafter ARTS, *INTEGRATING HUMAN RIGHTS*].

<sup>14</sup> M. K. Addo, *Some Issues in European Community Aid Policy and Human Rights*, 1 *LEGAL ISSUES OF EUROPEAN INTEGRATION* 73 (1988).

<sup>15</sup> Concluded on 26 June 1981, entered into force on 21 October 1986, OAU Doc CAB/LEG/67/3 Rev. 5, reprinted in: 21 *ILM* 59 (1982).

Lome IV for the first time drew a direct link between development cooperation and human rights.<sup>16</sup>

Having succeeded in incorporating references to human rights within the Lome IV provisions on development cooperation, the EC proposed the introduction of an explicit suspension mechanism in order to strengthen the force of Article 5.<sup>17</sup> This was accomplished during the 1994 Mid Term Review of the Lome IV Convention with the incorporation of respect for human rights, democratic principles, and the rule of law as essential elements of the Lome IV and a new Article 336a Lome IV-bis which allowed for full or partial suspension of the application of Lome IV in the event that any party fails to fulfil its obligation in respect of one of the essential elements (human rights, democracy, and the rule of law); however, such a suspension can only take effect after the consultation procedure has taken place.

The Cotonou Agreement, the successor agreement to the Lome Conventions, also incorporated human rights references. It views the ACP-EU cooperation as 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. The parties agree that respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law, and transparent and accountable governance are an integral part of sustainable development. Article 9 reiterates human rights, democracy, and the rule of law as essential elements and good governance as a fundamental element of the Cotonou Agreement. Breaches of any essential elements or fundamental element may ultimately lead to a country facing suspension as a measure of last resort.<sup>18</sup>

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<sup>16</sup> Article 5(1) of the Lome Convention IV states that:

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

In this context development policy and cooperation are closely linked with the respect for and enjoyment of fundamental human rights. The role and potential of initiatives taken by individuals and groups shall also be recognised and fostered in order to achieve in practice real participation of the population in the development process in accordance with Article 13.

<sup>17</sup> Karin Arts/J. Byron, *The Mid-Term Review of the Lome IV Convention: Heralding the Future?*, 18 *THIRD WORLD Q.* 73, 77 (1997).

<sup>18</sup> Cotonou Agreement (note 1), Articles 96-97.

The EPAs designed to regulate the trade aspects of the ACP-EU Partnership have also incorporated human rights considerations. The EPAs are expected to incorporate the provisions of Articles 96 and 97 of the Cotonou Agreement dealing with the non-execution clauses in the event of human rights violations.<sup>19</sup> Also to be included is the standard exception clause in Article XX of GATT, allowing measures to be taken on grounds of protection of public order, human, animal, or plant life or health, conservation of exhaustible natural resources, etcetera, provided such measures are applied in conformity with World Trade Organisation (WTO) rules.<sup>20</sup>

Surely, it is arguable that human rights considerations are now part and parcel of the ACP-EU development cooperation relationship, especially in light of the fact that respect for human rights is considered an essential element and cooperation is directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development. However, the exact status and role of human rights within the regime of the ACP-EU partnership remains unclear. Simply put, is the promotion and protection of human rights a core objective of the partnership or does it play second fiddle to the notion of development cooperation? This is the issue that will be the subject of further analysis in the following section.

### C. Status and Objective of Human Rights in the ACP-EU Partnership

In order to define the status of human rights within the ACP-EU partnership, it is necessary to examine the legal basis of human rights considerations within the overall European Development Cooperation scheme. Even though the human rights clause has become a familiar feature of EU external agreements, it was not until the entry into force of the Treaty of Nice in February 2003 that there a satisfactory legal basis for the human rights clause. Hitherto, doubts have been raised, particularly in light of opinion 2/94 on Accession of the European Community to the European Convention on Human Rights (ECHR), in which paragraph 27 provided that "no treaty provision confers upon the Community any general power to enact general rules on human rights or to conclude international conventions on the field."<sup>21</sup> Indeed, Australia – with whom the Commission was

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<sup>19</sup> European Union Negotiating Mandate for Economic Partnership Agreements, adopted 21 June 2002, available at: [http://www.epawatch.net/documents/doc71\\_2.doc](http://www.epawatch.net/documents/doc71_2.doc) (last accessed 23 May 2005).

<sup>20</sup> *Id.*

<sup>21</sup> ELENA FIERRO, THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE, 245 (2003).

negotiating a trade and cooperation agreement – had challenged the inclusion of a human rights clause in the agreement on the ground that the EC lacked competence to promote human rights in the light of opinion 2/94.<sup>22</sup>

However, commentators are agreed that the legal basis for the human rights clause within the field of European development cooperation is Article 177(2) of the European Community Treaty (EC Treaty).<sup>23</sup> It provides that “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”<sup>24</sup> Furthermore, the Treaty of Nice provided for the insertion of Article 181(a) in the EC Treaty on economic, financial, and technical cooperation measures with external countries, which encourages EC action in this sphere to “contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.”<sup>25</sup> The combined effect of the above provisions appears to make respect for human rights one of the general objectives of development cooperation. Consequently, can it be argued that development cooperation must be directed at promoting human rights? In *Portugal v. Council*,<sup>26</sup> the European Court of Justice (ECJ) was called upon to rule on the relationship between development cooperation and human rights. It held that Article 177(2) of the EC Treaty:

demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the respect for those rights and principles.

... to adapt cooperation policy to respect for human rights necessarily entails establishing a certain connection between those matters whereby one of them is made subordinate to the other.<sup>27</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> E. Riedel/M. Will, *Human Rights Clauses in External Agreements of the EC*, in *THE EU AND HUMAN RIGHTS*, 723 (Philip Alston et al. eds., 1999); B. Simma/J. B. Aschenbrenner/C. Schulte, *Human Rights Considerations in the Development Co-operation Activities of the EC*, in *THE EU AND HUMAN RIGHTS*, 583 (Philip Alston et al. eds., 1999).

<sup>24</sup> *Article 177(2) Consolidated Version of the Treaty Establishing the European Community*, in NIGEL FOSTER, *BLACKSTONE'S EC LEGISLATION 1999–2000*, 10th ed. (1999).

<sup>25</sup> Treaty of Nice, signed on 26 February 2001, entered into force on 1 February 2003.

<sup>26</sup> Case C-268/94, *Portugal v. Council*, 1996 ECR I-6699.

<sup>27</sup> *Id.*, paras. 24, 26.

The *Portugal v. Council* decision appears to suggest that the obligation of the EC, on the basis of Article 177(2) of the EC Treaty, is to take account of the objective of respect for human rights in adopting measures in the field of development cooperation and to adapt its development policy to respect for human rights and democratic principles.<sup>28</sup> At first glance, this understanding of the relationship between human rights and development cooperation may have grave implications for the status and role of human rights within the ACP-EU partnership. This is because human rights and development may be seen as two distinct entities, whereby one may be subordinated to the other.

Adopting an instrumental or narrow view, one could argue that human rights should be perceived as a means to achieving a principal objective such as development. In this regard, respect for human rights could be applied in the form of a conditionality to be met by the recipient country in order to continue to enjoy the benefits of development cooperation. However, a different meaning may also be deduced in which the promotion and protection of human rights is itself a development policy measure, especially since development cooperation is *inter alia* aimed at supporting the economic, social, and cultural rights of the population of the recipient country. The relationship between development and human rights is an intimate one, in which both are fully interdependent. Thus, when countries are promoting economic and social rights of a given population, they are also contributing to its development. Commenting on the provisions of Article 5(1) of Lome IV, which makes human rights an essential element of the Lome partnership, Karin Arts stated that in essence all cooperation under the Lome Convention is supposed to further human rights one way or another.<sup>29</sup> Similar sentiments were expressed by Peter Hilpold to the effect that "the achievement of high human rights standards was no more the necessary by product of the development process but an autonomous goal and a consistent element of development itself."<sup>30</sup> The Cotonou Agreement concurs with this approach as it states that the agreement was concluded "in order to expedite the economic, cultural and social development of ACP States."<sup>31</sup> Furthermore, the central objective of the ACP-EU partnership is

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<sup>28</sup> Steve Peers has criticized the judgment of the Court in *Portugal v. Council*. In his view, "the Court's finding that development policy must be subordinated to human rights has no support in treaty law." See Steve Peers, *Case C/268/94 Portugal v. Council*, 35 COM. MARK. L. REV. 550 (1989).

<sup>29</sup> Karin Arts, *Development Co-operation and Human Rights: Turbulent Times for EU Policy*, in NEW PERSPECTIVES ON EUROPEAN UNION DEVELOPMENT COOPERATION, 12 (M. Lister ed., 1999) [hereinafter Arts, *Development Co-operation*].

<sup>30</sup> Peter Hilpold, *EU development Cooperation at Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance*, 7 EUR. FOR. AFF. REV. 53, 60 (2001).

<sup>31</sup> Cotonou Agreement (note 1), Article 1(1).

poverty eradication and sustainable development, concepts that readily resonate with human rights.

Having established that the promotion and respect of human rights is a core objective of the ACP-EU partnership, we shall proceed to ponder the question: how is the objective of respect for human rights to be achieved? There appears to be some disagreement as to how the aspiration of respect for human rights values within the European development cooperation policy, *a fortiori* the Cotonou relationship, is to be pursued. One school of thought promotes a negative approach while the other favours a positive approach. The ECJ in *Portugal v. Council* recognised the suspension dimension of the human rights clause. According to the Court, "a provision such as Article 1(1) of the Agreement may be, amongst other things, an important factor for the exercise of the rights to have a development cooperation agreement suspended where the non-member country has violated human rights."<sup>32</sup> Authors such as Brandtner and Rosas have said that the human rights clause "simply constitutes a mutual re-affirmation of commonly shared values and principles, a pre-condition for economic and other co-operation under the agreements and expressly allows for suspension in case of non-compliance with those values."<sup>33</sup> Allan Rosas further argues that "the main legal implication of the clause is to spell out a right of suspension in case of violation of such fundamental human rights."<sup>34</sup>

Advocates of the positive approach such as Elena Fierro have, while conceding the suspension dimension of the human rights clause, maintained that it also places a responsibility on the EU to protect and to promote human rights worldwide and that in discharging this responsibility high priority should be given to the positive approach.<sup>35</sup> This point was confirmed in the landmark November 1991 Resolution of the Council of Ministers in which the Council said that "the Community and its Member States will give high priority to a positive approach that stimulates respect for human rights and encourages democracy."<sup>36</sup> Within the ACP-EU partnership, this positive approach has been recognised. For instance, Article 5(1) of Lome IV states that "[c]o-operation operations shall be conceived in accordance with the

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<sup>32</sup> *Portugal v. Council* (note 26), para. 27.

<sup>33</sup> B. Brandtner/Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of the Doctrine and Practice*, EUR. J. INT'L L. 474 (1998).

<sup>34</sup> A. Rosas, *Mixed Union-Mixed Agreements*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION, 145 (M. Koskenniemi ed., 1998).

<sup>35</sup> Fierro (note 21), 281.

<sup>36</sup> 24 Bull. EC. No. 11, 1991, item 1.3.67.

positive approach, where respect for human rights is recognised as the basic factor of real development and where co-operation is conceived as contribution to the promotion of these rights.”

#### **D. Current ACP-EU Human Rights Practice**

The true state of affairs as to how the ACP-EU partnership has gone about attaining the objective of respect for human rights within the paradigm of development cooperation can only be appreciated when an assessment of the practice within the Lome/Cotonou regime is undertaken. The picture appears to be a mixture of stick and carrot approaches.

##### *I. Negative/Stick Approach*

In the application of human rights considerations within the ACP-EU cooperation, the stick approach appears to have a place of prominence. This is no doubt linked to the EU practice of withholding financial assistance on grounds of grave human rights abuses that were prevalent in the 1970s and 1980s in countries such as Uganda, Zaire, and the Central African Republic, with whom the EC had development cooperation agreements. However, it was not until 1991 that the EC articulated general principles on the EC's negative external human rights and development policy. According to the November 1991 European Council Resolution on Human Rights, Democracy and Development, if any one of the conditions of “grave and persistent human rights violations” or “serious interruption of democratic processes” is fulfilled, “appropriate responses in the light of the circumstances” will be considered.<sup>37</sup> Any negative measures taken may be confidential or public, but “must be based on objective and equitable criteria and be suited to the situation on ground. At the same time care must be taken to keep open the avenue of dialogue.”<sup>38</sup> Negative measures will only be taken as a last resort, when all other means have failed and they will be graded according to the gravity of the case at stake; that is, restrictive measures will be applied proportionally.<sup>39</sup>

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<sup>37</sup> 24 Bull. EC No. 11, 1991, 122-123, para 6.

<sup>38</sup> Commission, *Communication on Democratisation, the Rule of Law, Respect for Human Rights, and Good Governance: The Challenges of the Partnership between the European Union and the ACP States*, 146 COM 2 (1998).

<sup>39</sup> See generally Cotonou Agreement (note 1), Article 96.

Over the years the EU has found the stick approach a useful weapon to deploy against ACP governments implicated in human rights violations. It has unilaterally suspended Lome benefits due to several ACP countries. In 1994, EC aid to eight ACP countries<sup>40</sup> was suspended or restricted because of the security situation and those countries' failure to move towards democracy or observe human rights.<sup>41</sup> In April 1999, the Commission proposed to the Council to open Article 366a Lome IV-bis consultations with Niger in response to the coup in that country. In a communication the Commission announced that "in the meantime no new funding will be approved in favour of Niger other than for humanitarian projects directly benefiting the poorest sections of the population."<sup>42</sup> The EU also held Article 366a Lome IV-bis consultations with the Government of Togo in 1998 and with the military Government of Comoros after the coup there in April 1999.<sup>43</sup>

Article 96 of the Cotonou Consultation Procedure has been used in relation to both Haiti and Zimbabwe. In the case of Haiti, after the general elections in 2000 the observer mission of the Organisation of American States (OAS) noted various irregularities and fraud. According to the EU, this constituted a breach of Article 9, the essential element clause of the Cotonou Agreement. The EU invited the Government of Haiti to enter into consultations under Article 96. Haiti did not respond to the EU's concerns and the Council adopted a decision on 29 January 2001 to take "appropriate measures" in accordance with Article 96(2).<sup>44</sup> These measures included suspending direct budgetary aid and withholding future aid from the European Development Fund (EDF). This Council decision was renewed in December 2001, 2002, and early 2003.

The EU adopted a different strategy in imposing negative measures with respect to Zimbabwe. In March 2001, as the political situation in Zimbabwe deteriorated, the EU for the first time tried to go through an Article 8 political dialogue in the hope of avoiding the use of the Article 96 consultation procedure.<sup>45</sup> On 24 June 2001, the

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<sup>40</sup> The ACP Countries are Equatorial Guinea, The Gambia, Liberia, Nigeria, Somalia, Sudan, Togo, and Zaire.

<sup>41</sup> ARTS, INTEGRATING HUMAN RIGHTS (note 13), 340.

<sup>42</sup> Commission, *Communication on the Opening of Consultations with Niger pursuant to Article 366a of the Lome Convention*, 204 COM 3 (1999).

<sup>43</sup> M. BULTERMAN, HUMAN RIGHTS IN THE TREATY RELATIONS OF THE EUROPEAN COMMUNITY, 252-257 (2001).

<sup>44</sup> DEC 2001/131/EC, OJ L 48, 17 February 2001.

<sup>45</sup> 200 THE COURIER 32 (September-October 2003).

Council noted “the lack of substantial progress in the on-going political dialogue with the Government of Zimbabwe and expressed its deep concern over recent developments in Zimbabwe.”<sup>46</sup> The General Affairs Council subsequently concluded that the essential elements defined in Article 9 of the Cotonou Agreement were not being respected and that the Article 96 consultations had not remedied the situation. Sanctions were subsequently approved against Zimbabwe, which included suspension of funds due under the EDF and a travel ban on the ruling ZANU-PF politicians and officials.<sup>47</sup> The Republic of Guinea is the latest ACP country to be at the receiving end of “appropriate measures” in accordance with Article 96 of the Cotonou Agreement.<sup>48</sup>

## *II. Positive/Carrot Approach*

The legal basis for the support of human rights and democratisation activities under the ACP-EU partnership can be found in Article 9 of the Cotonou Agreement. In particular, according to Article 9(4), “the Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.” Positive measures to promote human rights are pursued through a dual approach that combines both vertical and horizontal funding. Vertical funding within the context of the Cotonou Agreement involves the EU providing direct funds from the EDF for the promotion of human rights and democratisation activities. Along with direct financial measures to promote human rights and democratisation, the EU also incorporates human rights as cross-cutting issues in the formulation of development policy and in the programming and planning stages of development with ACP Countries. This approach has been described as a horizontal approach and contributes to the notion of mainstreaming, which involves the integration of human rights norms into all aspects of policy-making and implementation.<sup>49</sup>

One medium through which the mainstreaming is accomplished is political dialogue. Through political dialogue, human rights are taken into account during

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<sup>46</sup> EU Council of Ministers, Press Release (25 June 2001).

<sup>47</sup> Council Decision 148/2002, Concluding Consultations with Zimbabwe under Article 96 of the Cotonou Agreement, OJ L 50, 21 February 2001; Council Regulation 313/2001 of 18 February 2003, Extending Regulation Concerning Restrictive Measures in respect of Zimbabwe, OJ L 50, 20 February 2003.

<sup>48</sup> Council Decision 321/2005 of 14 April 2005, Concluding Consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement, OJ L 104, 23 April 2005.

<sup>49</sup> Communication from the Commission to the Council and the European Parliament, *The European Union's Role in Promoting Human Rights and Democratisation in Third Countries*, 252 COM 11, 22 (2001).

negotiations for the accession to the ACP Group, although respect for human rights and democratic principles are not a precondition for membership.<sup>50</sup> During negotiations for the admission of Haiti to the Lome Convention in 1989, the Netherlands sought to include human rights commitments as a condition for membership.<sup>51</sup> However, this was rejected by the majority of Member States who stated that the human rights situation had not been a precondition for the accession of existing ACP States and many of the Member States argued that accession to Lome would be a positive step towards improving the human rights conditions in Haiti.<sup>52</sup> More recently, Cuba indicated its willingness to accede to the Cotonou Agreement<sup>53</sup>; however, this application was subsequently withdrawn due to alleged interference in internal affairs on the issue of human rights. Political dialogue on the subject of human rights, the rule of law, democratic principles, and good governance constitutes a central feature of ACP-EU cooperation. According to Article 8(4) of the Cotonou Agreement, "the dialogue shall encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance."

The Cotonou Agreement also includes gender equality as a specific cross-cutting theme in the ACP-EU cooperation. Article 31 specifically provides that cooperation under Cotonou shall integrate a gender-sensitive approach and should encourage the adoption of specific positive measures in favour of women such as participation in national and local politics, access to basic social services, and access to productive resources.<sup>54</sup>

In line with the promotion of human rights as an essential element of the Partnership, the ACP-EU cooperation allows for the mainstreaming of fundamental social rights in the areas of trade and internationally agreed upon core labour standards. These are derived from the conventions of the International Labour Organisation (ILO) and encompass rights such as "the freedom of association, the right to collective bargaining, the abolition of forced labour, the elimination of

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<sup>50</sup> Membership is based upon Cotonou Agreement (note 1), Article 94, which provides that membership will be considered for any "independent State whose structural characteristics and economic situation are comparable to those of the ACP States."

<sup>51</sup> ARTS, INTEGRATING HUMAN RIGHTS (note 13), 303.

<sup>52</sup> *Id.*, 302-303.

<sup>53</sup> 196 THE COURIER 6 (January-February 2003).

<sup>54</sup> For an analysis of the role of gender in the Cotonou Agreement see KARIN ARTS/WIDE, GENDER ASPECTS OF THE COTONOU AGREEMENT (2001), 11-12, available at: <http://www.igtn.org/Cotonou/WIDE%20Gender%20and%20Cotonou.pdf> (last accessed 22 May 2005).

worst forms of child labour and non-discrimination with respect to employment.”<sup>55</sup> The Parties aim to protect these rights through enhanced cooperation, in particular, through the exchange of information on their respective legislation, the formulation of national labour legislation, and strengthening of adherence to existing national legislation and work regulation.<sup>56</sup> It is also stipulated that labour standards should not be used for protectionist purposes.<sup>57</sup>

### E. Critique of Current ACP-EU Human Rights Practice

In the context of the ACP-EU relationship, it is submitted that the positive approach is preferred because it is consistent with the notion of “equality of the partners” in the development partnership<sup>58</sup> and it furthers the goal of economic, social, and cultural development to which the recipient ACP countries aspire.<sup>59</sup> Moreover, a positive approach resonates with the obligation of International Assistance and Cooperation guaranteed under Articles 55 and 56 of the UN Charter, Article 2(1) of the International Covenant on Economic Social and Cultural Rights, as well as the 1986 UN Declaration on the Right to Development, which articulates that States have a duty to create conditions for development and eliminate obstacles to it.<sup>60</sup> In the view of the Committee on Economic Social and Cultural Rights (CESCR), international cooperation for development (and thus for the realisation of economic, social, and cultural rights) is an obligation of all States, in particular those in a position to assist, such as the developed countries.<sup>61</sup> An active programme of international assistance and cooperation on the part of all those

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<sup>55</sup> Cotonou Agreement (note 1), Article 50(1).

<sup>56</sup> *Id.*, Article 50(2).

<sup>57</sup> *Id.*, Article 50(3).

<sup>58</sup> *Id.*, Article 2.

<sup>59</sup> Article 131 of the Treaty of Rome.

<sup>60</sup> Ambassador Mary Whelan of Ireland recently declared: “On behalf of the European Union, I wish to reiterate our commitment to the Right to Development, as set out in the Vienna Declaration and Programme of Action. It is also a commitment that is manifested in the development cooperation partnerships and agreements that we have with countries throughout the world.” See address delivered by Ambassador Mary Whelan, Ambassador of Ireland to the United Nations, on the Right to Development at the 60<sup>th</sup> Session of the United Nations Commission on Human Rights on 23 March 2004. See also Karin Arts, *Implementing the Right to Development? An Analysis of European Community Development and Human Rights Policies*, in HUMAN RIGHTS IN DEVELOPING COUNTRIES YEARBOOK, 59 (P. Baehr ed., 1996).

<sup>61</sup> CESCR General Comment 3 on the Nature of States Parties Obligations, 14 December 1990, para 14.

States that are in a position to undertake one will lead to the establishment of a social and international order in which the rights and freedoms are fully realised as envisaged by Article 28 of the UDHR. As a result, an ACP-EU partnership geared towards the economic, social, and cultural development of ACP countries furthers the goal of human rights as well as elements of the UN Millennium Development Goals (MDGs).<sup>62</sup>

While the integration of human rights considerations into the ACP-EU partnership may lead to some improvements in the human rights situation in ACP countries, the practice has not been altogether satisfactory. Firstly, the current application of human rights in the Lome/Cotonou regime is arbitrary and lacks transparency.<sup>63</sup> For instance, ACP countries such as Sudan and Haiti became targets of punitive measures by the EC while other ACP countries such as Ethiopia and Zaire enjoyed continued EC financial support. Both Ethiopia and Zaire have been prominent recipients of EC aid even though their human rights records are clearly abysmal.<sup>64</sup> The explanation for this inconsistency lies in the fact that human rights are just one consideration guiding the foreign policy of the EU. Thus the fact that the various EU Member States have different political relationships with different ACP countries may lead them to develop different attitudes and measures in response to human rights violations.

Another limitation on the current practice of integrating human rights into the ACP-EU partnership is the dominance of the conditionality approach, be it positive or negative conditionality. This trend is clearly linked to the 1989 World Bank study on Africa, which for the first time introduced the notion of respect for human rights, the rule of law, and democratic principles as criteria to be fulfilled by countries in order to receive the Bank's assistance.<sup>65</sup> Also, the fact that the EU had historically used restrictive measures such as withholding development aid from ACP countries deemed to be in violation of human rights may have influenced the

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<sup>62</sup> Goals 1 and 8 of the UN MDGs emphasises poverty eradication and the need to build a global partnership for development. The United Nations MDGs are available at: <http://www.developmentgoals.org/> (last accessed 22 May 2005).

<sup>63</sup> According to Tomasevski, "much as with other donors, the practice was punitive and arbitrary." See K. TOMASEVSKI, *BETWEEN SANCTIONS AND ELECTIONS: AID DONORS AND THEIR HUMAN RIGHTS PERFORMANCE*, 48 (1997).

<sup>64</sup> ARTS, *INTEGRATING HUMAN RIGHTS* (note 13), 370.

<sup>65</sup> TOMASEVSKI (note 63), 10.

current dominance of the conditionality approach in the literature.<sup>66</sup> Reference to human rights in the ACP-EU partnership should be seen as more than procedural mechanism for the imposition of restrictive measures, particularly sanctions. Indeed, the UN Committee on Economic Social and Cultural Rights recognised the negative impact of sanctions on the economic, social, and cultural rights of the affected population, when it stated thus:

while the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognised in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardise the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and educational systems, and undermine the right to work ...<sup>67</sup>

Economic sanctions may often be counter-productive from a human rights perspective. Accordingly, the trend should be towards sanctions that target individuals at fault, rather than societies.<sup>68</sup>

The applicability of human rights in the Lome/Cotonou regimes so far indicates that the suspension practice of the EU on human rights grounds has only affected the financial assistance aspects and not the trade regime. A cursory look at the instances in which the EU has adopted measures against ACP countries on the ground of gross violations of human rights would reveal that trade aspects have been exempted. For instance, in 1993 the EU announced the imposition of certain restrictive measures on Nigeria as a result of the state of human rights in that country. These measures did not affect EU-Nigeria trade and, despite repeated calls, the EU Council of Ministers refused to sanction an oil embargo against Nigeria.<sup>69</sup> A similar situation occurred with respect to Haiti. In response to the human rights violations in Haiti, the EC considered the option of imposing a trade embargo, but in the end it did not push it through. It based its decision on two grounds: That a trade embargo would breach the Lome Conventions trade

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<sup>66</sup> ARTS, *INTEGRATING HUMAN RIGHTS* (note 13); W. BROWN, *THE EUROPEAN UNION AND AFRICA* (2002), particularly chapter 4; and FIERRO (note 21).

<sup>67</sup> CESCR General Comment 8, *On the Relationship between Economic Sanctions and Respect for Economic Social and Cultural Rights*, para 3.

<sup>68</sup> See, for example, the EU sanctions against the Regime of Robert Mugabe in Zimbabwe, which included travel ban on the President and members of his cabinet.

<sup>69</sup> Arts, *Development Co-operation* (note 29), 18.

provisions and that, in the absence of a UN Security Council resolution under Chapter VII of the UN Charter, a trade embargo would also contravene obligations of Haiti under GATT.<sup>70</sup> This same thinking may have influenced the EU's decision to suspend financial and technical assistance rather than impose trade restrictions in response to the genocide in Rwanda.<sup>71</sup> Also, in the most recent instance in which the human rights clause was applied against the Republic of Guinea, the EU, in taking appropriate measures in accordance with Article 96 of the Cotonou Agreement, specifically excluded actions against trade cooperation and trade-linked preferences.<sup>72</sup>

This practice may continue under the EPA trade relations as EU officials have sought to allay the fears of ACP countries that the non-execution clause in the EPA may be used to impose sanctions on countries violating human rights, by pointing out that trade cooperation has never been suspended with any ACP country and that sanctions have always been limited to the bilateral suspension of EU aid.<sup>73</sup> Given the position of the EU, the question as to the exact role of human rights in the trade aspects of the ACP-EU partnership would require further clarification particularly in view of the emerging trade regime.

The Cotonou Agreement, apart from being an instrument for providing financial and technical assistance to ACP countries, has increasingly made the establishment of new WTO-compatible trading arrangements, progressively removing barriers to trade between EU and ACP countries, a major priority. This is required because the Lome trade regime, as structured, merely allowed for one-sided liberalisation, whereby the EU undertook to grant ACP countries preferential access to its markets without the ACP countries making reciprocal commitments regarding access. The Lome trade arrangement violated Article XXIV of GATT dealing with regional trade, which required contracting parties to remove all barriers to trade in furtherance of the objective of liberalisation.<sup>74</sup> The trade provisions of the Cotonou Agreement generally reflect the desire to have in place an agreement that should

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<sup>70</sup> Council Reply to EP question 593/92, rendered 22 October 1992, EPCD Bull., 1992, 490.

<sup>71</sup> E. U. Petersmann, *Human Rights and the Law of the World Trade Organisation*, 37(2) J. WORLD TRADE 241, 259 (2003), especially n. 62.

<sup>72</sup> Council Decision of 14 April 2005, Concluding Consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement, OJ L104, 23 April 2005.

<sup>73</sup> Trade Negotiation Insight, 6 (July 2004), available at: [http://www.ictsd.org/tni/tni\\_english/TNI\\_EN\\_3-4.pdf](http://www.ictsd.org/tni/tni_english/TNI_EN_3-4.pdf) (last accessed 23 May 2005).

<sup>74</sup> Francis AST Matambayla/Susanna Wolf, *The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO Compatible*, 35(1) J. World Trade 123, 131 (2001).

qualify as a free trade arrangement within the meaning of Article XXIV(5) of GATT and thereby render trade relations between the EU and ACP countries WTO-compatible without the need for a waiver. The new trade regime will have the effect of rolling back the non-reciprocal trade preferences that the ACP countries enjoyed under the Lome Conventions and will emphasise that future trade relations between ACP-EU partners should be on a reciprocal basis in order to comply with the WTO rules.<sup>75</sup> In furtherance of this goal, the EU is currently negotiating EPAs, on a regional basis, with most of the 78 ACP Countries.<sup>76</sup> The objective of the new ACP-EU economic and trade cooperation is to foster the smooth and gradual integration of ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries.<sup>77</sup>

#### F. Prospects for Human Rights in the Trade Aspects of ACP-EU Partnership

It is not difficult to discern that the reluctance of the EU to apply trade measures on human rights grounds in the ACP-EU partnership is rooted in the ideology that human rights has no relevance in an economic or trade agreement.<sup>78</sup> Indeed, a 1978 proposal of the European Commission to introduce a social/labour clause into the Lome Convention was rejected by the Council of Ministers.<sup>79</sup> This stance may not be unrelated to the fact that at the international level such a link between trade and human rights has remained controversial.<sup>80</sup> Within the context of the WTO, the social clause or core labour standards have been discussed; however, the Singapore Ministerial Conference could agree only on a general statement noting that the International Labour Organisation (ILO) is "the competent body to set and deal

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<sup>75</sup> Cotonou Agreement (note 1), Article 34(4), which provides that: "Economic and Trade Cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties mutual interests and their respective levels of development." See also A. Abass, *The Cotonou Trade Regime and WTO Law*, 10 EUR. L. J. 439, 462 (2004).

<sup>76</sup> For an update on the state of negotiations see Trade Negotiation Insight, available at: <http://www.acp-eu-trade.org/tni.html> (last accessed 22 May 2005).

<sup>77</sup> Cotonou Agreement (note 1), Article 34(1).

<sup>78</sup> 49 THE COURIER 3, 6-7 (May-June 1978).

<sup>79</sup> TOMASEVSKI (note 63), 148.

<sup>80</sup> B. Brandtner/A. Rosas, *Trade Preferences and Human Rights*, in THE EU AND HUMAN RIGHTS (Philip Alston et al. eds., 1999), 699 [hereinafter Brandtner/Rosas, *Trade Preferences*].

with these standards" affirming support for the ILO's work in promoting them.<sup>81</sup> Also, the International Labour Conference in its Declaration on Fundamental Principles and Rights at Work advanced the normative foundation of core labour standards but avoided establishing any conditionality between respect for them and trade rules.<sup>82</sup> However, outside the framework of the WTO, the EU has introduced links between trade preferences and human rights in its unilateral and bilateral trade policy instruments.<sup>83</sup>

### *I. EU GSP System and Human Rights*

The EU practice here may provide a clue as to the prospects of the applicability of human rights considerations within the trade aspects of the ACP-EU partnership. The EU Generalised System of Preferences (GSP) consists of unilateral acts between the EC and third countries which grant trade preferences to certain countries upon the fulfilment of specific criteria. A notable feature of the GSP regulations is the existence of the "special incentives clause," which has the potential to enforce both positive and negative conditionality with respect to compliance with fundamental rights contained within the conventions of the International Labour Organisation (ILO). The inclusion of this clause represents a form of positive conditionality, which denotes the granting of additional preferences that is contingent upon respect for and the adoption of core ILO labour standards in national legislation and proof of the establishment of monitoring mechanisms to ensure the effective implementation of these rights.

The Current Council Regulations on the EU GSP scheme<sup>84</sup> contains rules on procedural implementation and also contains a special incentive clause. This refers to respect for labour rights contained in ILO Conventions Nos. 87 and 98 on the Freedom of Association and Collective Bargaining, Convention No. 138 on the Elimination of Exploitative Forms of Child Labour, Conventions Nos. 29 and 105 on the Prohibition of Forced Labour, Conventions Nos. 100 and 111 on Non-

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<sup>81</sup> WTO Ministerial Conference, Singapore, 9-13 December 1996, Singapore Ministerial Declaration, para 4.

<sup>82</sup> Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference on 18 June 1998, para 5.

<sup>83</sup> On the legality of linking trade preferences to human rights see J. L. Stamberger, *Developments: The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause*, 4 CHI. J. INT'L L. 607 (2003).

<sup>84</sup> Council Regulation 2501/2001, Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2001 to 31 December 2004, OJ L 346, 31 December 2001, Title III.

Discrimination in Employment,<sup>85</sup> and the adoption of national legislation and effective monitoring mechanisms.<sup>86</sup> The proposed GSP regulations for 2006-2008 has gone a step further by granting additional preferences to countries that have ratified not only the core ILO conventions enumerated above but also the Covenants on Civil and Political Rights, Economic Social and Cultural Rights, the Child Convention, the Torture Convention, the Women Convention, the Race Discrimination Convention, and the Genocide Convention.<sup>87</sup> Moreover, every beneficiary country under the new GSP scheme must commit themselves to ratifying and effectively implementing all the human rights conventions which they have not ratified by 31 December 2008.<sup>88</sup>

The withdrawal of trade preferences is provided for in the 2001 regulation currently governing the EU GSP system, covering serious and systematic breaches of the core ILO Conventions. The Commission is empowered to examine complaints in consultation with the Generalised Preferences Committee and to open investigations into the alleged breach in the country concerned, which may lead to the eventual suspension of tariff preferences.<sup>89</sup> The first case of withdrawal of GSP preferences as a response to human rights problems relates to Myanmar (Burma). Forced by a complaint under the relevant GSP Regulation lodged by the International Confederation of Free Trade Unions (ICFTU) and the European Trade Union Confederation (ETFUC), the Commission, in January 1996, initiated an inquiry into practices of forced labour in Myanmar and the involvement therein of the Myanmar authorities.<sup>90</sup> The investigation resulted in the withdrawal of tariff preferences to Myanmar in 1997.<sup>91</sup>

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<sup>85</sup> *Id.*, Article 14.

<sup>86</sup> *Id.*, Article 15(1).

<sup>87</sup> Proposal for EU scheme of Trade Preferences for 2006-2008, available at: [http://europa.eu.int/comm/trade/issues/global/gsp/memo201004\\_en.htm](http://europa.eu.int/comm/trade/issues/global/gsp/memo201004_en.htm) (last accessed 22 May 2005).

<sup>88</sup> *Id.*

<sup>89</sup> Council Regulation 2501/2001 (note 84), Articles 27-30.

<sup>90</sup> Notice of 16 January 1996; Council Regulation 552/97 of 24 March 1997, Temporarily Withdrawing Access to Generalised Tariff Preferences from the Union of Myanmar, OJ L 85, 27 March 1997, 8.

<sup>91</sup> Council Regulation 552/97, *id.*

## *II. Human Rights under Economic Partnership Agreement*

Apart from providing financial and technical assistance as well as cooperating with the ACP countries in formulating, strengthening, and implementing national labour regulations,<sup>92</sup> the Cotonou Agreement does not provide any further insight as to how human rights principles can be integrated into the trade aspect of the ACP-EU partnership. Nevertheless, the EPA may provide a source of inspiration. It seeks to incorporate the non-execution clauses in Articles 96 and 97 of the Cotonou Agreement,<sup>93</sup> as well as the standard exception clause in Article XX of GATT, allowing measures to be taken on grounds of protection of public order, human, animal, or plant life or health, conservation of exhaustible natural resources, etcetera, provided such measures are applied in conformity with WTO rules.<sup>94</sup>

Following from this, it may be concluded that there are probably two ways to mainstream human rights in the trade-related aspects of the ACP-EU partnership. The first is the negative/sanction based-approach, which allows the EU to use restrictive measures under Article 96 of the Cotonou Agreement to promote human rights. In this regard the EU may withhold financial or technical assistance from any ACP country that it deems to be in violation of labour rights protected under the core ILO conventions.<sup>95</sup> Regardless of the denial issued by EU officials that the non-execution clause will not be used to impose trade sanctions, it is not difficult to construe that given its record under the Lome/Cotonou regimes, the EU will not hesitate to wield the big stick on any erring ACP State.

The second approach is progressive and positive. ACP countries may rely on Article XX of GATT to derogate from their trade obligations under the Cotonou Agreement/EPA in order to protect public order or morals, human life, and health. Although the provisions of GATT Article XX do not address human rights *per se*,<sup>96</sup> it is not improbable that they could form the platform for using human rights considerations as a ground for trade restrictions.<sup>97</sup> The provisions in Article XX

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<sup>92</sup> See generally Cotonou Agreement (note 1), Article 50.

<sup>93</sup> European Union Negotiation Mandate for Economic Partnership Agreements, adopted 21 June 2002, available at: [http://www.epawatch.net/documents/doc71\\_2.doc](http://www.epawatch.net/documents/doc71_2.doc) (last accessed 23 May 2005).

<sup>94</sup> *Id.*

<sup>95</sup> S. H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 *JIEL* 133 (2002).

<sup>96</sup> Brandtner/Rosas, *Trade Preferences* (note 80), 705.

<sup>97</sup> S. Charnovitz, *The Moral exception in Trade Policy*, 38 *VA. J. INT'L L.* 689 (1998).

appear to share much with some of the rights contained in the human rights covenants. This was acknowledged in the UN Secretary-General Report on Globalisation and its impact on Human Rights, which stated thus:

The exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean environment, the right to food and to health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few.<sup>98</sup>

For ACP countries the provisions of Article XX of GATT may offer a unique opportunity to challenge some of the provisions in the Cotonou Agreement/EPA that appear to put pressure on ACP countries to adopt trade liberalisation measures that may have human rights implications. Examples of such measures include an obligation on ACP countries to open up their borders to trade and investments from the EU in line with WTO trade commitments under TRIPs, the Agreement on Agriculture, etcetera. The human rights impact of these trade liberalisation agreements are well documented in several reports by the Office of the UN High Commissioner for Human Rights<sup>99</sup> and the European Parliament has recently lent its voice in this regard by calling on the European Commission to reduce its pressure on developing countries to indiscriminately liberalise and deregulate their markets.<sup>100</sup>

There are, however, some hurdles that must be scaled by ACP countries should they seek to escape Cotonou Agreement trade obligations by relying on the human-rights related exceptions in the provisions of GATT Article XX. Firstly, the WTO dispute settlement bodies have stressed the need to interpret the Article XX exceptions narrowly and in a manner that is least trade restrictive.<sup>101</sup> This has caused leading commentators to question the effectiveness of the exception<sup>102</sup> as a

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<sup>98</sup> UN Document A/55/342, Globalisation and its Impact on the Full Enjoyment of all Human Rights: Preliminary Report of the Secretary General, 55<sup>th</sup> session of the General Assembly, 4.

<sup>99</sup> See Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights and Human Rights, UN Doc E/CN.4/Sub.2/2001/13, June 2001; Report of the High Commissioner on Globalisation and its Impact on the Full Enjoyment of Human Rights, UN Doc E/CN.4/2002/54, 15 January 2002; Report of the High Commissioner on Liberalisation of Trade in Services and Human Rights, UN Doc E/CN.4/2002/9, 25 June 2002; and Report of the High Commissioner on Human Rights, Trade and Investment, UN Doc E/CN.4/Sub.2/2003/9, 2 July 2003.

<sup>100</sup> European Parliament Document, *Trade and Development – Assisting Developing Countries to Benefit from Trade*, A5-0277/2003 Final, 8, para 6.

<sup>101</sup> *United States – Restrictions on Imports of Tuna*, 30 ILM 1594 (1991).

<sup>102</sup> M. J. TREBILCOCK/R. HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, 2d ed., 140 (2001).

means for protecting the right of a State to regulate in the interest of the human rights of its citizens. Secondly, the phrase "human rights" is nowhere mentioned in the WTO agreement and, apart from Mauritius,<sup>103</sup> no member country in any of the WTO dispute settlement cases has actually used or invoked the phrase "human rights" in any of their panel submissions.<sup>104</sup> Thirdly, within the trade regime, the various links to the subject of human rights are generally expressed in terms of exception to the rule rather than the guiding principles, and are made subject to trade interests.<sup>105</sup> This position is further enhanced by studies that tend to show that trade liberalisation promotes human rights objectives since it is a positive contributor to poverty alleviation.<sup>106</sup>

Perhaps a potential response to these arguments that can be invoked by ACP countries is that the EU is founded on the value of respect for human rights and that Member States of the EU have accepted obligations to respect, protect, and fulfil human rights under their respective domestic system. Moreover, the contracting parties to the Cotonou Agreement have undertaken a legally binding obligation to respect all human rights<sup>107</sup> and cooperation therein will be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development.<sup>108</sup> Accordingly, any demand on ACP countries to adopt trade liberalising measures must take into account the human rights obligations that such countries have towards their citizens. This response is consistent with the view of the UN human rights bodies to the effect that Member States should adopt "a human rights approach to trade," which:

- (i) sets the promotion and protection of human rights as objectives of trade liberalisation, not exceptions;

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<sup>103</sup> Mauritius has argued that Article 20 of the Agreement on Agriculture (regarding the taking into account of "non-trade concerns") should be read in conjunction with Article 11 of ICESCR recognising the right of everyone to adequate food. See WTO Document G/AG/NG/W/36/Rev.1 of 9 November 2000.

<sup>104</sup> H. Lim, *Trade and Human Rights What's at Issue?*, 35(2) J. World Trade 275, 284 (2001).

<sup>105</sup> Report of the High Commissioner on Liberalisation of Trade in Services and Human Rights, UN Doc E/CN.4/2002/9, 25 June 2002, para 7.

<sup>106</sup> See the WTO study by Nordstrom/Winters, *Trade, Income Disparity and Poverty*, in WTO SPECIAL STUDY NO. 5 (2000).

<sup>107</sup> Cotonou Agreement (note 1), Article 9(2).

<sup>108</sup> *Id.*, Article 9(1).

- (ii) examines the effect of trade liberalisation on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (iii) emphasises the role of the State in the process of liberalisation – not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
- (iv) seeks consistency between the progressive liberalisation of trade and the progressive realisation of human rights;
- (v) requires a constant examination of the impact of trade liberalisation on the enjoyment of human rights;
- (vi) promotes international cooperation for the realisation of human rights and freedoms in the context of trade liberalisation.<sup>109</sup>

The legal basis for adopting a human rights approach to trade is clear. All WTO members have undertaken obligations under human rights law. All 148 members of the WTO<sup>110</sup> (which includes the EU and its Member States as well as a majority of the ACP States) have ratified at least one human rights instrument. One hundred and twelve (112) have ratified the International Covenant on Economic Social and Cultural Rights and all but one have ratified the Convention on the Rights of the Child. Furthermore, those areas of human rights law recognised as customary international law take on universal application, which means that trade rules should be interpreted as consistent with those norms and standards whatever the treaty commitments of States in trade matters. In other words, whatever the human rights treaty obligations undertaken by particular States, the contracting parties to the Cotonou Agreement have concurrent human rights obligations under international law and should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalisation.<sup>111</sup>

Whether the contracting parties in the ACP-EU partnership will adopt the rights-based practice recommended by the UN human rights bodies in their trade cooperation remains to be seen. After all, the parameters of the trade aspects of the partnership are still under negotiation and even when clearly defined will not come into force until January 2008.

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<sup>109</sup> Report of the High Commissioner on Liberalisation of Trade in Services and Human Rights, UN Doc E/CN.4/2002/9, 25 June 2002, 2 [hereinafter Report on Liberalisation of Trade].

<sup>110</sup> As at 16 February 2005.

<sup>111</sup> Report on Liberalisation of Trade (note 109).

### G. Concluding Remarks

After an initial reluctance attributable to the politics of the time and the perception that human rights have no place in the economic or trade sphere, the ACP countries and the EU have finally made the promotion and protection of human rights a principal objective of their partnership. They have expressed their deep attachment to human dignity and human rights by committing themselves to the respect of their international obligations and commitments regarding all human rights be they civil and political or economic, social, and cultural rights. However, the practice of linking human rights considerations within the ACP-EU Development and Trade Cooperation relationship has so far concentrated on using the capacity and financial resources of the EU to put pressure on those ACP countries that the EU has determined to be in violation of human rights principles.<sup>112</sup>

The unilateral GSP system of conditioning trade on respect for social rights may no longer be relevant in light of the new trading relationship between the ACP and the EU, which promotes reciprocal WTO-compatible trading arrangements, ending over two decades of non-reciprocal preferential trade. Under the Lome regime, the EU had the responsibility of granting non-reciprocal trade preferences to ACP countries, which, in turn, were under no obligation to open their markets to EU goods. However, with the coming into effect of the Cotonou Agreement in April 2003, the EU is legally entitled to request ACP countries to open their markets to EU goods and investments in order to promote the economic globalisation outlook of the Cotonou Agreement, to wit: the gradual integration of the ACP countries into the world economy. Compelling ACP countries to adopt trade liberalising measures, while promoting economic growth necessary for poverty alleviation, also has human rights implications for ACP populations, the majority of whom are persons living in poverty and disadvantaged groups such as women and children.<sup>113</sup>

How the human rights provisions in the Cotonou Agreement will be deployed in order for everyone to be entitled to a social and international order in which the rights and freedoms set forth in the UDHR can be achieved is a question that requires further research. A possible way out may lie in the ACP and the EU taking into cognisance their international human rights commitments in the negotiation and implementation of the Cotonou trade partnership. If this suggestion is adopted, the parties will be making the promotion and protection of human rights the

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<sup>112</sup> Horng (note 12), 698.

<sup>113</sup> J. Oloka-Onyango/D. Udagama, *Working Paper on Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, UN Doc E/CN.4/Sub.2/1999/11, 17 June 1999, para 3.

primary objective of their partnership rather than an exception, thus bringing to realisation the goal of economic, social, and cultural development of ACP countries. What are the prospects for the implementation of this suggestion? The current practice of mainstreaming human rights in the ACP-EU development partnership points in the direction of some difficult barriers that must be surmounted. These include defining the core human rights obligations of the parties arising from the Cotonou Agreement, determining that the notion of human rights within the partnership should be less about politics and more about legally binding international obligations, and the applicability of the principle of reciprocity to the human rights clause. Until these issues are resolved, the application of human rights considerations within the ACP-EU cooperation in particular, the trade partnership will remain controversial and unsatisfactory.