

# The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy: EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus

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## Abstract

This article demonstrates that Arts. 21 and 3 (5) of the *Treaty on European Union* (TEU) as well as Arts. 205, 207 (1), 208 (1), 209 (2) of the *Treaty on the Functioning of the European Union* (TFEU), *legally* oblige the European Union (EU) to promote the rule of law in its foreign trade and development policy. Furthermore, it is shown that, in the context of such promotion, the EU applies not a rudimentary but a sophisticated concept of the rule of law – quite similar to the concept of the rule of law that has developed within the Union. To fulfill the legal obligation to promote the rule of law abroad, the EU employs, as a key instrument, the *legal* mechanism of conditionality, not only through autonomous instruments but also in its contractual international relationships (*carrot-and-stick policy*). The EU's foreign policy in the trade and development nexus, in particular when it comes to the promotion of the rule of law, can, therefore, be considered a process, to a large extent, determined and organized the of law.

## A. Introduction – A Legal Perspective

The EU pursues a policy of promoting the rule of law. This applies not only within the EU – regarding its own Member States<sup>1</sup> and in the course of EU accession procedures<sup>2</sup> – but also with respect to legal orders beyond the EU's own (future) territory and jurisdiction.

For this policy of promoting the rule of law abroad, the EU employs a variety of instruments.<sup>3</sup> However, as the globally leading entity in development cooperation<sup>4</sup> and one of the world's largest trading powers,<sup>5</sup> the EU is particularly well-positioned to pursue the policy of *exporting values*, such as the rule of law,

<sup>1</sup> See L. Pech & K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', in K. Armstrong (ed), *Cambridge Yearbook of European Legal Studies* (2017), 3; see also the contributions of L. W. Gormley, P. Wennerås, M. Broberg, L. Besselink, F. Amtenbrink, R. Repasi, O. Stefan, A. von Bogdandy, C. Antpöhler, M. Ioannidis & J. W. Müller, in A. Jakab & D. Kochenov (eds), *The Enforcement of EU Law and Values* (2017); see also C. Closa & D. Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options', in W. Schroeder (ed), *Strengthening the Rule of Law in Europe* (2016), 173; [Schroeder (ed), *Rule of Law in Europe*], E. Crabit & N. Bel, 'The EU Rule of Law Framework', in *ibid.*, 197.

<sup>2</sup> F. Emmert & S. Petrovic, 'The Past, Present, and Future of EU Enlargement', 37 *Fordham International Law Journal* (2014) 5, 1349, 1349-1355; H. de Waele, *Legal Dynamics of EU External Relations* (2017), 157-162.

<sup>3</sup> See extensively, though with a particular focus on human rights, V. Haász, J. Jaraczewski & K. Podstawa, 'The FRAME Toolbox for the EU Fundamental and Human Rights Policies', European Commission, GA No. 320000 (2017); see also M. Cremona, 'Values in EU Foreign Policy', in M. Evans & P. Koutrakos (eds), *Beyond the Established Legal Orders* (2011), 275, 292-307 [Cremona, *Values in EU Foreign Policy*]; A. Kumin, 'Global Activities and Current Initiatives in the Union to Strengthen the Rule of Law – A State of Play', in Schroeder (ed), *Rule of Law in Europe*, *supra* note 1, 207; L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', CLEER Working Papers (2012/3), 14-20 [Pech, *Rule of Law*].

<sup>4</sup> European Commission, Press Release, *EU Official Development Assistance Reaches Highest Level Ever*, IP/18/3002 (10 April 2018), available at [http://europa.eu/rapid/press-release\\_IP-18-3002\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3002_en.htm) (last visited 13 December 2018); see also OECD, *Development Aid Stable in 2017 With More Sent to Poorest Countries* (9 April 2018), available at <http://www.oecd.org/development/financing-sustainable-development/development-finance-data/ODA-2017-detailed-summary.pdf> (last visited 13 December 2018).

<sup>5</sup> The EU-28 accounts for around 15 % of the world's trade in goods. In 2016 the EU-28 had the highest level of trade in goods (imports and exports) exceeding those of the US or China, see Eurostat, *International Trade in Goods* (2017), 1, available at <http://ec.europa.eu/eurostat/statistics-explained/pdfscache/1188.pdf> (last visited 13 December 2018).

through the medium of its foreign trade and development policies.<sup>6</sup> A clear indication of such policy conception can be observed in the EU's recent 2017 New European Consensus on Development which states:

“The EU and its Member States will promote the universal values of democracy, good governance, the rule of law and human rights for all, because they are preconditions for sustainable development and stability, across the full range of partnerships and instruments in all situations and in all countries, including through development action.”<sup>7</sup>

It is this rule of law promotion policy, in the so-called foreign trade and development nexus, that shall form the general backdrop of this article – with the ‘foreign trade and development nexus’ in this context to be understood as the entirety of the EU's international action (uni-, bi- and multilateral) in the closely interlinked and mutually reinforcing fields of trade liberalization and development cooperation (after all, many of the EU's trade activities are not only conducted for the economic benefit of the Union but also for the development benefit of the respective partner States).<sup>8</sup>

In light of the specific topic of this GoJIL Special Issue, the article will approach the above-described general field of EU rule of law promotion in the foreign trade and development nexus from a particular analytical perspective – namely a *legal* perspective.<sup>9</sup> With this perspective, the article focuses not

<sup>6</sup> See J. Larik, ‘Much More Than Tarde: The Common Commercial Policy in a Global Context’, in M. Evans & P. Koutrakos (eds), *Beyond the Established Legal Orders* (2011), 13, 25-34 [Larik, Much More Than Tarde].

<sup>7</sup> European Commission, *Proposal for a New European Consensus on Development – Our World, our Dignity, our Future* (22 November 2016), COM(2016) 740 final/2, para. 49. The “New European Consensus on Development” is a non-legally binding joint statement of the Council, The European Commission, the European Parliament as well as the EU Member States, constituting a comprehensive common framework for European development cooperation, applying to the entirety of the EU's institutions and all EU Member States.

<sup>8</sup> See Larik, ‘Much More Than Tarde’, *supra* note 6, 25-34; on development cooperation see generally P. Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (2013).

<sup>9</sup> For a related approach see e.g. J. Larik, ‘Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality’, in B. van Vooren, S. Blockmans & J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (2013), 7 [Larik, Entrenching Global Governance].

only on understanding which positive legal norms impel and drive the EU to promote the rule of law abroad, but also on exploring what legal instruments and mechanisms employed by the EU govern and organize the actual promotion and transfer processes. Consequently, the assessment aims to emphasize the law's relevance in what often rather seems to consist of a sequence of decisions and aspirations in a predominantly socio-political sphere.<sup>10</sup>

With the aim of contributing to a better understanding of what might, therefore, be described as *the law behind rule of law transfers*, the article will proceed in two steps.

First, the article will deal with the EU's internal legal imperatives with respect to the promotion of the rule of law in the EU's foreign policy (B.). Within this part, it will be assessed why a certain detachment of foreign policies from legal determination and control, typically to be observed in western constitutional democracies, does not hold true for the EU (I.), to what extent the EU is actually legally obliged to promote the rule of law in foreign policy

With this article's specific focus on the assessment of these *legal dimensions* of the EU's rule of law promotion, other issues, notwithstanding how related they may appear, shall not be discussed. In particular, such issues would not include the legitimacy ('legal imperialism'), overall effectiveness, or coherence of the EU's approach. See on these issues e.g. R. Brooks, 'The New Imperialism: Violence, Norms and the "Rule of Law"', 101 *Mich. L. Rev.* (2003) 7, 2275; A. Zimelis, 'Conditionality and the E-ACP Partnership: A Misguided Approach to Development?', 46 *Australian Journal of Political Science* (2011) 3, 389; R. Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012); A. Sepos, 'Imperial power Europe? The EU's relations with the ACP countries', 6 *Journal of Political Power* (2013) 2, 261; L. Pech, 'Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law', in D. Kochenov & F. Amtenbrink, *The European Union's Shaping of the International Legal Order* (2014), 108, 119-128 [Pech, Promoting the Rule of Law Abroad]; L. Bartels, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and other Trade Agreements with Third Countries' (2008), European Parliament, Policy Department External Policies [Bartels, Human Rights in EU Trade Agreements]; J.D. Saltnes, 'The EU's Human Rights Policy, Unpacking the literature on the EU's implementation of aid conditionality', ARENA Working Paper No. 2, (03/2013).

<sup>10</sup> For a perspective rather emphasizing the political (science) and sociological dimension of rule of law promotion, see e.g. A. Magen & L. Morlino, 'Hybrid Regimes, the Rule of Law, and External Influence on Domestic Change', in A. Magen & L. Morlino (eds), *International Actors, Democratization and the Rule of Law* (2009), 1; L. Morlino & A. Magen, 'Methods of Influence, Layers of Impact, Cycles of Change', in A. Magen & L. Morlino (eds), *International Actors, Democratization and the Rule of Law* (2009), 26; or E. Baracani, 'EU Democratic Rule of Law Promotion', in A. Magen & L. Morlino (eds), *International Actors, Democratization and the Rule of Law* (2009), 53.

(II.), and, subsequently, what concept of the rule of law the EU applies when promoting it abroad (III.).

Based on these findings, the second part will then focus on a significant legal mean that the EU employs for external value promotion in its foreign trade and development policy, namely the mechanism of (rule of law) conditionality (C.). This conditionality will be analyzed in the context of two of its major fields of application in the trade and development nexus, namely the Special Incentive Scheme of Preferences (GSP+) (I.), and the *Cotonou Agreement's* essential elements clause and non-compliance procedure (II.). For both, an examination of the mechanism's legal background and functionality, as well as two short case studies with respect to the mechanism's actual application, will be provided.

## B. Legal Imperatives for Rule of Law Promotion in EU Foreign Policy

### I. EU Foreign Policy as a Purely Political Sphere?

#### 1. The Particularity of Foreign Policy

At first glance, an assertion of the EU's rule of law promotion in foreign policy as a process extensively influenced by *legal* imperatives appears to have a natural antagonist, best referred to as the "particularity of foreign policy"<sup>11</sup> – a phenomenon that denotes a certain detachment of the sphere of foreign policy from internal (in particular constitutional) legal determination and control, often to be observed in western constitutional democracies.<sup>12</sup>

Such exceptional status of foreign policy is usually reasoned with the particularly *political* nature of foreign policy – conceived as being highly complex and difficult to predict, in constant need of confidentiality, expert knowledge, compromise, political flexibility, and spontaneous decision-making. Only a certain detachment from legal constraints would, therefore, not hinder

<sup>11</sup> See on this conceptual term ("Particularity of Foreign Affairs") D. Thym, 'Foreign Affairs', in A. von Bogdandy & J. Bast, *Principles of European Constitutional Law*, 2nd ed. (2009), 309, 309-311.

<sup>12</sup> M. Krajewski, 'Foreign Policy and the European Constitution', *22 Yearbook of European Law* (2003), 435, 438-442 with further references [Krajewski, Foreign Policy and the European Constitution]; see also Thym, *supra* note 11, 311-314.

foreign policy's effectiveness in the context of largely power-driven international relations.<sup>13</sup>

Approaches of (a certain) particularity can be well-observed in, for example, France, the United Kingdom, the United States of America or Germany, referring to it with terms such as “*theorie de l’acte de gouvernement*”, “political question doctrine/crown prerogative”, “acts of [S]tate doctrine” or “*weiter Ermessensspielraum in Angelegenheiten des Auswärtigen*”.<sup>14</sup>

## 2. Legal Permeation of EU Foreign (Trade and Development) Policy

Regardless of the general question of whether the exceptional status of foreign policy is (still) a fitting approach in light of the increasing relevance and impacts of international relations within domestic legal spheres and the consequential need for legitimization,<sup>15</sup> such an exceptional status is, however, not an accurate description of the EU's constitutional structure when it comes to the trade and development nexus. Quite the contrary holds true: EU foreign trade and development policy is to be considered a field profoundly permeated by the law.

This legal permeation can be well-observed in two aspects.

The first aspect is, as will be shown below, the density of EU primary law that establishes substantive legal standards on the strategic orientation and direction of the EU's foreign (trade and development) policy.<sup>16</sup>

The second aspect is that, with respect to foreign (trade and development) policy,<sup>17</sup> the EU legal order assigns its judiciary rather extensive powers of review<sup>18</sup>

<sup>13</sup> See Thym, *supra* note 11, 314-316; see also T. M. Franck, *Political Questions/Judicial Answers* (1992), 45-60.

<sup>14</sup> See Krajewski, ‘Foreign Policy and the European Constitution’, *supra* note 12, 440-441.

<sup>15</sup> For a critical approach “in a post-national context” see *ibid.*, 441-443.

<sup>16</sup> Thym, *supra* note 11, 326-330; Larik, ‘Entrenching Global Governance’, *supra* note 9, 7-12; C. Vedder, ‘Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action’, in M. Bungenberg & C. Herrmann (eds), *European Yearbook of International Economic Law – Special Issue: Common Commercial Policy After Lisbon* (2013), 115; M. Cremona, ‘Structural Principles and their Role in EU External Relations Law’, in M. Cremona (ed), *Structural Principles in EU External Relations Law* (2018), 3 [Cremona, Structural Principles].

<sup>17</sup> However, with the Common Foreign and Security Policy being, to a great extent, excluded from judicial review (Art. 24 (1) TEU and Art. 275 TFEU).

<sup>18</sup> Thym, *supra* note 11, 326-330; P. Koutrakos, *EU International Relations Law* (2015), 229-235; M. Cremona, ‘A Reticent Court? Policy Objectives and the Court of Justice’, in M.

– with the CJEU indeed making use of these powers, frequently subjecting acts within the field to quite a high level of scrutiny. This applies not only in terms of EU law’s allocation of competences and procedural matters<sup>19</sup> but also in terms of substantive legal requirements.<sup>20</sup>

Cremona & A. Thies (eds), *The European Court of Justice and External Relations Review* (2016), 15, 15-19, 29-31 [Cremona, A Reticent Court?].

<sup>19</sup> See e.g. *European Parliament v. Council* (EDF), Case No. C-316/91, Judgment of 2 March 1994, [1994] ECR I-00625, para. 29; *Parliament v. Council (Waste Shipment)*, Case No. C-187/93, Judgment of 28 June 1994, [1994] ECR I-2874, para. 17; *Parliament v. Council (Article 43 EEC)*, Case No. C-65/93, Judgment of 30 March 1995, [1995] ECR I-643, para. 23; *Parliament v. Council (Common Commercial Policy)*, Case No. C-360/93, Judgment of 7 March 1996, [1996] ECR I-1195, paras. 23-25; *Commission v. Council (Fishery Agreement)*, Case No. C-25/94, Judgment of 19 March 1996, [1996] ECR I-1496, para. 48; *Andersson and Wåkerås-Andersson*, Case No. C-321/97, Judgment of 15 June 1999, [1999] ECR I-03551, para. 26; *Commission v. Council (Accession to the Nuclear Safety Convention)*, Case No. C-29/99 Judgment of 10 December 2002, [2002] ECR I-11221, paras. 67-70; *Commission v. Council (Energy Star Agreement)*, Case No. C-281/01, Judgment of 12 December 2002, [2002] ECR I-12049, paras. 33-35; *Commission v. Council (Carriage of goods agreement)*, Case No. C-211/01, Judgment of 11 September 2003, [2003] ECR I-8913, para. 39; *Commission v. Council (Rotterdam Convention)*, Case No. C-94/03, Judgment of 10 January 2006, [2006] ECR I-1, paras. 50-51; *Parliament v. Council and Commission (PNR)*, Case No. C-317/04 and C-318/04, Judgment of 30 May 2006, [2006] ECR I-4721, para. 63 and 68.

<sup>20</sup> See e.g. *Germany v. Council (Framework Agreement on Bananas)*, Case No. C-122/95, Judgment of 10 March 1998, [1998] ECR I-00973, paras. 62-64; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission (Kadi I)*, Case No. C-402/05 P and C-415/05 P, Judgment of 3 September 2008, [2008] ECR I-06351, paras. 283-285, 326. Later confirmed by the joined cases *Faraj Hassan v. Council and Commission and Chafiq Ayadi v. Council*, Case No. C-399/06 P and C-403/06 P, Judgment of 3 December 2009, [2009] ECR I-11393, paras. 71-75; as well as *Commission and Others v. Yassin Abdullah Kadi (Kadi II)*, Cases No. C-584/10 P, C-593/10 P and C-595/10 P, Judgment of 18 July 2013, ECLI:EU:C:2013:518, paras. 66-67, 97; *Front Polisario v. Council*, Case No. T-512/12, Judgment of 10 December 2015, ECLI:EU:T:2015:953, paras. 227-233, later set aside by the follow-up case *Council v. Front Polisario*, Case No. C-104/16 P, Judgment of 21 December 2016, ECLI:EU:C:2016:973, paras. 92-99, 103-108; which in turn was confirmed through the recent case *Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, Case No. C-266/16, Judgment of 27 February 2018, ECLI:EU:C:2018:118, paras. 62-63. The reversal of the judgment was, however, not based on an incorrect legal assessment regarding the substantive consistency of the agreement with general principles of EU law, but rather on a faulty assessment of the agreement’s territorial scope of application. See also *EEA I*, Opinion 1/91 of the Court of 14 December 1991, [1991] ECR I-06079, paras. 41-46; *European Common Aviation Area*, Opinion 1/00 of the Court of 18 April 2002, [2002] ECR I-03493, paras. 11-13; GATS, Opinion 1/08



Accordingly, the law is anything but absent when it comes to the EU's (promotion of the rule of law in) foreign trade and development policy; as a matter of fact, the law widely determines and controls this policy, as will be elaborated further below.

## II. The EU's Legal Obligation to Promote the Rule of Law Abroad

As indicated above, under EU primary law, the EU and its organs are not free to design its foreign policy and conduct its activities in the external sphere as they (politically) please. Instead, they have to comply with certain substantive requirements in EU primary law.<sup>21</sup> This includes an obligation to promote the rule of law abroad. With respect to the foreign trade and development policy, EU primary law establishes the relevant standards (on rule of law promotion) in Arts. 21<sup>22</sup> and 3 (5) *Treaty on European Union* (TEU) as well as in Arts. 205, 207 (1), 208 (1), 209 (2) *Treaty on the Functioning of the European Union* (TFEU).

of the Court of 30 November 2009, [2009] ECR I-11129, para. 108; *ECHR Accession*, Opinion 2/13 of the Court of 18 December 2014, ECLI:EU:C:2014:2454, paras. 168, 179-200, 258; *PNR*, Opinion 1/15 of the Court of 16 July 2017, ECLI:EU:C:2017:592, para. 67.

<sup>21</sup> The question as to what extent the EU might be obliged under international law to promote the rule of law in its foreign policy is not subject to this assessment; on this issue see Vedder, *supra* note 16, 140-141.

<sup>22</sup> Article 21 TEU reads:

“(1) *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.*

*The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*

(2) *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:*

[..]

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

[..]

(3) *The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action*

## 1. Rule of Law Promotion in Art. 21 TEU

Art. 21 TEU stands in the center of this normative conglomerate, being the general and at the same time most detailed substantive provision. It applies to all fields of EU foreign policy as well as all forms and formats of the EU's external means (may it be diplomatic, autonomous/unilateral foreign policy instruments or bi-/multilateral treaty-making). Art. 5 (3) TEU and Arts. 205, 207 (1), 208 (1), 209 (2) TFEU in this regard do not substantially add to Art. 21 TEU. However, they do (explicitly) repeat, refer back to, or incorporate its normative content and clarify its full applicability to the external dimensions of the common commercial policy (trade) and international development cooperation.

As an introductory provision to Title V of the TEU ("General Provisions on the Union's External Action"), Art. 21 TEU establishes a framework of guiding principles and objectives concerning the EU's external action ("the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement", Art. 21 (1) TEU), thereby, as Christoph Vedder rightly notes, "externaliz[es] [the EU's] internal constitutional values".<sup>23</sup> These guiding principles and objectives comprise, among others, the rule of law, explicitly referred to in Art. 21 (1), (2) TEU.

The reference to the rule of law in Art. 21 TEU unfolds its relevance as a guiding principle in EU foreign policy in two dimensions. First, it constitutes the basic idea that the EU and its organs have to comply with the rule of law, not only when acting internally but also when acting externally. However, Art. 21 TEU is not restricted to such a requirement to *respect* the rule of law when acting externally.<sup>24</sup> Secondly, it also demands from the EU and its organs to *promote* the rule of law abroad, meaning to globally strengthen and support it beyond its own territory and jurisdiction ("which it seeks to advance in the wider world", Art. 21 (2) TEU).<sup>25</sup> This dimension, which is of specific relevance here, becomes

*covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.*

[...]" (emphasis added).

<sup>23</sup> Vedder, *supra* note 16, 120.

<sup>24</sup> I. Vianello, 'The Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners', in M. Cremona (ed), *Structural Principles in EU External Relations Law* (2018), 225.

<sup>25</sup> Vedder, *supra* note 16, 115-119, 123, 127, 141; R. Geiger, D. E. Khan & M. Kotzur, *Commentary European Union Treaties* (2015), Art. 21, para. 9, 13; V. Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Art. 21 TEU?', EUI Working Papers 2016/10, 26-29.

even more evident when reading Art. 21 TEU in conjunction with Art. 3 (5) TEU, which explicitly points out, that “[i]n its relations with the wider world, the Union shall uphold and promote its values and interests”.

## 2. The Legally Binding Character of Art. 21 TEU

Though not undisputed,<sup>26</sup> Art. 21 TEU has to be considered as legally binding.<sup>27</sup>

This first and foremost follows from its explicit wording (“shall be guided”, “shall seek”, “shall pursue”, “shall work for”).<sup>28</sup>

### a. ECJ Judgement *H v. Council and Commission*

Such literal interpretation of Art. 21 TEU is also supported by the ECJ’s (Grand Chamber) recent judgment in *H v. Council and Commission (CFSP)*.<sup>29</sup> The case did not concern the particular issue of Art. 21 TEU as a legal guiding principle for the promotion of the rule of law abroad directly but instead dealt with the construction of CJEU jurisdiction in the field of Common Foreign and Security Policy (where such jurisdiction is principally excluded, Art. 24 (1) TEU, Art. 275 TFEU). However, in its findings, the ECJ reasoned the necessity of an effective judicial remedy even with respect to EU operational actions outside of the EU (in this case, the European Union Police Mission in Bosnia and Herzegovina), *inter alia*, with a reference to the rule of law demands of Art. 21 TEU, and with that made Art. 21 TEU a normative standard against which EU external actions were legally measured. The judgment reads:

<sup>26</sup> For a rather skeptical approach see e.g. S. Oeter, ‘Art. 21’, in H.J. Blanke & S. Mangiameli (eds), *TEU Commentary* (2013), paras. 41-43.

<sup>27</sup> Vedder, *supra* note 16, 137-138; Larik, ‘Entrenching Global Governance’, *supra* note 9, 10-12, 15-16; Cremona, ‘Structural Principles’, *supra* note 16, 12; M. Krajewski, ‘The Reform of the Common Commercial Policy’, in A. Biondi, P. Eeckhout & S. Ripley (eds), *EU-Law After Lisbon* (2012), 292, 296-298; J. Larik, *Foreign Policy Objectives in European Constitutional Law* (2016), 154-156 [Larik, Foreign Policy Objectives]; J. Larik, ‘Shaping the International Order as an EU Objective’, in Kochenov & Amttenbrink, *supra* note 9, 62, 78-86 [Larik, International Order].

<sup>28</sup> See European Commission, *English Style Guide – A handbook for authors and translators in the European Commission* (2016), 49, which states: “Positive imperative. To impose an obligation or a requirement, EU legislation uses *shall*.” (emphasis added).

<sup>29</sup> *H v. Council and Commission (CFSP)*, Case No. C-455/14 P, Judgment of 19 July 2016, ECLI:EU:C:2016:569.

“In that regard, it must be noted that, as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union’s external action, to which Article 23 TEU, relating to the *CFSP*, refers, the European Union is founded, in particular, on the values of equality and the rule of law [...]. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law [...]”<sup>30</sup>

b. Opinion of Advocate General *Wathelet* in *Western Sahara Campaign UK*

An additional indicator of the legally binding character of Art. 21 TEU is the quite explicit recent opinion of Advocate General *Wathelet* in *Western Sahara Campaign UK*.<sup>31</sup> The opinion – which concerned the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco and its Protocol setting out the fishing opportunities and financial contribution provided for in that agreement – explicitly states that Art. 21 TEU forms a legal standard with respect to the EU’s external actions. It reads:

“Thus, the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU and FEU Treaties, such as Article 3 (5) TEU and Article 21 TEU, [...]”<sup>32</sup>

The Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco and the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in that agreement are incompatible with Article 3(5) TEU, the first subparagraph of Article 21 (1) TEU, Article 21 (2) (b) and (c) TEU and Articles 23 TEU and 205 TFEU [...]”<sup>33</sup>

<sup>30</sup> *Ibid.*, para. 41.

<sup>31</sup> Opinion of Advocate General *Wathelet*, *Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, Case No. C-266/16, Opinion of 10 January 2018, ECLI:EU:C:2018:1.

<sup>32</sup> *Ibid.*, para. 100.

<sup>33</sup> *Ibid.*, para. 286.

### c. (Procedural) Consequences and Relativity

The direction to promote the rule of law in EU foreign policy laid down in Art. 21 TEU, therefore, is not to be considered optional but establishes a legal obligation for the EU and its organs.

Accordingly, being part of the EU primary law, Art. 21 TEU can also be made a standard of judicial review before the CJEU.<sup>34</sup> The actual possibility to measure an act of foreign policy against the requirements of Art. 21 TEU could, for example, occur in the review of an envisaged international treaty in an Art. 218 (1) TFEU procedure or in the context of reviewing the enactment of foreign policy-related EU secondary laws, e.g. in an Art. 263 (1) TFEU annulment procedure over a Council decision on the signing of an international treaty.<sup>35</sup> Consequently, non-compliance with the requirement to promote the rule of law under Art. 21 TEU could ultimately render an action illegal.

However, although of legally binding nature, certain aspects have to be pointed out that put the requirements of Art. 21 TEU into perspective.<sup>36</sup> First, an obligation to promote the rule of law in foreign policy is necessarily a rather vague obligation, allowing for multiple paths of compliance.<sup>37</sup> Second, Art. 21 TEU does not only mention the rule of law but also a number of other principles to be promoted in EU foreign policy (such as human rights, democracy, European security, international peace, environmentally sustainable development, or international economic liberalization, to name but a few). Although many of these principles are compatible and even mutually reinforcing, scenarios of incoherence or conflict are possible. With Art. 21 TEU not establishing a hierarchy among its principles, this, again, suggests that Art. 21 TEU necessarily needs to allow for a certain flexibility with respect to its realization (as long as a certain consistency is ensured, Art. 21 (3) TEU).<sup>38</sup> And third, when it comes to judicial review, the CJEU – though far from adopting an

<sup>34</sup> Kube, *supra* note 25, 26-29; Vianello, *supra* note 24, 228-230.

<sup>35</sup> Vedder, *supra* note 16, 138; R. Geiger, D.E. Khan & M. Kotzur, *Commentary European Union Treaties* (2015), Art. 218, paras. 20-24; for an overview on the CJEU's jurisdiction with respect to EU foreign policy see P. Craig & G. de Burca, *EU Law: Text, Cases, and Materials* (2015), 369-375.

<sup>36</sup> Larik, 'Much More Than Tarde', *supra* note 6, 16-17.

<sup>37</sup> Pech, 'Rule of Law', *supra* note 3, 12; Oeter, *supra* note 26, para. 41; Cremona, 'Structural Principles', *supra* note 16, 11-13.

<sup>38</sup> Kube, *supra* note 25, 11.

approach of a “particularity of foreign policy”<sup>39</sup> – grants the EU and its organs a certain margin of appreciation with respect to EU foreign policy decisions.<sup>40</sup>

Accordingly, for the assertion of an actual violation of the obligation to promote the rule of law abroad under Art. 21 TEU, one would therefore need to assume a rather severe disregard or neglect of the rule of law in an external context.

### III. The EU’s Rule of Law Concept With Respect to its External Promotion

With the recognition of the EU’s legal obligation to promote the rule of law in its foreign policy, a question naturally arises as to which specific concept of the rule of law applies in this external regard.

#### 1. Absence of an Explicit External EU Rule of Law Concept

Answering the above question is not easy since neither EU primary law nor CJEU adjudication provides for an explicit definition or conceptual description of the rule of law contained in Art. 21 TEU.

However, with Art. 21 (1) TEU stating that the EU’s actions on the international scene shall be guided by principles “which have inspired [the EU’s] own creation”, much suggests that the concept of the rule of law to be promoted abroad corresponds to the one that already applies within the EU.<sup>41</sup> Respectively, in its recent (aforementioned) judgment of *CFSP*, the ECJ has also implied this comparability of the two rule of law conceptions when, in the same sentence, the Court referred to the EU’s rule of law principle in internal and external dimensions without making any conceptual distinctions:

“In that regard, it must be noted that, as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union’s

<sup>39</sup> See *supra* B. I. 1.

<sup>40</sup> On the discretion in the field of the EU’s external economic relations see e.g. *Odigitria v. Council and Commission*, Case No. T-572/93, Judgment of 6 July 1995, [1995] ECR II-02025, para. 38; see also Vedder, *supra* note 16, 137; M. Cremona, ‘A Reticent Court?’, *supra* note 18, 25-31; Vianello, *supra* note 24, 232-235.

<sup>41</sup> Speaking of “reflection” in this regard, Oeter, *supra* note 26, para. 27.

external action, [...], the European Union is founded, in particular, on the values of [...] the rule of law [...].<sup>42</sup>

Accordingly, answering the question as to which specific concept of the rule of law has to be promoted by the EU in its external actions requires outlining the sophisticated concept of the rule of law that has developed *within* the EU legal order (2.).

Subsequently, this section shall assess whether EU foreign policy actually meets this (rather sophisticated) internal concept when promoting the rule of law abroad (3.).

## 2. The (Internal) EU Rule of Law

Generally, the concept of the rule of law can best be described as a set of principles organizing the relationship between a community and its governing institutions aiming at the subjection of power to law<sup>43</sup> – namely the principles of legality, a public monopoly of power, the supremacy of the law, the separation of powers, effective judicial remedies, and legitimacy.<sup>44</sup> Mainly developed in the course of the struggle over the establishment of governmental powers in the

<sup>42</sup> *H v. Council and Commission (CFSP)*, Case No. C-455/14 P, Judgment of 19 July 2016, ECLI:EU:C:2016:569, para. 41.

<sup>43</sup> See M. Krygier, 'Rule of Law (and Rechtsstaat)', in J. R. Silkenat, J. E. Hickey Jr. & P. D. Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014) 45, 46; R. Grote, 'Rule of Law, Rechtsstaat and 'Etat de droit'', in C. Starck (ed), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (1999), 269, 270.

<sup>44</sup> In its traditional form, the rule of law can be divided into six core principles. First, a community must be organized by general, clear, public and accessible, prospective, and predictive laws, being equally applied, instead of being ruled arbitrarily, in the sense of random individual decisions prone to unrestrained passion, bias, prejudice etc. (legality). Second, the right and power to enforce compliance with the law must lie with the public governing institutions and not with private actors (public monopoly of power). Third, the governing institutions themselves must be bound by the law (supremacy of the law). Fourth, the power of the governing institutions must be separated into independent branches, establishing checks and balances among them (separation of powers). Fifth, accessible, independent, effective, and fair mechanisms to settle legal disputes must exist, in particular allowing the governed community to review the exercise of governmental power (effective judicial remedies). Sixth, the governing institutions, in particular with respect to the making, applying, enforcing, and interpreting of the law, must be legitimized by the governed community itself (legitimacy). See T. P. Holterhus, 'The History of the Rule of Law', in F. Lachenmann & R. Wolfrum (eds), 21 *Max Planck Yearbook of United Nations Law* (2018), 430, 432-433 with many further references.

Westphalian Nation-States of the 18th, 19th, and 20th centuries,<sup>45</sup> the rule of law, however, can, as a basic concept, be applied to any legal order that features public governance functions<sup>46</sup> – such as, for example, the EU.

As famously stated in the CJEU's early "*Les Verts*" decision, the EU legal order is a community based on the rule of law.<sup>47</sup> Among other principles (namely respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities), the rule of law also is explicitly mentioned as one of the EU's fundamental principles<sup>48</sup> in Art. 2 TEU, forming part of the EU primary law. Accordingly, the subjection of governmental power to law, essentially to be accomplished by the above-named six core principles, constitutes a supreme legal imperative within the EU legal order ("the rule of law is the source of fully justiciable principles applicable within the EU legal system"<sup>49</sup>). Therefore, the rule of law legally binds and limits

However, beyond this quite widely accepted basis, much theoretical dispute over the rule of law's particular further content needs to be considered unsettled. Definitions range from purely formal to quite substantive approaches; formal definitions again being separated into thinner (demanding governance by general, clear, prospective, predictive, and equally applied laws) and thicker (additionally requiring the governing institutions to be bound and limited by the law as well as by a separation of powers and a certain level of participation of the governed community) versions. Substantive definitions again add features such as individual rights, dignity, justice, substantive equality, and other moral values or welfare. For an overview of the different definitions, see B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), 91-113; Krygier, *supra* note 43, 51-54.

<sup>45</sup> See extensively Holterhus, *supra* note 44; see also Tamanaha, *supra* note 44.

<sup>46</sup> See R. McCorquodale, 'The Rule of Law Internationally', in C. A. Feinäugle (ed.), *The Rule of Law and its Application to the United Nations* (2016), 51, 55-59; S. Chesterman, 'An International Rule of Law?', 56 *The American Journal of Comparative Law* (2008) 2, 331, 350-360.

<sup>47</sup> "*Les Verts*" v. *European Parliament*, Case No. 294/83, Judgment of 23 April 1986, [1986] ECR 1339, para. 23.

<sup>48</sup> The fact that Art. 2 TEU refers to them as "values" does not hinder their binding normative character (as principles), see on this issue S. Mangiameli, 'Article 2 [The Homogeneity Clause]', in H.-J. Blanke & S. Mangiameli (eds), *The Treaty on European Union (TEU)* (2013), para. 7; W. Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', in Schroeder (ed), *Rule of Law in Europe*, *supra* note 1, 3, 14-15 [Schroeder, EU and Rule of Law]; D. Kochenov, 'The Acquis and Its Principles: The Enforcement of the 'Law' vs. the Enforcement of 'Values' in the European Union', in A. Jakab & D. Kochenov (eds), *The Enforcement of EU Law and Values* (2017), 9, 9-12.

<sup>49</sup> European Commission, *Annexes to the Communication of the Commission to the European Parliament and the Council – A New EU Framework to strengthen the Rule of Law* (11.3.2014), (COM(2014) 158 final, 1.



all EU organs and institutions with respect to their exercise of governmental powers, be it in administrative, judicial, or legislative matters.<sup>50</sup>

In need of an operationalization within the EU, the rule of law has experienced a broad and detailed concretization of its principles and sub-principles (Werner Schroeder fittingly speaks of a “conceptual puzzle”<sup>51</sup>). Such concretization is not only to be found in other EU primary law (e.g. in the numerous treaty provisions on the checks and balances among the EU’s institutions or the judicial rights in the *EU Charter of Fundamental Rights*) but also in CJEU adjudication which extensively formed and developed rule of law aspects as general principles of EU law (being part of EU primary law as well<sup>52</sup>).<sup>53</sup>

Today, numerous such principles have been established within the EU legal order.<sup>54</sup> These include legality (of administrative action),<sup>55</sup> the requirement of a legal basis for the exercise of governmental powers,<sup>56</sup> State liability,<sup>57</sup> legal

<sup>50</sup> See Schroeder, ‘EU and Rule of Law’, *supra* note 48, 14-15; Vianello, *supra* note 24, 231-232, on the binding character of principles in general see A. Jakab, ‘Concept and Function of Principles’, in M. Borowski (ed), *On the Nature of Legal Principles* (2009), 145, 152-158; see also generally A. von Bogdandy, ‘Founding Principles of EU Law’, 16 *European Law Journal* (2010) 2, 95.

<sup>51</sup> Schroeder, ‘EU and Rule of Law’, *supra* note 48, 25.

<sup>52</sup> On the hierarchical legal status of general principles of EU law see Craig & de Burca, *supra* note 35, 111-112.

<sup>53</sup> T. von Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’, in Schroeder (ed), *Rule of Law in Europe*, *supra* note 1, 155.

<sup>54</sup> See European Commission, *Annexes to the Communication of the Commission to the European Parliament and the Council – A New EU Framework to strengthen the Rule of Law* (11.3.2014), (COM(2014) 158 final, 1; for an overview see also Schroeder (ed), *Rule of Law in Europe*, *supra* note 1, Part II; T. Konstadinides, *The Rule of Law in the European Union* (2017), 45-102.

<sup>55</sup> *Nölle v. Council and Commission*, Case No. T-167/94, Judgment of 18 September 1995, [1995] ECR II-2589, para. 73; *New Europe Consulting and others v. Commission*, Case No. T-231/97, Judgment of 9 July 1999, [1999] ECR II-2403, para. 41.

<sup>56</sup> *France v. Commission*, Case No. C-325/91, Judgment of 16 June 1993, [1993] ECR I-3283, para. 26; *France v. Commission*, Case No. T-240/04, Judgment of 17 September 2007, [2007] ECR II-4038, para. 31.

<sup>57</sup> *Francovich and Others v. Italy*, Case No. C-6/90 and C-9/90, Judgment of 19 November 1991, [1991] ECR I-5357, para. 35; *Brasserie du pêcheur v. Factortame*, Case No. C-46/93 and C-48/93, Judgment of 5 March 1996, [1996] ECR I-1029, para. 31.

certainty,<sup>58</sup> equality before the law,<sup>59</sup> institutional balance (being the separation of powers within the EU),<sup>60</sup> effective judicial remedies,<sup>61</sup> fair trial,<sup>62</sup> the protection of legitimate expectations,<sup>63</sup> prohibition of retroactivity,<sup>64</sup> and proportionality.<sup>65</sup>

As has been indicated above, it is this sophisticated internal rule of law conception of Art. 2 TEU that, according to the wording of Art. 21 (1) TEU and relevant case law, also needs to be understood as the concept of the rule of law the EU is obliged to promote abroad.

### 3. The Rule of Law Conception in EU Foreign Policy Practice

Accordingly, in its foreign policy, the EU does actively implement an external rule of law conception, which is not a reduced version but rather is comparable to the sophisticated conception applied internally.

<sup>58</sup> *Deutsche Milchkontor GmbH v. Germany*, Case No. 205-215/82, Judgment of 21 September 1983, [1983] ECR 2633, 2669, para. 30; *France v. Commission*, Case No. C-325/91, Judgment of 16 June 1993, [1993] ECR I-3283, para. 26; *BGL v. Germany*, Case No. C-78/01, Judgment of 23 September 2003, [2003] ECR I-9543, para. 71.

<sup>59</sup> *Racke v. Hauptzollamt Mainz*, Case No. 283/83, Judgment of 13 November 1984, [1984] ECR 3791, 3800; *EARL de Kerlast v. Unicopa*, Case No. Case C-15/95, Judgment of 17 April 1997, [1997] ECR I-1961, para. 35.

<sup>60</sup> *Parliament v. Council*, Case No. C-70/88, Judgment of 22 May 1990, [1990] ECR I-02041, paras. 21-26; *Parliament v. Council*, Case No. C-133/06, Judgment of 6 May 2008, [2008] ECR I-3189, para. 57.

<sup>61</sup> *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case No. 222/84, Judgment of 15 May 1986, [1986] ECR 1651, paras. 13-21 and 58; *UNECTEF v. Heylens*, Case No. 222/86, Judgment of 15 October 1987, [1987] ECR 4097, para. 14.

<sup>62</sup> *Baustahlgewebe v. Commission*, Case No. C-185/95 P, Judgment of 17 December 1998, [1998] ECR I-8417, para. 21; *Ordre des barreaux francophones et germanophone and Others*, Case No. C-305/05, Judgment of 26 June 2007, [2007] ECR I-5305, para. 29.

<sup>63</sup> *Töpfer v. Commission*, Case No. 112/77, Judgment of 3 May 1978, [1978] ECR 1019, 1033, para. 19; *Deutsche Milchkontor GmbH v. Germany*, Case No. 205-215/82, Judgment of 21 September 1983, [1983] ECR 2633, 2667; *France and Ireland v. Commission*, Case No. C-296/93 and C-307/93, Judgment of 29 February 1996, [1996] ECR I-795, para. 59.

<sup>64</sup> *Kirk*, Case No. 63/83, Judgment of 10 July 1984, [1984] ECR 2689, 2781, paras. 21-22; *Fedesa and Others*, Case No. C-331/88, Judgment of 13 November 1990, [1990] ECR I-4023, paras. 42-44.

<sup>65</sup> *Testa*, Case No. 41/79, 121/79 and 769/79, Judgment of 19 June 1980, [1980] ECR 1979, 1997, para. 21; *Schröder v. Hauptzollamt Gronau*, Case No. 265/87, Judgment of 11 July 1989, [1989] ECR 2237, para. 21; *Pietsch v. Hauptzollamt Hamburg-Waltershof*, Case No. C-296/94, Judgment of 4 July 1996, [1996] ECR I-3409, para. 15.

This is demonstrated not only by EU organs' treaty practice but also by the EU's internal strategy documents with respect to the rule of law promotion in the trade and development nexus (see below a.-d.).<sup>66</sup>

a. In the Context of the *Cotonou Agreement*

A distinct example of the concept of the rule of law, which the EU applies when promoting it externally, can be found in the EU's most comprehensive international trade and development agreement, namely the Partnership Agreement between the EU and the 79 States of the African, Caribbean, and Pacific Group of States, more generally known as the ACP Group (the *Cotonou Agreement* – which shall be considered with respect to the particular issue of rule of law conditionality in more detail below<sup>67</sup>).

The key provision in this regard is Art. 9 *Cotonou Agreement*, in which the treaty parties agree to the reciprocal contractual obligation to implement and uphold rule of law-coherent domestic orders. Being an important legal tool in the EU's external rule of law promotion, Art. 9 *Cotonou Agreement* (under the heading “Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance”) lists a number of rule of law principles such as: “[...] transparent and accountable governance [...]”, an “[...] organization of the state to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms [...]” as well as “[...] clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law [...]”.<sup>68</sup>

It also points out that:

“The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.”<sup>69</sup>

<sup>66</sup> See on this similarity also Pech, ‘Promoting the Rule of Law Abroad’, *supra* note 9, 114-115.

<sup>67</sup> See *supra* C.II.

<sup>68</sup> Art. 9 (1), (2), (3) *Cotonou Agreement*.

<sup>69</sup> Art. 9 (2) *Cotonou Agreement*.

An even more explicit documentation of the EU's sophisticated concept of the rule of law with respect to its external promotion in the trade and development nexus can already be found in the EU Commission's early 1998 *pre-Cotonou Agreement* communication: "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".<sup>70</sup> The communication emphasizes elements such as the limitation of governmental power through the requirement of legality, a public monopoly of power, the separation of powers, effective judicial remedies, and governmental legitimacy:

"The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example; a legislature respecting and giving full effect to human rights and fundamental freedoms; an independent judiciary; effective and accessible means of legal recourse; a legal system guaranteeing equality before the law; a prison system respecting the human person; a police force at the service of the law; an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society."<sup>71</sup>

Legality means the existence of clear-cut rules that are applied to all citizens without discrimination. It is reflected in: an appropriate constitutional, legislative and regulatory system;<sup>72</sup>

Effective application requires that the behavior and practices of the authorities, institutions and legal persons be consistent with the rule of law [...] It is against this background that the State's institutional set-up, transparent institutions and decision-making, institutional

<sup>70</sup> Commission of the European Communities, *Communication from the Commission to the Council and The European Parliament – 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* (12.03.1998) COM(1998) 146 final.

<sup>71</sup> *Ibid.*, 4-5.

<sup>72</sup> *Ibid.*, 6.

capacities and the existence of supervisory bodies acquire their full significance. This is a long-term process affecting both the structure of the State and its administration and the constitution of a democratic culture enabling the different social forces to interact and strengthen each other.<sup>73</sup>

Effective application involves: [...] the separation of powers, which curbs the powers of the State and relates specifically to: the independence of the legislative and judicial powers from the executive power; the effective exercise of the three powers; [...] transparency and integrity of the institutions: [...] operational and independent control mechanisms; citizens' access to administrative services; regulations conducive to fighting corruption."<sup>74</sup>

b. In the Action Plan on Human Rights and Democracy 2015-2019

This level of sophistication in treaty practice is confirmed by the more recent EU statements in this regard (although the EU lately tends to discuss its concepts of external rule of law promotion under the captions of human rights, good governance, or sustainability). An insightful document with respect to the trade and development nexus is the Council's "Action Plan on Human Rights and Democracy 2015-2019".<sup>75</sup> Within the annex category "Boosting Ownership of Local Actors; Delivering a comprehensive support to public institutions," the Action Plan lists specific goals of an external promotion of the rule of law, such as:

"Monitor and promote at bilateral and multilateral level the compliance by partner countries of their international obligations in terms of access to justice and fair trial at all stages of the legal process; [...]; promote the independence of the judiciary; facilitate

<sup>73</sup> *Ibid.*, 6.

<sup>74</sup> *Ibid.*, 6-7.

<sup>75</sup> Council of the European Union, *Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019*, (20.07.2015) Doc. 10897/15, Annex [Action Plan]. The Action Plan is a political non-legally binding action plan adopted by the Council with respect to the EU's external relations. Stating, in para. I: "With this Action Plan, the Council reaffirms the European Union's commitment to promote and protect human rights and to support democracy worldwide".

access to justice at local level (No. 4 b., Targeted support to justice systems).<sup>76</sup>

or

“Continue strengthening good governance and the rule of law through support to the separation of powers, independence and accountability of democratic institutions; promote the role of domestic actors in reform processes, including constitutional reforms, in order to better reflect the interests of various stakeholders (No. 5 a., Providing comprehensive support to public institutions).<sup>77</sup>

### c. In the 2017 European Consensus on Development

The same level of sophistication with respect to the rule of law conception can be found in the joint 2017 “European Consensus on Development”.<sup>78</sup> The Consensus again enumerates for the external sphere much of what is considered the EU’s rule of law concept internally, putting a particular emphasis on the existence of institutional checks and balances, governmental legitimacy, and the access to effective judicial remedies:

“Good governance, democracy and the rule of law are vital for sustainable development. The rule of law is a prerequisite for the protection of all fundamental rights. Effective governance institutions and systems that are responsive to public needs deliver essential services and promote inclusive growth, while inclusive political processes ensure that citizens can hold public officials to account at all levels. The EU and its Member States will promote accountable and transparent institutions, [...]. They will promote

<sup>76</sup> *Ibid.*, Annex, No. 4 (Targeted support to justice systems).

<sup>77</sup> *Ibid.*, Annex, No. 5 a. (Providing comprehensive support to public institutions).

<sup>78</sup> 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, *The New European Consensus on Development – ‘Our World, our Dignity, our Future’* (30.06.2017), 2017/C 210/01 [2017 European Consensus on Development]. The 2017 European Consensus on Development is a political, non-legally binding joint statement by the Council, the European Parliament, and the European Commission with the purpose, as per para. 6, “to provide the framework for a common approach to development policy that will be applied by the EU institutions and the Member States while fully respecting each other’s distinct roles and competences” and to “guide the action of EU institutions and Member States in their cooperation with all developing countries”.

independent and impartial courts, and support the provision of fair justice, including access to legal assistance. They will support capacity building for strong institutions and multi-level governance [...].<sup>79</sup>

The EU and its Member States will foster efficient, transparent, independent, open and accountable justice systems and will promote access to justice for all – in particular the poor and persons in vulnerable situations.”<sup>80</sup>

Interestingly, the Consensus also explicitly links its efforts of rule of law promotion to the above-discussed obligations under Art. 21 TEU:

“In line with the objectives set out in Article 21 (2) TEU, development policy also contributes, inter alia, to supporting democracy, the rule of law [...].<sup>81</sup>

The EU and its Member States will promote the universal values of democracy, good governance, the rule of law and human rights for all, because they are preconditions for sustainable development and stability, across the full range of partnerships and instruments in all situations and in all countries, including through development action.”<sup>82</sup>

#### d. In the UN 2030 Agenda for Sustainable Development

The 2017 European Consensus on Development also explicitly<sup>83</sup> incorporates and aims at framing the implementation of the UN 2030 Agenda for Sustainable Development,<sup>84</sup> which again, in Sustainable Development Goal 16, sets out a rule of law concept that is quite close to the EU’s internal conception.<sup>85</sup>

<sup>79</sup> *Ibid.*, para. 61.

<sup>80</sup> *Ibid.*, para. 63.

<sup>81</sup> *Ibid.*, para. 11.

<sup>82</sup> *Ibid.*, para. 6.

<sup>83</sup> *Ibid.*, para. 5; see also chapters 1 and 5, “The EU’s Response to the 2030 Agenda” and “The EU as a Force for the Implementation of the 2030 Agenda” respectively.

<sup>84</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015.

<sup>85</sup> On the rule of law as a Sustainable Development Goal in the 2030 Agenda see N. Arajärvi, ‘The Rule of Law in the 2030 Agenda’, 10 *Hague Journal on the Rule of Law* (2018) 1, 187, 205-209.

“Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

[...]

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all

[...]

16.5 Substantially reduce corruption and bribery in all their forms

16.6 Develop effective, accountable and transparent institutions at all levels

16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels

[...]

16.a Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime

16.b Promote and enforce non-discriminatory laws and policies for sustainable development”.

### C. Legal Mechanism of Rule of Law Conditionality in EU Foreign Policy

As has been stated above, this article aims to emphasize the legal dimensions of the rule of law promotion in EU foreign policy.

So far, it has been established that EU foreign (trade and development) policy is not a particular and legally detached, but instead a widely legally determined field and that Art. 21 TEU actually legally obliges the EU to promote the rule of law in its external actions. It has also been shown that the concept of the rule of law promoted abroad corresponds to the rule of law concept applied within the EU.

However, it is not only the *if* but also the *how* of external rule of law promotion that holds a *legal* dimension (and is organized by *legal* means). This legal permeation is particularly well-illustrated by the EU’s rule of law conditionality mechanism – a key legal instrument in this regard, especially when it comes to



the promotion of the rule of law in the foreign trade and development nexus.<sup>86</sup> Rule of law conditionality in this context is to be understood as a mechanism that puts benefits granted by the EU in the international sphere (trade preferences, development cooperation, etc.) under the legal condition of a certain behavior or deliverable of a third State, namely the domestic implementation and upholding of a rule of law-coherent legal order (so-called *carrot-and-stick policy*).<sup>87</sup>

The EU employs the legal mechanism of conditionality to fulfill its external Art. 21 TEU obligations quite extensively, not only via unilateral/autonomous instruments but also in its bilateral/contractual relationships.<sup>88</sup> Two manifestations of the EU's rule of law conditionality in the trade and development nexus are particularly well-suited to illustrate its legal functioning, namely the Special Incentive Scheme of Preferences (GSP+) (I.), and the *Cotonou Agreement's* essential elements clause and non-compliance procedure (II.). The GSP+ mechanism forms part of the autonomous instruments, while the *Cotonou Agreement's* essential elements clause and non-compliance procedure form part of the contractual relationships.

## I. GSP+

### 1. Unilateral Rule of Law Conditionality in the GSP+

Since 1971, the EU unilaterally grants trade preferences (easier access to the EU's common market, in particular through reduced tariffs) to developing countries under its so-called generalized scheme of preferences (GSP).<sup>89</sup>

<sup>86</sup> See M. Cremona, 'Values in EU Foreign Policy', *supra* note 3, 292-307; Pech, 'Rule of Law', *supra* note 3, 13-28; for an early assessment, though with a particular focus on human rights conditionality, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005) [Bartels, Human Rights].

<sup>87</sup> See (with a particular focus on human rights conditionality) Bartels, *Human Rights*, *supra* note 86, 1-2.

<sup>88</sup> With respect to contractual rule of law conditionality (see in detail *supra* at C. II. 1), the Treaties Office Database of the European External Action Service lists no less than 28 international agreements of the EU which make the domestic implementation and upholding of a rule of law-coherent legal order an essential element of the respective treaty (full text search in the 'Inventory of Agreements containing the Human Rights Clause', SG.AFFGEN.3 Legal Affairs Division, available at <http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=26> (last visited 13 December 2018)).

<sup>89</sup> For a (historical) overview, with a particular focus on WTO law compatibility, of the EU's GSP+ scheme see P. Hilpold, 'The 'Politicisation' of the EU Development Policy', 9 *Trade Law & Development* (2017) 2, 89, 95-99; see also L. Bartels, 'The Trade and

This approach is currently based on the *GSP Regulation*<sup>90</sup> which explicitly aims to achieve “the objectives of the Union policy in the field of development cooperation, laid down in Article 208 of the TEU” (that refers back to Art. 21 TEU).<sup>91</sup> The *GSP Regulation* also states that:

“By providing preferential access to the Union market, the scheme should assist developing countries in their efforts to reduce poverty and promote good governance and sustainable development by helping them to generate additional revenue through international trade, which can then be reinvested for the benefit of their own development and, in addition, to diversify their economies.”<sup>92</sup>

To this end, the preferential status is granted to all eligible developing countries, namely low-income or lower-middle income developing countries as listed in Annex I of the *GSP Regulation*.

However, apart from this general scheme, the *GSP Regulation* additionally establishes a special incentive scheme (the GSP+), offering extended trade benefits under certain conditions.

The most significant condition for admittance to the GSP+ is that the respective developing country has ratified (without reservations) and effectively implemented a list of 27 international conventions on core human and labor rights, environmental protection, and good governance, listed in Annex VIII of the Regulation. This condition also remains effective after admittance. If an admitted country seriously and systemically violates its obligations or terminates a convention, the GSP+ preferences are suspended or withdrawn.<sup>93</sup> The burden of proof with respect to the compliance with the GSP+ conditions rests with the beneficiary developing country.<sup>94</sup>

Although the 27 conventions listed in Annex VIII predominantly concern human rights, labor rights, or the protection of the environment, a rule of law dimension to the conditionality scheme does also exist. First, Annex VIII includes the *UN Convention Against Corruption* – with the absence of corruption being an

Development Policy of the European Union’, in M. Cremona (ed), *Developments in EU External Relations Law* (2008), 128 [Bartels, The Trade and Development Policy].

<sup>90</sup> Regulation (EU) No. 978/2012 of the European Parliament and Council of 25 October 2012 [GSP Regulation].

<sup>91</sup> Recital 4 *GSP Regulation*.

<sup>92</sup> Recital 7 *GSP Regulation*.

<sup>93</sup> Art. 19 (1)(a) *GSP Regulation*.

<sup>94</sup> Art. 15 (2) *GSP Regulation*.

essential sub-element of the rule of law principles of legality and the supremacy of the law. Second, Annex VIII demands the ratification of the *International Covenant on Civil and Political Rights*<sup>95</sup> (ICCPR) whose guarantees, although in the form of individual human rights, are closely interlinked and partly overlap with the rule of law – in particular with respect to Arts. 14, 15, 25 and 26 ICCPR, establishing obligations regarding e.g. equality before the law, access to justice and effective judicial remedies, fair trial, the prohibition of retroactivity as well as certain basic aspects of democratic participation.

The unilateral GSP+ mechanism might therefore not be considered the EU's most significant rule of law conditionality instrument; it does, however, add to the EU's overall approach of rule of law promotion through legal means.

## 2. Case Study – Sri Lanka (2009)

The functionality of the instrument could be well-observed in the process of withdrawing Sri Lanka's GSP+ preferences in 2009. In the context of Sri Lanka's application for a renewal of its GSP+ eligibility (first granted in 2005), the EU in 2008 launched an independent expert's investigation with respect to the State of Sri Lanka's implementation of the GSP+ relevant conventions.<sup>96</sup>

Among the exposure of multiple other shortcomings, the investigation concluded that Sri Lanka lacked effective implementation of Art. 14 ICCPR, in particular the guarantees of access to effective judicial remedies and a fair trial, both essential elements of the rule of law. Although Sri Lanka's Constitution *de jure* provided for judicial independence, the investigation concluded that, in fact, the judiciary showed critical shortcomings with respect to its independence, was subject to severe political interference (unjustified threats of impeachment, arbitrary dismissals, or transfers of judges), and also showed a remarkable inefficiency regarding the conviction of government officials.<sup>97</sup>

<sup>95</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, [ICCPR].

<sup>96</sup> F. Hampson, L. Sevón & R. Wieruszewski, 'The Implementation of Certain Human Rights Conventions in Sri Lanka' (2009), Report for the European Commission.

<sup>97</sup> *Ibid.*, 39-40, 101-104; see also C. Portela & J. Orbie, 'Sanctions under the EU Generalised System of Preferences and Foreign Policy: Coherence by Accident?', in M. Carbone & J. Orbie (eds), *The Trade-Development Nexus in the European Union: Differentiation, Coherence and Norms* (2016), 63, 69.

By applying the *GSP Regulation's* standards to these deficiencies, the EU withdrew GSP+ preferences in October 2009<sup>98</sup> and in August 2010 Sri Lanka reverted to the general scheme GSP (not regaining its GSP+ status until 2017<sup>99</sup>).

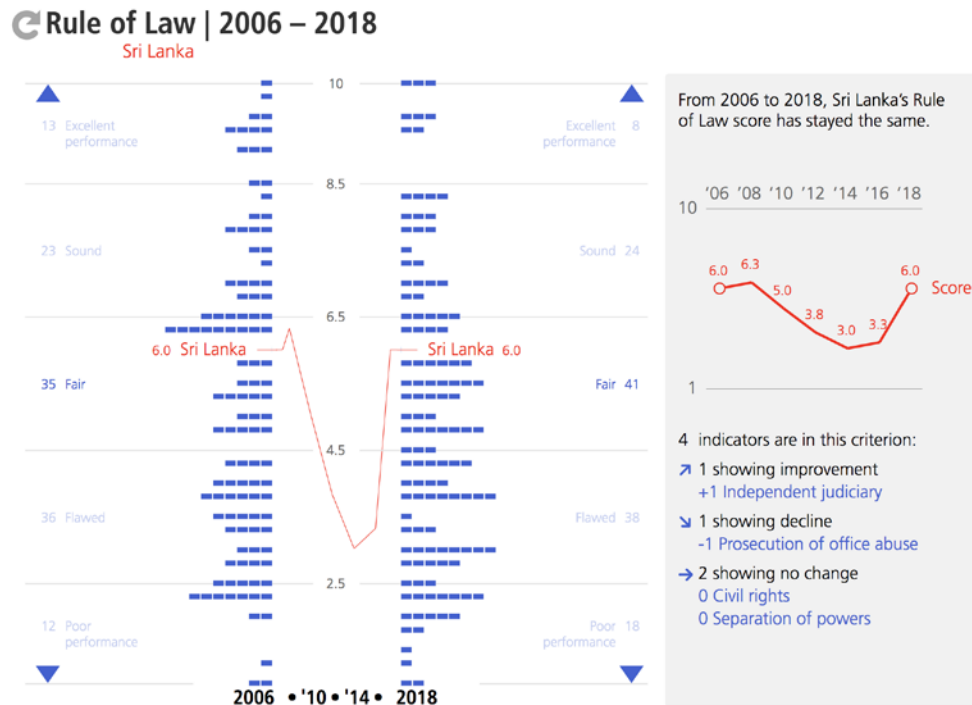
The Bertelsmann Transformation Index,<sup>100</sup> which monitors and measures the development of governance factors such as democracy, market economy, and also the rule of law, provides some noteworthy data on Sri Lanka in this regard.

When inspecting the data (see below), it turns out that the EU withdrew GSP+ benefits in 2009 at the beginning of a significant decline in the level of the rule of law in the Sri Lankan legal order. Then, after Sri Lanka achieved a significant recovery in the rule of law level in 2016, GSP+ benefits were re-granted in 2017. Although it appears difficult to prove a direct causality between Sri Lanka's desire for GSP+ benefits and the recovery of the Sri Lankan rule of law, the correlation of these developments is quite remarkable.

<sup>98</sup> Implementing Regulation (EU) No 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 (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, 53 *Official Journal of the EU* L45 (20.02.2010); see also European Commission, Press Release, *EU Temporarily Withdraws GSP+ Trade Benefits from Sri Lanka* (15 February 2010), available at [http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc\\_145799.pdf](http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145799.pdf) (last visited 13 December 2018).

<sup>99</sup> Commission Delegated Regulation (EU) 2017/836 of 11 January 2017 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences, 60 *Official Journal of the EU* L125 (18.05.2017); see also European Commission, Press Release, *EU Grants Sri Lanka Improved Access to its Market as Incentive for Reform*, IP/17/1363 (17 May 2017), available at [http://europa.eu/rapid/press-release\\_IP-17-1363\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1363_en.htm) (last visited 13 December 2018).

<sup>100</sup> Data available at <https://www.bti-project.org/en/home/> (Transformation Atlas, Time Series, Sri Lanka 2006-2018, category: democracy, rule of Law) (last visited 13 December 2018).



## II. Cotonou Agreement

### 1. Contractual Rule of Law Conditionality in the *Cotonou Agreement*

When it comes to contractual relationships, the most relevant instrument of the EU's rule of law conditionality approach in the trade and development nexus can be found within the *Cotonou Agreement* of 2000.

The *Cotonou Agreement*, succeeding the *Lomé Convention (Lomé I – Lomé IV-bis)*, is a comprehensive and overarching international framework agreement between the EU and its Member States on the one side and the 79 members of the African, Caribbean, and Pacific Group of States (ACP States) on the other. With the primary objective of reducing and eventually eradicating poverty in the ACP States (Art. 1 *Cotonou Agreement*), the *Cotonou Agreement* legally organizes the supportive relationship between the EU and the ACP States with

respect to development cooperation, political cooperation, and economic and trade cooperation.<sup>101</sup>

Support provided through means of development cooperation is usually granted in the form of financial and technical assistance under the Arts. 59-78 *Cotonou Agreement*. With respect to the economic and trade cooperation, however, the *Cotonou Agreement* itself does not provide for substantive contractual trade liberalization as such, but only for a framework of objectives and principles. The specificities of the actual substantive reciprocal trade liberalization (market access, reduction of tariffs and non-tariff trade barriers, etc.) are intended by the *Cotonou Agreement* to be arranged in additional so-called Economic Partnership Agreements (EPAs)<sup>102</sup> between the EU and different regional groups of the ACP States.<sup>103</sup>

To this day, a number of such regional EPA's have been concluded or are presently negotiated,<sup>104</sup> one of the most recent being the *Economic Partnership Agreement Between the European Union and its Member States, of the one Part, and*

<sup>101</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States of the other Part, signed in Cotonou on 23 June 2000 (OJ L317/3, 15.12.2000) as amended by the Agreement signed in Luxembourg on 25 June 2005 (OJ L209/27, 11.8.2005) and the Agreement signed in Ouagadougou on 22 June 2010 (OJ L287/3, 4.11.2010). For a comprehensive overview on the (historical development of the) *Cotonou Agreement* see C. Gammage, *North-South Regional Trade Agreements as Legal Regimes* (2017), 137-168; see also Bartels, 'The Trade and Development Policy', *supra* note 89.

<sup>102</sup> With a clear development agenda the EU had (under the *Lomé Conventions*) for over 25 years granted substantive trade preferences to the ACP States non-reciprocally. Due to the incompatibility of such non-reciprocal and discriminating trade preferences with WTO law, the *Cotonou Agreement's* framework for economic and trade cooperation now (WTO waiver expired in 2007) only allows for trade liberalization to be arranged on a reciprocal basis. To take account of the differing demands of such reciprocal trade liberalization with the various ACP States, the *Cotonou Agreement* introduced the supplementary instrument of the regional EPAs (Art. 36 *Cotonou Agreement*) see Hilpold, *supra* note 89, 99-106.

<sup>103</sup> The ACP States have, based on Art. 35 (2) *Cotonou Agreement*, formed seven regional groups to enter into EPAs: the Economic Community of West African States (ECOWAS); the Economic and Monetary Community of Central Africa; the Southern African Development Community (SADC); the East African Community; the Eastern and Southern Africa (ESA); the Caribbean Community with the Dominican Republic (CARIFORUM); the Pacific Region.

<sup>104</sup> For an overview see European Commission, Overview of Economic Partnership Agreements [online], last updated March 2018, available at [http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc\\_144912.pdf](http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf) (last visited 13 December 2018).

*the SADC EPA States, of the Other Part* (EU-SADC EPA)<sup>105</sup> of 2016 (currently in provisional application). With this EU-SADC EPA, the EU admits to an extensive scheme of reciprocal trade liberalization by agreeing to full market access and the elimination of almost all tariffs and quotas on goods imported from the Southern African Development Community (SADC).

a. Essential Elements Clause (Art. 9 *Cotonou Agreement*)

The aforementioned rule of law conditionality mechanism of the *Cotonou Agreement* is enshrined in two central provisions, namely Arts. 9 and 96 *Cotonou Agreement*.

Although the Arts. 9 and 96 *Cotonou Agreement* theoretically apply mutually, their obvious purpose – considering the dissimilar relationship of the EU and the ACP States, with the *Cotonou Agreement* essentially being an instrument of EU development cooperation – is to establish a (rule of law) monitoring mechanism to be predominantly used by the EU.

Art. 9 *Cotonou Agreement* establishes the treaty parties' obligation to implement and uphold a rule of law-coherent domestic legal order as an "essential element" of the overall contractual relationship. Differing from the GSP+ mechanism, rule of law conditionality within the *Cotonou Agreement* therefore does not work as a unilateral (or autonomous) instrument but as part of a contractual relationship within an international treaty. Art. 9 *Cotonou Agreement* ("Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance") reads:

“1. Cooperation shall be directed towards sustainable development centered on the human person [...].

Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. [...]

<sup>105</sup> *Economic Partnership Agreement Between the European Union and its Member States, of the one Part, and the SADC EPA States, of the Other Part*, 16 September 2016, OJ L250, 3 [EU-SADC EPA]; for a comprehensive overview on the EU-SADC EPA see C. Gammage, *North-South Regional Trade Agreements as Legal Regimes* (2017), 231-267.

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. [...]

The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall [...] constitute the essential elements of this Agreement.

3. In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

Good governance, which underpins the ACP-EU Partnership, shall [...] constitute a fundamental element of this Agreement.

The Parties agree that serious cases of corruption, including acts of bribery leading to such corruption, as referred to in Article 97, constitute a violation of that element.

[...]"

#### b. Suspension Procedure (Art. 96 *Cotonou Agreement*)

The *Cotonou Agreement* does not stop at declaring the implementation and upholding of a rule of law-coherent domestic legal order a contractual obligation between the EU and the ACP States but additionally establishes a legal procedure to be applied in cases of non-compliance. The procedure is enshrined in Art. 96 *Cotonou Agreement* ("Essential elements: consultation procedure and appropriate



measures as regards human rights, democratic principles and the rule of law”). It reads:

“1. Within the meaning of this Article, the term ‘Party’ refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

[..]

2. (a) If, despite the political dialogue on the essential elements [...], a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9 (2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annex VII.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

[..]

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them no longer prevail.

(b) The term ‘cases of special urgency’ shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.

[..]

(c) The ‘appropriate measures’ referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement.

It is understood that suspension would be a measure of last resort.

[..]”

Based on a careful reading, Art. 96 *Cotonou Agreement* does not only provide for a consultation procedure if a party to the agreement is not fulfilling

its rule of law obligations under Art. 9 *Cotonou Agreement* (namely the obligation to implement and uphold a rule of law-coherent domestic legal order) but, more significantly, also explicitly allows for appropriate measures to be taken, in accordance with international law, if the consultations do not result in the cessation of the violations.

Appropriate measures in accordance with international law, meaning in accordance with Art. 60 of the *Vienna Convention on the Law of Treaties*<sup>106</sup> (VCLT), comprise the suspension of the treaty or proportional parts of it (although considered a measure of last resort, Art. 96 (2) (c) *Cotonou Agreement*).<sup>107</sup>

Such (partial) suspension under Art. 96 (2) (a) and (c) *Cotonou Agreement* in accordance with Art. 60 VCLT can theoretically concern all obligations agreed upon under the framework of the *Cotonou Agreement*.<sup>108</sup> It can, therefore, and often will (see the case study on Guinea-Bissau below) concern ongoing development programs already agreed upon under Art. 59-78 *Cotonou Agreement*.<sup>109</sup>

Somewhat more complex is the suspension of contractual trade preferences as an appropriate measure under Art. 96 *Cotonou Agreement*, since these trade preferences, as has been discussed above, are not agreed upon directly within the *Cotonou Agreement*, but are granted via supplementary EPAs.<sup>110</sup> However, where the respective EPA explicitly incorporates the *Cotonou Agreement's* essential

<sup>106</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

<sup>107</sup> Vedder, *supra* note 16, 135.

<sup>108</sup> See T. Giegerich, 'Art. 60', in O. Doerr & K. Schmalenbach (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (2018), 1095, para. 43.

<sup>109</sup> Technically, pursuant to Art. 17 of Annex IV (Implementation and Management Procedures) to the *Cotonou Agreement*, financial assistance, for instance, is granted through a financing agreement drawn up by the Commission and the ACP State (or the relevant organization or body at regional or intra-ACP level). These financing agreements then usually comprise a reference to the *Cotonou Agreement* treaty obligations and, again, explicitly specify that breaches of such obligations relating to respect of the rule of law may result in the suspension of the financing agreement. See, as an example, Art. 23.1 of the 2012 EDF Model Financial Agreement of the EU Commission (Annex I General Conditions), available at [https://ec.europa.eu/europeaid/sites/devco/files/general-conditions-financing-agreement-2012-edf\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/general-conditions-financing-agreement-2012-edf_en.pdf) (last visited 13 December 2018).

<sup>110</sup> See on this issue in general Giegerich, *supra* note 108, para. 44 and with a particular focus on EPA's L. Beke et al., *The Integration of Human Rights in EU Development and Trade Policies*, FRAME, 2014, 63-64.

elements clause, as, for example, the EU-SADC EPA does in its Art. 2,<sup>111</sup> the suspension of trade preferences granted under the EPA is also feasible as an appropriate measure under Art. 96 *Cotonou Agreement*.<sup>112</sup>

The non-compliance procedure under Art. 96 *Cotonou Agreement* therefore offers the EU an effective legal instrument to conditionalize benefits in the trade and development nexus with the rule of law implementation in the respective ACP States. On account of, *inter alia*, *coup d'états*, flawed elections, or systematic rule of law violations, the Art. 96 procedure has been invoked over 15 times since the conclusion of the *Cotonou Agreement* in 2000 – including procedures against Fiji (2000, 2007), Zimbabwe (2002), the Central African Republic (2003), Guinea-Bissau (2004, 2011), Togo (2004), Madagascar (2010), and Burundi (2015).<sup>113</sup>

## 2. Case Study – Guinea-Bissau (2011)

The application of Arts. 9 and 96 *Cotonou Agreement*, with respect to the EU's rule of law conditionality approach, is well-illustrated by the procedures launched against Guinea-Bissau in 2011.<sup>114</sup>

In April 2010, military unrest took place in Guinea-Bissau, in the course of which the Guinea-Bissauan Prime Minister was arrested and eventually left the country while the coup's main instigators were appointed to high-ranking military positions. Furthermore, arbitrary detentions and illegal conduct of the acting security forces occurred and looting took place.<sup>115</sup> The significant interference with the Guinea-Bissauan constitutional order by this illegal

<sup>111</sup> Art. 2 (Principles) EU-SADC EPA reads:

“(1) This Agreement is based on the Fundamental Principles, as well as the Essential and Fundamental Elements, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement. [...]

(2) This Agreement shall be implemented in a complementary and mutually reinforcing manner with respect to the Cotonou Agreement [...].”

<sup>112</sup> The EU-SADC EPA does additionally stipulate its own dispute settlement mechanism with the possibility to adopt appropriate measures in case of non-compliance, Arts. 75-87 EU-SADC EPA.

<sup>113</sup> See European Council and Council of the European Union, *Consultation Procedure (Article 96)*, last updated February 2018, available at <http://www.consilium.europa.eu/de/policies/cotonou-agreement/article-96-cotonou-agreement/> (last visited 13 December 2018).

<sup>114</sup> For an overview on the Guinea-Bissau procedures in particular see also *ibid.*

<sup>115</sup> For an extensive assessment see UNSC, Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country, UN Doc S/2010/335, 24 June 2010.

military seizure of power gave rise to multiple rule of law concerns, in particular with respect to legality, the public monopoly of power, the supremacy of the law, and the separation of powers, as well as to the legitimacy of the governing institution.<sup>116</sup>

As a response, in January 2011, the EU launched consultations under Art. 96 *Cotonou Agreement* with the Guinea-Bissauan authorities, considering the developments “a serious and evident breach of essential elements set out in Article 9 of the Cotonou Agreement”.<sup>117</sup> However, the consultations, until their conclusion in July 2011, did not resolve the situation.

Consequently, the EU, as an *appropriate measure* under Art. 96 *Cotonou Agreement*, suspended large parts of its ongoing budget support as well as other development cooperation within Guinea-Bissau and started to channel the remaining funding directly to the population through NGOs and international organizations. The suspension was scheduled to end in July 2012.<sup>118</sup>

However, due to the further deterioration of the rule of law in Guinea-Bissau, in particular with the 2012 overt military *coup d'état* during the national election process, resulting in another displacement of the government and the illegal establishment of a so-called Transitional National Council by the military leadership and its supporters,<sup>119</sup> the suspension was extended.<sup>120</sup>

<sup>116</sup> Council of the European Union, Press Release, *Opening of Consultations With the ACP Side on Guinea-Bissau Under Article 96 of the Cotonou Agreement*, 8405/11 (29 March 2011).

<sup>117</sup> *Ibid.*, 1.

<sup>118</sup> Council Decision of 18 July 2011, OJ 2011 L 203.

<sup>119</sup> UNSC, Statement by the President of the Security Council, UN Doc S/PRST/2012/15, 21 April 2012; for an extensive assessment see UNSC, Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Integrated Peacebuilding Office in that country, UN Doc S/2012/554, 17 July 2012.

<sup>120</sup> Suspension was extended until 19 July 2013 by Council Decision 2012/387/EU of 16 July 2012, OJ 2012 L 187 and, subsequently, until 19 July 2014 by Council Decision 2013/385/EU of 15 July 2013, OJ 2013 L 194. Council Decision 2014/467/EU of 14 July 2014, OJ 2014 L 212 extended the validity of Council Decision 2011/492/EU of 18 July 2011, OJ 2011 L 203 by one year, until 19 July 2015, but suspended the application of the appropriate measures.

It was not until March 2015 that the suspension was finally lifted,<sup>121</sup> following a slowly emerging normalization of the situation, the basic restoration of Guinea-Bissau's constitutional order, and the free elections in 2014.<sup>122</sup>

## D. Conclusion

It has been shown that Art. 21 TEU (as well as Art. 3 (5) TEU and Arts. 205, 207 (1), 208 (1), 209 (2) TFEU) legally obliges the EU to promote the rule of law in its foreign trade and development policy. To fulfill this obligation, the EU employs, as a key instrument, the legal mechanism of rule of law conditionality, not only via unilateral/autonomous instruments but also in its bilateral/contractual relationships. The EU's foreign trade and development policy can, therefore, be considered as a process extensively determined and organized by means of law.

Four distinct conclusions can be drawn from these findings.

First, the functioning and development of the EU foreign trade and development policy, with respect to rule of law promotion, can neither be understood nor described without due consideration being afforded to, first and foremost, its legal grounding and permeation.

Second, the EU's hegemonial aspirations of *exporting* its values, are, in principle, not open to political debate. Instead, these aspirations derive from and are decided by the constitutional legal imperative of the EU treaties.

Third, the EU's choice to fulfill its foreign policy obligations by combining its leading position in the trade and development nexus with legal means of rigid

<sup>121</sup> Council Decision (EU) 2015/541, OJ 2015 L 88; see Council of the European Union, Press Release, *EU to Resume Cooperation with Guinea-Bissau*, 11664/14 (14 July 2014) "The EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, and the EU Commissioner for Development, Andris Piebalgs, said: 'We are indeed very satisfied with this decision since it enables the EU to support the newly elected authorities on their path towards the reconstruction and stabilisation of the state by helping them rapidly to ensure vital state functions and provide basic social services to the population.' While today's decision suspends measures limiting EU cooperation with Guinea-Bissau, the EU expects that the Guinea-Bissauan authorities make every effort to fulfil their commitments to the EU as a matter of priority. These undertakings were made during consultations with the EU in 2011 and concern for instance the reform of the security sector, the renewal of the military hierarchy and the fight against impunity."; see also European Commission, Press Release, *A Fresh Start for Guinea-Bissau: EU to Resume Cooperation and Provide New Support*, IP/15/4663 (25 March 2015).

<sup>122</sup> For an extensive assessment see UNSC, Report of the Secretary-General on the restoration of constitutional order in Guinea-Bissau, UN Doc S/2014/332, 12 May 2014.

conditionality (as opposed to e.g. diplomatic persuasion) demonstrates a quite firm commitment to promoting the rule of law abroad. With this combination, the EU can be seen as making a rather uncompromising use of its capacities as a normative power.

Fourth and final, the legal entrenchment of the above-described values and their promotion affords a certain predictability of the future direction of EU foreign policy – a welcome assurance in a currently quite unstable and unpredictable global international order.