

The Lisbon Treaty Evaluated: Impact and Consequences

London, 31 January - 1 February 2011

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Something Old, Something New, Something Borrowed, Something Blue - EU Development Cooperation After Lisbon

Morten Broberg*

1. Introduction

In early 2011 I went to Cambodia's capital, Phnom Penh, to conduct a number of interviews. That Cambodia is a poverty stricken country is immediately apparent no matter where you are in Phnom Penh – and even more so if you move into the countryside. In the streets of Phnom Penh cycle rickshaws and uncomfortable motor cycle taxis mingle with white 4X4 cars carrying logos of development cooperation agencies of the European Union or of Member States or of numerous other development cooperation donors.¹

Cambodia is far from the only developing country where the European Union is providing development assistance. Indeed, jointly the EU Member States and the European Union provide more than half of all development assistance in the world.² The European Union is also unique in that its constitution – the Treaties – contains a special chapter on “Development Policy”.

This paper sets out to examine how the substantive provision of the Lisbon Treaty affects the European Union's development policy. It does so by first providing an outline of how this policy has developed from the Union's inception more than 50 years ago and until the entry into force of the Lisbon Treaty (section 2). Thereupon it goes on to identify the changes brought about by the Lisbon Treaty (section 3). Finally the paper provides an evaluation of these changes (section 4).

2. Outline of the evolution of EU development cooperation policy until today

EU development policy dates back to the inception of the European Economic Community with the signing of the Treaty of Rome in 1957. The early inclusion of development policy as a specific part of the European Union was strongly rooted in European colonialism, in that France, supported by Belgium, conditioned participation upon the Union establishing and maintaining permanent relations with what were then colonies of the Member States.³

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

* University of Copenhagen, Faculty of Law, Studiegaarden, Studiestraede 6, DK-1455 Copenhagen K., Denmark.

¹ In this paper there will be no distinction between ‘European Economic Community’, ‘European Community’ and ‘European Union’. Instead the term ‘European Union’ (or ‘Union’ or ‘EU’) will be used throughout.

² OECD, Development Assistance Committee (DAC), ‘EUROPEAN COMMUNITY – PEER REVIEW’, Paris 2007, p. 12 (accessible at <http://www.oecd.org/dataoecd/57/6/38965119.pdf>).

³ Martin Holland, *The European Union and the Third World*, 1st edition, Palgrave, Houndmills 2002, Joseph A. McMahon, *The Development Co-operation Policy of the EC*, 1st edition, Kluwer Law International Ltd., London 1998, p. 31 and Halima Noor-Abdi, *The Lomé IV Convention, The Legal and Socio-Economic Aspects of African, Caribbean and Pacific States (ACP) and European Community (EC) Cooperation*, Stockholm University, Stockholm 1997, pp. 33-36.

⁴ Whereas today ‘association’ of a country to the European Union implies the prospect of future membership, the association provided in Article 131 did not carry with it such prospect.

The main implication of the accordance of association status to the OCTs was that the tariff measures, which applied amongst the EU members, were extended to the OCTs thereby allowing both OCT and EU products reciprocal customs-duty-free access to their respective market.⁵ Moreover, the European Union also provided development assistance to the OCTs.⁶ Hence, already from this early stage the EU-OCT relationship included market access as well as economic assistance, the two components which even today constitute the main pillars of EU development policy.

From the very outset, EU development policy was not to substitute but merely to supplement the development policies pursued by the individual Member State.⁷ Not all the founding members of the European Union found it attractive to finance what primarily were French colonies, however.⁸ Therefore, rather than financing the development assistance over the European Union's general budget a special financing mechanism – called the European Development Fund (EDF) – was established in 1958 providing for a division of the Member States' financing obligation which differed from that of the general budget. The first EDF was established for a limited duration and its budget was kept separate from the general budget of the Union. When this EDF expired it was followed by a second EDF, and this has continued so that today a tenth EDF is in place.

De-colonisation, which primarily took place in the European Union's early years, sparked demands for a redefinition of the relationship between the European Union and the former colonies.⁹ As a consequence, the First Yaoundé Convention of Association covering the period 1964-69¹⁰ was agreed upon to replace the provisions of the Treaty of Rome as the legal framework governing the relationship between the Union and the so-called Associated African and Malgache Countries; generally known under the French acronym EAMA.¹¹ Arguably, the main difference between the Treaty of Rome's provisions on OCTs and the Yaoundé Convention was that the former was designed to govern the Union's relationship with dependent or 'subordinate' territories, whereas in principle the Yaoundé Convention was negotiated between equal and sovereign parties.¹²

The accession of the United Kingdom to the European Union in 1973 facilitated a widening of the scope of EU development policy. Former United Kingdom colonies were offered 'association status' corresponding to that of the EAMA.¹³

⁵ Implementing Convention on the Association of the Overseas Countries and Territories with the Community, Art 9.

⁶ Implementing Convention on the Association of the Overseas Countries and Territories with the Community, Arts 1-7.

⁷ Implementing Convention on the Association of the Overseas Countries and Territories with the Community, Art 1.

⁸ Lorand Bartels, 'The Trade and Development Policy of the European Union', *European Journal of International Law* 2007, pp. 715-756 at pp. 718-719.

⁹ Holland *supra* note 3.

¹⁰ Journal officielle des Communautés européennes 1964, 93 p. 1431. The First Yaoundé Convention was followed by the Second Yaoundé Convention covering the period 1969-1975, see further Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté – Signée à Yaoundé le 29 juillet 1969, Journal officielle des Communautés européennes 1970, L282/2.

¹¹ For those overseas countries and territories which did not acquire independence the Treaty's OCT provisions continued to apply.

¹² Noor-Abdi, *supra* note 3, pp. 41-42.

¹³ See in particular Agreement Establishing an Association Between the European Economic Community and the United Republic of Tanzania, The Republic of Uganda and the Republic of Kenya and annexed documents, signed on 24 September 1969, Journal official des Communautés européennes 1970, No. L282/55.

From 1975 the Yaoundé Convention framework was replaced by the First Lomé Convention.¹⁴ Together with subsequent Lomé Conventions which together covered the period up until 2000 the First Lomé Convention marked both a geographical widening of the Union's development policy and the inclusion of new areas of cooperation as compared with the Yaoundé Conventions. Like its predecessors, the Lomé Conventions were centred on trade and aid. With regard to trade, the Lomé I Convention represented an important shift in the European Union's commercial policy by introducing *non-reciprocal* preferential schemes favouring a number of former colonies in Sub-Saharan Africa, the Caribbean and the Pacific (ACP countries).¹⁵ Lomé I was replaced by Lomé II in 1980,¹⁶ by Lomé III¹⁷ in 1986 and by Lomé IV in 1990 – expiring in 2000.¹⁸

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

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

In 1992 the Maastricht Treaty brought about the most important regulatory change within the development cooperation policy since 1957 when it introduced a specific Treaty title on development. The new provisions laid down the framework for the European Union's development policy, establishing that the objectives of this policy were the sustainable economic and social development of the developing countries, their smooth and gradual integration into the world economy, the campaign against poverty and the promotion of democracy, human rights and the rule of law.²¹ The 'new' policy was founded on what is often referred to as the 'three Cs', namely (i) that the policy *vis-à-vis* developing countries and other policies must be *coherent*, (ii) that Union policy and Member State policies in the area of development cooperation must be *complementary*, and (iii) that the Union and the Member States are obligated to *coordinate* their efforts in the field of development cooperation.²²

¹⁴ Official Journal of the European Communities 1976, L25/1.

¹⁵ Bartels *supra* note 8, p. 733; Piet Eeckhout External relations of the European Union, legal and constitutional foundations, Oxford University Press, Oxford 2004.

¹⁶ Official Journal of the European Communities 1980, L347/1.

¹⁷ Official Journal of the European Communities 1986, L86/1.

¹⁸ Official Journal of the European Communities 1989, L229/1.

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

²⁰ Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford 2005, pp. 13-15; see for example the preamble to the Lomé III Convention and Art 5 of the Lomé IV Convention.

²¹ EC Treaty Article 177(1) and (2).

²² There is a large body of literature on the three Cs. See for example www.three-Cs.net.

Since the late 1990s, EU development policy has been strongly influenced by the Union's attempt to define and establish itself as a strong global actor. The European Union's increased attention accorded to security issues has spilled over onto its development agenda, in that greater attention has been given to conflict prevention and political emergencies taking place well beyond the European borders.²³ This is clearly reflected in the Cotonou Partnership Agreement which replaced Lomé IV in 2000.²⁴ Moreover, with respect to trade, the Cotonou Agreement constituted a marked change from the unilateral trade preferences of the Lomé conventions in that also European Union products must benefit from preferential treatment in ACP countries. Hence, in the words of Bartels this 'brings the EU's trade and development policy back full circle to its free trade ambitions in Part IV of the EEC Treaty'.²⁵ The Cotonou Agreement remains in force until 2020, albeit subject to revision by the parties every five years.

Finally, mention must be made of the so-called 'European Consensus on Development' agreed in 2005 by the European Commission, the European Parliament, the Council of Ministers and all Member States.²⁶ This measure establishes a common framework for the provision of development assistance to developing countries provided by the European Union or by Member States. The European Consensus clearly emphasises that the relationship between donor and recipient is one of partnership and equality, and it unequivocally establishes 'that development is a central goal by itself; and that sustainable development includes good governance, human rights and political, economic, social and environmental aspects'.²⁷ Like the Cotonou Agreement the European Consensus continues to be in force.

3. Apparent changes brought about by the Lisbon Treaty

3.1. Introduction

On 1 December 2009 the Lisbon Treaty entered into force so that the European Union's legal foundation is now formed by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). At least at first glance, the Lisbon Treaty has brought about a number of substantive changes within the area of development cooperation. Below I shall consider these changes. First I will consider the new provision on the Union's competence in the field of development cooperation (section 3.2). I will thereupon consider the apparent change with regard to the stated objectives of the Union's development cooperation policy (section 3.3). Following this, I will examine the principle of coherence (section 3.4) and the missionary principle (section 3.5). I will then move on to the complementarity obligation (section 3.6) before I end by considering the new provision on humanitarian aid (section 3.7).

3.2. Competence

The limits of the European Union's competences are governed by the principle of conferral.²⁸ This essentially means that the Union shall act only within the limits of the competences conferred upon it in

²³ Maurizio Carbone, *The European Union and International Development, The Politics of Foreign Aid*, Routledge, London and New York, 2007, p. 34; Gorm Rye Olsen, 'Changing European Concerns: Security and complex political emergencies instead of development' in *EU Development Cooperation - from model to symbol*, (Karin Arts and Anna K. Dickson, eds.) Manchester University Press, Manchester 2004, p. 81.

²⁴ Official Journal of the European Union 2000, L317/3.

²⁵ Bartels *supra* note 8, p. 751.

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

²⁷ See para 7 as well as paras 12-13 of the European Consensus.

²⁸ Article 5(1) TEU.

the Treaties to attain the objectives set out therein. If the Treaties do not confer competence on the Union, it is precluded from acting.²⁹

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

Article 3 TFEU lays down the areas where the Union has exclusive competence whereas Article 4 TFEU identifies the areas where the Union and the Member States have shared competence. With particular regard to the development cooperation policy, Article 4(4) however provides as follows:

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

This essentially means that within the areas of development cooperation and humanitarian aid, the fact that the Union has legislated over a given matter will not pre-empt the Member States from legislating over the very same matter. In these two areas the Union's and the Member States' legislative schemes may therefore develop side-by-side over the same matters.

3.3. (Explicit) objectives of European Union development policy

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

‘— the *sustainable economic and social development* of the developing countries, and more particularly the most disadvantaged among them,
— the smooth and gradual *integration of the developing countries into the world economy*,
— the *campaign against poverty* in the developing countries.’³¹

And in its second section, Article 177 EC went on to provide that:

‘Community policy in this area shall contribute to the general objective of developing and consolidating *democracy* and the *rule of law*, and to that of *respecting human rights and fundamental freedoms*.’³²

In contrast, Article 208(1)(2) TFEU only provides that:

‘Union development cooperation policy shall have as its primary objective the *reduction and, in the long term, the eradication of poverty*. ...’³³

²⁹ Article 5(2) TEU.

³⁰ Cf. Article 2(1) TFEU.

³¹ Emphasis added.

³² Emphasis added.

Hence, on the face of it, it would seem that with the Lisbon Treaty objectives *such as* ‘sustainable economic and social development’ and ‘developing and consolidating democracy’ have been abandoned so that today the European Union’s development policy focuses exclusively on poverty eradication. A closer examination will however show that none of the above objectives have been abandoned. Rather, they have been given a more prominent position in the Treaties.

Development Cooperation falls within Part Five on ‘External Action by the Union’ of the Treaty on the Functioning of the European Union’s. The first provision in Part Five provides that:

‘[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.’³⁴

Chapter 1 of Title V of the Treaty on European Union in Article 21(2) *inter alia* provides that

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

(a) ...

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) ...

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

...’

It follows that the Lisbon Treaty has not led to a limitation of the objectives which shall guide the European Union’s development cooperation policy. Indeed, if anything, there has been an increase in this regard!

3.4. Principle of coherence

Somewhat surprisingly perhaps, as a main rule, legislators are not obliged to create a coherent body of legislation. Intentionally or unintentionally they may adopt pieces of legislation that are mutually incoherent – or even incompatible. In this regard the European Union appears to be the exception to prove the rule since some Treaty provisions require the Union’s legislation to comply with a formal coherence requirement.³⁵ The actual impact of these provisions appears questionable, however – at least with regard to new legislation that affects developing countries.

³³ Emphasis added.

³⁴ Article 205 TFEU.

³⁵ For a careful examination of the notion of coherence, see Christophe Hillion, ‘*Tous pou un, un pour tous!* Coherence in the External Relations of the European Union’, in *Developments in EU External Relations Law* (Marise Cremona, ed.), Oxford University Press, 2008, p. 10. It may be noted that the present essay is only concerned with Union legislation as such, i.e. horizontal coherence. It therefore does not cover coherence requirements regarding the relationship between Union legislation and Member State legislation, i.e. vertical coherence, which is achieved *inter alia* through the fulfilment of the principle of sincere cooperation (Articles 4(3) and 24(3) of the Treaty on European Union).

Before the entry into force of the Lisbon Treaty, the EC Treaty in Article 178 provided that:

‘The Community shall take account of the objectives referred to in [the Article laying down the EU’s policy in the area of development cooperation] in the policies that it implements which are likely to affect developing countries.’

In practice Article 178 EC appears not to have played any material role.

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

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

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.’³⁶

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

If we focus exclusively on the formal requirements on attaining consistency and coherence (and thus exclude the institutional changes), it appears however that the Lisbon Treaty has merely carried over the two above provisions into the new treaties. Thus, Article 208(1) of the Treaty on the Functioning of the European Union now provides as follows:

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

And today Article 21(3)(2) of the Treaty on European Union provides:

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

³⁶ See also Article 27a(1) of the (then) EU Treaty.

In Article 7 of the Treaty on the Functioning of the European Union the Lisbon Treaty has, however, brought about a change which may prove to be important. Hence, this provision lays down that:

‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’

Whilst this provision is not concerned with consistency with regard to the Union’s external activities as it does not cover the CFSP, it must be recalled that Part V of the Treaty on the Functioning of the European Union that Treaty covers the ‘External Action of the Union’ which, amongst others, includes the common commercial policy, economic, financial and technical cooperation with third countries, and humanitarian aid. It therefore clearly enforces the obligation of consistency weighing on the European Union. What impact this strengthening of the coherence principle may have on Union legislation affecting developing countries is discussed below in section 4.

3.5. Missionary principle

3.5.1. The duty to promote the Union’s values

In particular over the last two decades the European Union has actively tried to promote so-called European values as part of its external relations policies. However, only with the entry into force of the Lisbon Treaty has this become an explicit obligation weighing on the Union in its external actions. Hence, Article 3(5) of the Treaty on European Union now provides that:

‘In its relations with the wider world, the Union shall *uphold and promote* its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.’³⁷

The missionary principle is also reflected in Article 21(1) of the Treaty on European Union³⁸ which provides that:

‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, *and which it seeks to advance in the wider world*: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’³⁹

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

³⁷ Emphasis added.

³⁸ See also Article 205 of the Treaty on the Functioning of the European Union which provides that ‘[t]he Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in [Articles 21 and 22] of the Treaty on European Union.’

³⁹ Emphasis added.

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

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

The duty to further European values in the wider world, as set out above, applies with respect to all third-countries, not merely with regard to the developing ones. With particular regard to the latter group of countries, Article 208(1) of the Treaty on the Functioning of the European Union merely provides that:

‘Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. ...’⁴⁰

This, somewhat bland, formulation, does not really reflect that in practice European values play a particularly important role in the Union’s development policy (as well as in the neighbourhood policy).⁴¹

3.5.2. What are European values?

The Lisbon Treaty thus now explicitly obliges the European Union to further its values in the wider world. But what are those values that must be furthered? Article 3(5) not only lays down the missionary principle, but also sets out the objectives that shall guide the Union’s behaviour on the international stage.⁴² These objectives are (or at least should be) a reflection of the Union’s values – but they are not values as such. In contrast, Article 21(1) of the Treaty on European Union provides the following (non-exhaustive) list:

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

Further specification of several of the Union’s values may be found in its Charter of Fundamental Rights,⁴⁴ in the case-law of the Court of Justice and in secondary legislation such as the European Consensus on Development that is referred to in section 2 above.⁴⁵

⁴⁰ The phrase ‘the framework of the principles and objectives of the Union’s external action’ presumably is a reference to Article 205 TFEU which in turn refers to Articles 21 and 22 TEU, cf. footnote 35 above.

⁴¹ See in this regard section 3.5.3 below.

⁴² The relevant part of Article 3(5) TEU provides that the Union shall contribute to: ‘peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.’

⁴³ Emphasis added.

⁴⁴ Charter of Fundamental Rights of the European Union, OJ (2000) C364/1.

Whereas it is possible to encircle the European Union's values, it seems rather difficult to establish an unequivocal, detailed list thereof: Democracy, rule of law and human rights arguably constitute the core of those values which the European Union must promote in the wider world. Other values such as free trade, protection of the environment (including fighting climate change) and animal welfare must also be taken into account, however.

3.5.3. The Union's means for promoting its values

The explicit inclusion of the missionary principle in the Treaty on European Union following the entry into force of the Lisbon Treaty marks a clear change *vis-à-vis* the situation prior to this time. This does not mean, however, that the European Union has not hitherto actively promoted its values as part of its development cooperation policy. Hence, from the early 1990s the European Union has included a so-called human rights clause in virtually all trade and cooperation agreements between the Union and a third country.⁴⁶ These clauses require the parties – i.e. the European Union and the third country/countries – to pay due respect to human rights and to democracy based on the rule of law.

Where a human rights clause is inserted into an international agreement, it will as a rule be made 'an essential element' thereof. This means that where one of the parties infringes the clause, the other party may terminate or suspend the operation of the agreement in whole or in part.⁴⁷ It is difficult to estimate what impact the inclusion of human rights clauses has made, but it is clear that the European Union has actively used the possibility of, for example, cutting down on its development cooperation assistance where a developing country has committed a sufficiently serious infringement of the clause.⁴⁸

The European Union also seeks to further its values through the use of trade preferences – i.e. the provision of favourable customs duties which are only awarded to some selected countries. True enough, it follows from the WTO's MFN principle that where a member of the WTO offers a third country preferential treatment, this treatment must be extended to all WTO members. However, the WTO Agreement's 'enabling clause' allows the Union to divert from the MFN principle and offer preferential treatment to developing countries provided that the criteria which the developing countries must meet do not discriminate between the different developing countries.

On this basis the European Union has established a preferential customs system. As part of this system the Union has created what in Regulation 732/2008⁴⁹ is referred to as a 'special incentive arrangement'; or the GSP+ as it is normally called. Under the GSP+ arrangement, a group of so-called 'vulnerable' developing countries are offered attractive customs duties – on condition that they ratify and effectively implement 27 specified international conventions. And on condition that they accept regular monitoring and review of their implementation record with regard to these conventions. Amongst the 27 conventions we find Convention on the Elimination of All Forms of

⁴⁵ Cf. note 26 above.

⁴⁶ See in particular Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final and the Council conclusions of 29 May 1995 (reported in EU Bulletin No 5 1995 at point 1.2.3).

⁴⁷ This follows from Article 60 of the Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

⁴⁸ See for instance Council decision of 27 September 2010 concerning the conclusion of consultations with the Republic of Niger under Article 96 of the ACP-EU Partnership Agreement, OJ (2010) L260/6.

⁴⁹ Regulation 732/2008 applying a scheme of generalised tariff preferences, OJ (2008) L211/1.

Discrimination Against Women, Convention on the Rights of the Child, the Montreal Protocol on Substances that Deplete the Ozone Layer, and Convention on International Trade in Endangered Species of Wild Fauna and Flora. Failure to comply with one or more of these conventions may lead to the European Union fully or partly withdrawing the preferential customs scheme *vis-à-vis* the developing country in question.⁵⁰

In other words, the GSP+ arrangement essentially means that those developing countries which implement the European Union's values are rewarded with reduced customs duties when exporting to the Union

Mention must also be made of a European Parliament and Council regulation providing the European Union with financing for 'the promotion of democracy and human rights worldwide', as the measure's title explains.⁵¹ Just over €1 billion has been allocated towards the financing activities under the instrument.⁵² In practice the financing instrument is closely related to the Union's development cooperation assistance, although it may equally be used for financial and technical cooperation with other (i.e. non-developing) third countries. A remarkable aspect of the instrument is that it may also be used for financing non-State actors. For instance, the European Union may use it to support NGOs whose aim it is to watch over human rights breaches in a dictatorship – something that is normally not well received by the dictatorship's rulers.

Finally, the fundamental principles of the European Union together with the objectives that are laid down in the Treaties regarding the Union's action on the international scene form the framework for the Union's external policies. This framework applies to external policies falling under the Common Foreign and Security Policy (CFSP) as well as to such policies falling outwith the CFSP. The Union's external action policies must therefore comply with these principles and pursue those objectives.

3.6. The complementarity obligation

Before the adoption of the Lisbon Treaty, Article 177 of the EC Treaty provided that:

'Community policy in the sphere of development cooperation [...] shall be complementary to the policies pursued by the Member States ...'

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

Following the entry into force of the Lisbon Treaty, Article 208(1) now provides that:

'[t]he Union's development cooperation policy and that of the Member States complement and reinforce each other.'

⁵⁰ Cf. Regulation 732/2008 applying a scheme of generalised tariff preferences, *supra* note 49, Article 15(2). For an example, see Implementing Regulation 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, OJ (2010) L45/1.

⁵¹ Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ (2006) L386/1. Sometimes merely called the 'Financing Instrument'.

⁵² See further http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/latin_america/-114172_en.htm (accessed 27 January 2011).

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

3.7. Humanitarian aid

For many years the European Union has provided humanitarian aid (emergency relief) to third countries on the basis of Regulation 1257/96.⁵³ From a purely legal perspective this regulation has been criticised in two respects.

Firstly, it has been argued that the regulation cannot form the legal basis for providing humanitarian aid to countries that do not qualify as being developing since it has been adopted on the basis of Article 179 of the EC Treaty concerning development assistance.⁵⁴ The argument goes that Article 179 of the EC Treaty only empowered the Union to adopt legislation aimed at helping developing countries. Irrespective of this, the regulation has also been used for providing humanitarian aid to countries that cannot be classified as developing.

Secondly, it has been argued that Article 179 of the EC Treaty simply did not provide the required legal foundation for adopting measures in the field of humanitarian aid.⁵⁵ According to this argument, the regulation is *ultra vires*, meaning that it cannot form the basis for providing humanitarian aid whatsoever.

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

4. Evaluating the changes

The Lisbon Treaty has brought about a considerable number of changes to the European Union's legal foundation – and some of the most significant of these changes are to be found in the area of the European Union's external relations. *A priori*, one would therefore expect that the Lisbon Treaty has also led to appreciable changes with regard to the regulation of the Union's development cooperation policy. However, a very considerable part of those changes concerns the Union's *institutional structure* in the field of external relations and not the substance of the Union's development cooperation policy which is the subject of the above examination.

Whilst the Lisbon Treaty certainly has brought about changes to the regulation of the European Union's development cooperation policy, the majority of these changes are limited. However, there

⁵³ Council Regulation no 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L163/1 (amended by Regulation no 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, [2003] OJ L284/1).

⁵⁴ Cf. Broberg, 'Undue assistance? An analysis of the legal basis of Regulation 1257/96 concerning humanitarian aid', *European Law Review* 2009, pp. 769-778.

⁵⁵ Cf. Alan Dashwood, "External Relations Provisions of the Amsterdam Treaty" in *Legal Issues of the Amsterdam Treaty*, ed. David O'Keefe and Patrick Twomey (Oxford: Hart Publishing, 1999), 201-24 at 223.

seems to be one exception to this, namely the explicit introduction of the missionary principle combined with the strengthening of the principle of coherence.

In the opinion of the present author these two changes may have consequences for the Union's development policy in at least the three following respects.

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

Secondly, prior to the entry into force of the Lisbon Treaty not all of the EC Treaty's legal bases for entering into international agreements with developing countries necessarily also allowed the European Union to actively further its own values by, for instance, introducing human rights clauses into these agreements.⁵⁶ In contrast, I would argue that today the missionary principle and the coherence principle in combination must mean that the Union now is obliged to further democracy (etc.) whenever it enters into new international agreements.

Thirdly, there are reasons to expect that the explicit introduction of the missionary principle and the strengthening of the coherence principle will increase awareness of the European values in the Union institutions and in the Member State administrations and thereby lead these values to a more prominent position on the agenda whenever new policies and new measures are negotiated.

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

⁵⁶ See in this respect Case C-268/94 *Portugal v Council (India Agreement)* [1996] ECR I-6177.