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The Legal Significance of Global Development Partnerships: European Development Cooperation and its Contribution to the International Law of Development

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Table of Contents

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Abstract

The global development partnerships of the European Union are embedded in a legal context which provides several constraints for stakeholders in Brussels. This legal framework consists both of the rules and principles of public international law and of the 'supranational' law of the European Union. After a short survey of the activities of the European Union referring to North-South relations, some of the prevailing legal problems of the Union's development policy as well as its contribution to the international law of development are discussed in this Article.

A. Introduction

In September 2000, the United Nations held its Millennium Summit in New York to adopt the United Nations Millennium Declaration.[1] Seven so-called 'Millennium Development Goals' (MDGs) were set out as a series of time-bound targets to be implemented by the global community by the year 2015. One year later – initiated by the developing countries – a further Goal, MDG 8, was added.[2] It aims at setting-up a global partnership for development and is mainly addressed to industrial countries. In particular, its objective is to improve development finance, world trade, debt reduction and transfer of technologies.

The European Union understands its relationship to emerging markets and developing countries as such a 'global partnership'. In a document published by the European Commission in 2002, the European Union, as the world's largest donor in development cooperation and one of the most important trading partners of developing countries, is described as being 'well placed to assume a leading role in the pursuit of global sustainable development'.[3] The document is entitled 'Towards a Global Partnership for

1 GA. Res. 55/2, 18 September 2000.

2 United Nations, Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc A/56/326, 6 September 2001, Annex, 58; see also United Nations, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals*, MDG Gap Task Force Report 2008 (2008) available at http://www.un.org/millenniumgoals/pdf/MDG%20Gap%20Task%20Force%20Report%202008.pdf (last visited 18 December 2010).

3 Commission Communication of 21 February 2002, COM (2002) 82 final, 6.

Sustainable Development'. In a recent document, giving an account of the actual state of implementation of the MDG, the European Union again characterizes itself as a 'global partner for development.'[4] The term 'partnership' is also frequently used to describe the relations between individual southern countries or regions and the European Union.[5]

This Article introduces the most important elements of this development partnership; it offers insight into some of the legal problems of the partnership[6] and shows its significance to the emerging framework of international development law. Two levels have to be differentiated: at first, European development policy – as with development policy of other

4 Commission Communication of 9 April 2008, COM (2008) 177 final: "The EU – a global partner for development – Speeding up progress towards the Millennium Development Goals".

5 See *e.g.* Commission Communication on a new partnership with South-East Asia, COM (2003) 399 final; Commission Communication of 16 June 2004, An EU-India Strategic Partnership, COM (2004) 430 final; Commission Communication of 8 December 2005, A stronger partnership between the European Union and Latin America, COM (2005) 636 final; Commission Communication of 27 June 2007, From Cairo to Lisbon – The EU-Africa Strategic Partnership, COM (2007) 357 final; see moreover the documents regarding the Euro-Mediterranean Partnership, e.g. Commission Communication of 20 May 2008 on the "Barcelona Process: Union for the Mediterranean", COM (2008) 319 final.

6 For a general analysis of European development policy see E. R. Grilli, *The European Community and the Developing Countries* (1993); O. Babarinde, *The Lomé Convention and Development* (1994); A. Cox, *How European Aid Works. A Comparison of Management Systems and Effectiveness* (1997); C. Cosgrove-Sacks (ed.) *The European Union and Developing Countries: The Challenges of Globalization* (1999); A. Cox *et al.*, *European Development Co-operation and the Poor* (1999); M. Lister (ed.), *New perspectives on European Union development cooperation* (1999); M. Holland, *The European Union and the Third World* (2002); K. Arts & A. K. Dickinson (eds), *EU Development Cooperation: From model to symbol* (2004); F. Granell, *La coopération au développement de la communauté européenne*, 2nd ed. (2005); J. Mayall, 'The Shadow of Empire: The EU and the Former Colonial World', in C. Hill & M. Smith (eds), *International Relations and the European Union* (2005), 292-316; M. Carbone, *The European Union and International Development: the Politics of Foreign Aid* (2007); Y. Bourdet *et al.* (eds), *The European Union and Developing Countries* (2007); A. Mold (ed.), *EU Development Policy in a Changing World* (2007); W. Hout (ed.), *EU Development Policy and Poverty Reduction* (2008); M. van Reisen, *Window of Opportunity. Development Co-operation Policy after the End of the Cold War* (2009); T. Hauschild & K. Schilder, *Wohin Europäische Entwicklungspolitik?* (2009); O. Stokke & P. Hoebink (eds), *Perspectives on European Development Cooperation* (2009).

industrial countries as well – is embedded in a public international law context that includes not only basic rules of international trade law but also international human rights standards and aspects of international environmental law. Apart from that, development policy of the European Union is also confronted with judicial problems where European Union law is concerned, in particular the relevant provisions of the Treaty on the European Union (TEU),[7] the Treaty on the Functioning of the European Union (TFEU)[8] and of secondary legislation. Both public international law and the 'supranational' law of the European Union create the legal framework for global partnerships between Europe and the developing countries. Part II of this Article offers a short survey of the activities of the European Union referring to North-South relations. Part III discusses some of the prevailing legal problems of the Union's development policy as well as its contribution to international development law.

7 Consolidated Version of the Treaty on European Union, OJ 2008 C 115/13 [TEU].

8 After the Treaty of Lisbon (Draft Treaty of Lisbon, OJ 2007 C 306/01), entered into force on 1 December 2009, the former Treaty establishing the European Community (TEC) was renamed to Treaty on the Functioning of the European Union (hereinafter TFEU; for the consolidated version of the TFEU see OJ 2008 C 115/47). For a general survey of the main innovations in the field of the European Union's external relations *see* J. Wouters *et al.*, 'The European Union's External Relations after the Lisbon Treaty', in St. Griller & J. Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (2008), 143-203; C. Vedder, 'Außenbeziehungen und Außenvertretung', in W. Hummer & W. Obwexer (eds), *Der Vertrag von Lissabon* (2009), 267-300; C. Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (2009); especially with regard to development policy see E. Koeb, 'A more political EU external action. Implications of the Treaty of Lisbon for the EU's relations with developing countries', 21 *ECDPM-InBrief* (2008), available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/610BD646FDC57122C125748100533C75/$FILE/InBrief%2021_e_Lisbon%20final.pdf (last visited 18 December 2010); B. Martenczuk, 'Die Kooperation der Europäischen Union mit Entwicklungsländern und Drittstaaten und der Vertrag von Lissabon', 43 *Europarecht (*2008) 2, 36; S. Grimm, 'The Reorganisation of EU Foreign Relations: What Role for Development Policies within the European Institutional Setup?', *German Development Institute (DIE)-Briefing Paper No* 11 (2009) available at http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/%28ynDK_contentByKey%29/ANES-7YUHGV/$FILE/BP%2011.2009.pdf (last visited 18 December 2010).

B. Development Policy of the European Union

I. The Partnership between Europe and the ACP-Countries

The notion of partnership is vividly expressed mainly in the relations of the European Union and the so-called ACP-countries. 'ACP' refers to a group of developing countries in the African, Caribbean and Pacific region (with main emphasis on Sub-Saharan African partners[9]). Contractual relations between these countries and the European Union are not based on individual bilateral agreements, but on one multilateral agreement. The partnership has been effective since the 1960s. Over time, the name of the agreement has been changed several times and the number of participating countries has steadily grown. Today, 79 countries are parties to the 'Cotonou-Agreement'[10] which is meant to be in force as a contractual basis

9 South Africa is also member of the ACP group. Nevertheless the economic and financial covenants of the Cotonou-Agreement do not address South Africa. In fact the European Union agreed on a separate economic and cooperation agreement with South Africa in 1999 which entered into force in 2004 (Trade, Development and Cooperation Agreement of 11 October 1999, OJ 1999 L 311/3 [TDCA] and the Additional Protocol of 25 June 2005, OJ 2005 L 68/33); see furthermore Commission Communication of 28 June 2006, COM (2006) 347 final. For details of the relationship between the European Union and South Africa see J. Weusmann, *Die Europäische Union und Südafrika* (2005); G. Olivier, *South Africa and the European Union: Self-interest, Ideology and Altruism* (2006); L. Petersson, 'The EU and South Africa: Trade and Diversification', in Bourdet, *supra* note 6, 97-119; M. Frennhoff Larsén, 'Trade negotiations between the EU and South Africa: a three-level game', 45 *Journal of Common Market Studies* (2007) 4, 857-881.

10 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 2000 L 317/3 and Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, of 22 December 2005, OJ 2000 L 209/27. See generally O. Babarind & G. Faber (eds), *The European Union and the Developing Countries: the Cotonou Agreement* (2005); D. Dialer, *Die EU-Entwicklungspolitik im Brennpunkt: Eine Analyse der politischen Dimension des Cotonou-Abkommens* (2007); G. Laporte, *The Cotonou Partnership Agreement: What Role in a Changing World?* (2007); A. Flint, *Trade, Poverty and the Environment: the EU, Cotonou and the African-Caribbean-Pacific Bloc* (2008); see also F. Müller, 'Storming, Norming, Performing – Implications of the Financial Crisis in Southern Africa', 2 *Goettingen Journal of International Law* (2010) 1, 167.

for the partnership from 2000 until 2020. The agreement comprises numerous issues of development cooperation: the one hundred articles of the treaty contain, *inter alia*, regulations regarding economic cooperation and cooperation in trade policy (Arts 34 *et seq*.), competition policy (Art. 45), investment promotion (Arts 74 *et seq*.), service transactions (Arts 41 *et seq*.), regional economic integration (Arts 28 *et seq*.) and protection of intellectual property (Art. 46). Provisions concern the protection of human rights, good governance and participation of civil society are included in the Cotonou-Agreement (Arts 2 [2], 9); regulations on a political dialogue between the partners, in particular with regard to conflict prevention and fighting organized crime, can be found in the treaty (Art. 8). However, the central objective of the agreement is to reduce poverty in the ACP countries. Art. 1 (2) of the Cotonou-Agreement claims: 'The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of ACP countries into the world economy'. At the institutional level, the ACP-EU Council of Ministers, the committee of ambassadors and the so called balanced assembly, consisting of members of parliament both from the EU and the ACP partners, keeps watch over the enforcement of the Cotonou-Agreement (Arts 14 *et seq*.).

II. Relations between the European Union and Latin American, Asian and Mediterranean countries

Primarily for historic reasons, Sub-Saharan Africa forms the focus of European development cooperation, but the European Union also maintains cooperation relationships with other states and groups of states of the so-called 'Third World'. Trade agreements usually are the basis for such cooperation. They often also provide elements of development policy and therefore are called 'cooperation agreements'. Some Latin American states are bound to the European Union by bilateral agreements[11] but there are also

[11] See Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, of 8 December 1997, OJ 2000 L 276/45; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, of 18 November 2002, OJ 2002 L 352/3. Beyond these two association agreements with Chile and Mexico there exists a so-called "strategic partnership" with Brazil; see

contractual relations with regional organizations such as the Andean Community[12] and the Central American Integration System.[13] The European Union moreover has entered into negotiations with the most important regional organization in Latin America, the Mercosur, on setting up a cooperation partnership.[14] In addition to contractual relations there is an intense political dialogue between both continents. As a result of the sixth 'European Union – Latin America and Caribbean Summit' which took place in Madrid in May 2010, the partnership between the continents will focus in the future on strengthening the science, technology and innovation dialogue for achieving sustainable development and social inclusion.[15]

Commission Communication of 30 May 2007, COM (2007) 281 final; see furthermore A. Poletti, 'The EU for Brazil: A Partner Towards a 'Fairer' Globalization?', 12 *European Foreign Affairs Review* (2007) 3, 271-285; R. Leal-Arcas, 'The European Union and the New Leading Powers: Towards Partnership in Strategic Trade Policy Areas', 32 *Fordham International Law Journal* (2009) 2, 353; 382.

12 Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, of 28 April 1993, OJ 1998 L 127/11; see furthermore M. Bustamante & R. Giacalone, 'An Assessment of European Union Cooperation towards the Andean Community (1992–2007)', in P De Lombaerde (ed.), *The EU and World Regionalism. The Makability of Regions in the 21st Century* (2009), 149-170.

13 Framework Cooperation Agreement between the European Economic Community and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of 22 February 1993, OJ 1999 L 63/39. In May 2010 the EU and the Central American Integration System signed an association agreement covering trade, political dialogue and cooperation; see http://www.eu2010.es/en/cumbre_ue-alc/noticias/may19centroamerica.html (last visited 18 December 2010).

14 Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part – Joint Declaration on political dialogue between the European Union and Mercosur, of 15 December 1995, OJ 1996 L 69/4; see also European Commission of 2 August 2007 (E/2007/1640). See generally A. G. A. Valladão *et al.* (eds), *EU-Mercosur Relations and the WTO Doha Round Common Sectorial Interests and Conflicts* (2006).

15 Madrid Declaration 'Towards a new stage in the bi-regional partnership: innovation and technology for sustainable development and social inclusion', of 18 May 2010, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/114535.pdf (last visited 18 December 2010); see also Commission Communication of 30 September 2009 COM (2009) 495/3; furthermore Commission Communication of 8 December 2005, *supra* note 5. See generally W. Grabendorff & R. Seidelmann (eds), *Relations between the European Union and Latin America: Biregionalism in a Changing Global System* (2005); C. Freres, 'Challenges of Forging a Partnership Between the European Union and Latin America', in Mold, *supra* note 6, 169-199.

Asian developing countries and emerging markets are also connected to the European Union through several cooperation agreements (*e.g.*, China[16], India[17] and the ASEAN group[18]) and via a regular political dialogue.[19] European heads of state and government, the President of the

16 Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, of 21 May 1985, OJ 1985 L 250/2; see also Commission Communication of 24 October 2006, COM (2006) 631 final; see furthermore M. Mattlin, 'Thinking Clearly on Political Strategy: The Formulation of a Common EU Policy Toward China', in B. Gaens *et al.* (eds), *The Role of the European Union in Asia: China and India as Strategic Partners*, (2009), 95-120; F. Snyder, *The European Union and China, 1949 – 2008: Basic Documents and Commentary* (2009); Leal-Arcas, *supra* note 11, 396.

17 Cooperation Agreement between the European Community and the Republic of India on partnership and development of 20 December 1993, OJ 1994 L 223/24; see also The EU-India Joint Action Plan (JAP) – Global partners for global challenges, of 29 September 2008, available at http://ec.europa.eu/external_relations/india/sum09_08/joint_ action_plan_2008_en.pdf (last visited 18 December 2010); furthermore S. Chauvin *et al.*, 'EU-India trade and investment relations', in R. K. Jain & H. Elsenhans (eds), *India, the European Union, and the WTO* (2006), 129-165, in R. K. Jain (ed.), *India and the European Union* (2007); S. Baroowa, 'The Emerging Strategic Partnership between India and the EU: A Critical Appraisal', 13 *European Law Journal* (2007) 6, 732-749; S. A. Wülbers (ed.), *EU India Relations: a Critique* (2008); R. K. Jain, 'Engaging the European Superpower: India and the European Union', in Gaens *et al.*, *supra* note 16, 173- 188; S. T. Madsen, 'EU – India Relations: An Expanded Interpretive Framework', *id.*, 77-94; Leal-Arcas, *supra* note 11, 386.

18 Cooperation Agreement between the European Economic Community and the member countries of the Association of South-East Asian Nations, of 7 March 1980, OJ 1980 L 144/2; see furthermore Plan of Action to Implement the Nuremberg Declaration on an EU ASEAN Enhanced Partnership, of 22 November 2007, available at http://ec.europa.eu/external_relations/asean/docs/action_plan07.pdf (last visited 18 December 2010); for details of the projected Free Trade Agreement see B. Andreosso-O'Callaghan & F. Nicolas, 'What Scope for an EU-ASEAN Free Trade Agreement?', 42 *Journal of World Trade* (2008) 1, 105-128; D. Camroux, 'The Political and Economic Dimensions of EU-ASEAN Relations: An Overview', in J. L. de Sales Marques *et al.* (eds), *Asia and Europe: dynamics of inter- and intra-regional dialogues* (2009), 183-208.

19 See Commission working document, COM (2000) 241 final. For a general discussion of the relationship between Asian states and the EU see H. Loewen, 'Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures?', *GIGA Working Paper No 92* (2008), available at http://www.giga-hamburg.de/dl/download.php?d=/content/publikationen/pdf/wp92_loewen.pdf (last visited 18 December 2010); R. Seidelmann *et al.* (eds), *European Union and Asia: a*

Commission and the heads of ten Asian countries meet every two years, European Union-China summits even take place every year.[20] However, dissonances, especially regarding human rights policy, repeatedly put a strain on the 'strategic partnership'[21] the European Union maintains with the People's Republic of China.

A third important region for the European Union in economic and development policy, and with regard to migration policy[22], is the Mediterranean. A steadily increasing number of ships with refugees landing on the Spanish and Italian coasts visualize dramatically the North-South divide to Europeans. The EU tries to combat this migration problem by supporting their neighbors located on the other side of the Mediterranean, both on a bilateral and multilateral level. The Europeans ratified association agreements with seven of the Mediterranean countries, which form the basis for political and economic cooperation.[23] In addition, the so called 'Euro-

Dialogue on Regionalism and Interregional Cooperation (2008); J. Rüland *et al.* (eds), *Asian-European Relations. Buildings Blocks for Global Governance?* (2008).

20 See http://ec.europa.eu/external_relations/china/summits_en.htm (last visited 18 December 2010).

21 C. Hackenesch & J. Ling, 'White Bull, Red Dragon – EU-China Strategic Partnership in the Making', *German Development Institute (DIE) – The Current Column*, 2 June 2009, available at http://www.die-gdi.de (last visited 18 December 2010); see also A. Sautenet, 'The Current Status and Prospects of the 'Strategic Partnership' between the EU and China', 13 *European Law Journal* (2007) 6, 699-731; J. Men, 'Building a long-term EU-China partnership', in F. Laursen (ed.), *The EU in the Global Political Economy* (2009), 219-238; X. Dai, 'Understanding EU-China Relations', in G. Hauser *et al.* (eds), *China: The Rising Power* (2009), 63-86; D. Bingran, 'Towards an EU-China Partnership', in de Sales Marques *et al.*, *supra* note 18, 239-252.

22 See 'Agreed Ministerial Conclusions of the First Euro-Mediterranean Ministerial Meeting on Migration' (19 November 2007) available at http://www.eu2007.pt/NR/rdonlyres/8D86D66E-B37A-457E-9E4A-2D7AFF2643D9/0/20071119AGREEDCONCLUSIONSEuromed.pdf (last visited 10 December 2010); see generally B. Gebrewold (ed.), *Africa and Fortress Europe* (2007); R. Kunz & S. Lavenex, 'The Migration-Development Nexus in EU External Relations', 30 *Journal of European Integration* (2008) 3, 439-457; St. Sterkx, 'The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?', in J. Orbie (ed.), *Europe's Global Role. External Policies of the European Union* (2008), 117-138); P. J. Cardwell, *EU External Relations and Systems of Governance. The CFSP, Euro-Mediterranean Partnership and Migration* (2009), 140.

23 See the documents listed at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm (last visited 18 December 2010); see also F. Zaim, 'The Third Generation of Euro-Mediterranean Association Agreements: A View from the South', 4 *Mediterranean*

Mediterranean Partnership' (EUROMED) – sometimes also called 'Barcelona Process' for the place of the foundation conference – was founded in 1995.[24] At the initiative of France's President Sarkozy the EU recently called for an extension of its relations to the Mediterranean countries, resulting in a 'Union for the Mediterranean' in 2008.[25] In that context, several specific projects will be implemented, especially with regard to environmental protection of the sea, transportation and exploitation of solar energy. Currently there are several problems within that partnership, in large part due to the difference in attitudes between Europeans and some Arab states relating to Middle East policy.[26]

III. Global Development Policy of the European Union

European development policy is not limited to bilateral relations with single states or groups of states, but also takes place in various global arrangements. One outstanding example is the Generalized System of

Politics (1999) 2, 36-52; G. Joffé (ed.), *Perspectives in Development: The Euro-Mediterranean Partnership* (1999).

24 Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme, available at http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf (last visited 18 December 2010); see H. A. Fernández & R. Youngs (eds), *The Euro-Mediterranean Partnership: Assessing the First Decade* (2005); B. Gavin, 'The Euro-Mediterranean Partnership', 40 *Intereconomics* (2005) 6, 353-361; J. Brach, 'The Euro-Mediterranean Partnership: The Role and Impact of the Economic and Financial Dimension', 12 *European Foreign Affairs Review* (2007) 4, 555-579; E. Lannon, 'The EU's strategic partnership with Mediterranean and the Middle East', in A. Dashwood & M. Maresceau (eds) , *Law and practice of EU external relations. Salient patterns of a changing landscape* (2008), 360-375.

25 Joint Declaration of the Paris Summit for the Mediterranean, of 13 July 2008, available at http://www.eu2008.fr/webdav/site/PFUE/shared/import/07/0713_declaration_de_paris/Joint_declaration_of_the_Paris_summit_for_the_Mediterranean-EN.pdf (last visited 18 December 2010); Commission Communication from the Commission to the European Parliament and the Council of 20 May 2008 on the "Barcelona Process: Union for the Mediterranean", COM (2008) 319 final; see also R. Gillespie, 'A 'Union for the Mediterranean' … or for the EU?', 13 *Mediterranean Politics* (2008) 2, 277-286; R. Balfour, 'The Transformation of the Union for the Mediterranean', 14 *Mediterranean Politics* (2009) 1, 99-105.

26 See generally K. Krausch & R. Youngs, 'The end of the 'Euro-Mediterranean vision'', 85 *International Affairs* (2009) 5, 963-975.

Preferences that provides tariff advantages for all developing countries.[27] Beyond that, the least developed countries (LDC's) benefit from the Union's 'Everything but Arms' (EBA) initiative, which grants such states duty-free and quota-free market access for all products with the exception of armaments.[28] Furthermore the European Union participates in international agreements and programs on environmental[29] and health protection,[30] rural development,[31] energy security[32] and humanitarian aid[33]. Last but not least, it is noteworthy that the European Union – as well as its member states – is

27 Art. 6 Council Regulation 732/2008, applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ L 2008 211/1. The European GSP has been redesigned in a response to a decision of the WTO Appellate Body in 2004, see Appellate Body Report, EC – Granting of Tariff Preferences, WT/DS246/AB/R, adopted 7 April 2004; see also L. Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', 6 *Journal of International Economic Law* (2003) 2, 507-532; R. Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences', 4 *Chicago Journal of International Law* (2003) 2, 385-406; H. Jessen, '"GSP Plus" – Zur WTO-Konformität des zukünftigen Zollpräferenzsystems der EG', 9 *Policy Papers on Transnational Economic Law* (2004) available at http://www2.jura.uni-halle.de/telc/PolicyPaper9.pdf (last visited 18 December 2010); J. Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform', 42 *Common Market Law Review* (2005) 6, 1663-1689; G. M. Grossman & A. O. Sykes, 'A Preference for Development: The Law and Economics of GSP', in G. A. Bermann & P. C. Mavroidis (eds), *WTO Law and Developing Countries* (2007), 255-282; C. Stevens, 'Creating a Development-Friendly EU Trade Policy', in Mold, *supra* note 6, 221-236.

28 Art. 11 Council Regulation 732/2008, *supra* note 27; see also G. Faber & J. Orbie (eds), *European Union Trade Politics and Development. 'Everything but Arms' unravelled* (2007).

29 See e.g. Commission Staff Working Paper of 10 April 2001, SEC (2001) 609; Commission Staff Working Paper SEC (2009) 555 final; see also Y. G. Franco & J. M. Martínez Sierra, 'EU Environmental Cooperation with Developing Countries', in Laursen (ed.), *supra* note 21, 253-268.

30 Commission Communication of 22 March 2002, COM (2002) 129 final.

31 Commission Communication of 25 July 2002, COM (2002) 429 final.

32 Worth mentioning in this context are especially the activities of the European Union Energy Initiative (EUEI), see http://www.euei.net (last visited 18 December 2010).

33 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, The European Union Consensus on Humanitarian Aid, of 18 December 2007, OJ C 25/1 (2008); see also H. Versluys, 'European Union Humanitarian Aid: Lifesaver or Political Tool?', in Orbie (ed.), *supra* note 22, 91-118.

a member of the World Trade Organization (WTO)[34] and, therefore, one of the main stakeholders in the negotiations on new international trade regulations on the basis of the Doha Development Agenda.[35]

C. The Legal Framework of European Development Partnerships

I. The Basic Principles of Development Policy under European Union Law

1. The Competences of the European Institutions in Development Politics

From a legal point of view it is not self-evident that the European Union would have its own development policy. As a part of foreign affairs, activities in development policy fall within the member states´ sovereignty. The Union (respectively – in the pre-Lisbon system – the Community) was able to gain its own competences in that political area because of a correlating waiver of the member states. As early as the founding of the Community, this took place with regard to the former colonies, especially

[34] Art. XI:1 Agreement Establishing the WTO; see also M. E. Footer, 'The EU and the WTO global trading system', in P.-H. Laurent & M. Maresceau (eds), *Deepening and Widening* (1998), 317-338; P. Hilpold, *Die EU im GATT-WTO-System* (1999); G. de Búrca & J. Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (2001); C. Herrmann *et al.*, *Welthandelsrecht* (2007), 66.

[35] See WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, 41 International Legal Materials (2002), 746-754; for an analysis of the North-South divergences referring to the Doha Development Agenda see M. Khor, *The WTO's Doha Negotiations and Impasse: A Development Perspective* (2006); Th. W. Hertel & L. A. Winters (eds), *Poverty and the WTO: Impacts of the Doha Development Agenda* (2006); P. van Dijck & G. Faber (eds), *Developing Countries and the Doha Development Agenda of the WTO* (2006); H. Jessen, *WTO-Recht und "Entwicklungsländer"* (2006), 399; F. Ismail, *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007); Y.-S. Lee, *Economic Development throuh World Trade: a Developing World Perspective*, 2008; L. Crump & S. J. Maswood (eds), *Developing Countries and Global Trade Negotiations* (2009); C. Thomas & J. P. Trachtman (eds), *Developing Countries in the WTO Legal System* (2009); see also Leal-Arcas, *supra* note 11, 360-366.

those of France and Belgium in Sub-Saharan Africa. Via the legal instrument of association, these new founded states were bound close to the Community. After Great Britain entered the Community in 1973, the former British colonies also joined. Today, Art. 217 TFEU (ex Art. 310 TEC) is still widely considered to form the legal basis with regard to the Cotonou-partnership and other association agreements such as with the Mediterranean countries.[36] Art. 217 TFEU (ex Art. 310 TEC) covers all subject matters that the TFEU allocates to the Union, such as commercial policy, freedom of movement for workers, freedom of establishment, the service sector, competition law or aspects of consumer protection and pollution control. However, as a general rule, the Union is not the only contracting party in association agreements – the single member states have to accede to the agreement, too. These treaties are therefore called 'mixed agreements'.[37] This is due to the fact that some subject matters included in association agreements are not in the exclusive or concurrent jurisdiction of the Union but are part of a parallel jurisdiction of the Union and the member states. This mainly affects regulations regarding the health system, education, scientific research and cultural matters.

Even though the European Union from the very start had been involved in development activities apart from association policy, development cooperation has not been implemented into the EC Treaty as a domain of independent competence until its reform by the Maastricht Treaty in 1992. Today, the main legal basis for global partnerships between the European Union and both newly industrializing countries and developing countries is laid down in Arts 208-211 TFEU (ex Arts 177-181 TEC)[38] – as long as there are no special regulations in effect, such as specific provisions with regard to issues of association.

36 H.-H. Herrnfeld, 'EGV Artikel 310', in J. Schwarze (ed.), *EU-Kommentar*, 2nd ed. (2009), marginal note 4.

37 See generally D. O'Keeffe & H. G. Schermers (eds), *Mixed Agreements* (1983); A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood & C. Hillion (eds), *The General Law of E.C. External Relations* (2000), 200-220; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001); P. Koutrakos, *EU International Relations Law* (2006), 137-182; G. De Baere, *Constitutional Principles of EU External Relations* (2008), 232; R. Holdgaard, *External Relations Law of the European Community* (2008), 147-166.

38 See K. Lenaerts & P. Van Nuffel, *Constitutional Law of the European Union*, 2nd ed. (2005), 852.

According to Art. 208 TFEU (ex Art. 177 TEC), the Union's policy in the field of development cooperation has to be conducted within the framework of the principles and objectives of the Union's external action, which in turn are laid down in the new Art. 21 TEU. This provision specifies the principles which shall guide the Union's action on the international scene: 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'[39] Moreover the most important objectives of the Union's external action are specifically articulated in this Article. Among others, its foreign policy is aimed at consolidating and supporting 'democracy, the rule of law, human rights and the principles of international law,' fostering the 'sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and encouraging the 'integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.'[40] Art. 208 (1) TFEU reinforces one of these objectives – the aim of reducing (and, in the long term, eradicating) poverty as the primary objective of the Union's development cooperation policy. Art. 208 (2) TFEU (ex Art. 177 [3] TEC) obliges both the Union and each member state to comply with their commitments concerning development cooperation which they have approved in the context of the United Nations or other international organizations. Therefore, political declarations executed in these forums – *e.g.*, concerning the increase of development aid as one of the outcomes of the Monterrey Conference in 2002 or regarding the achievement of the MDG – gain legal effect through Art. 208 (2) TFEU (ex Art. 177 [3] TEC).[41]

Apart from that, the TFEU neither indicates how to accomplish the goals circumscribed in Art. 208 TFEU nor provides any specific legal instruments for the Union to use in order to achieve them. Art. 209 (1) TFEU (ex Art. 179 TEC) contains a kind of *carte blanche*, stating that the

39 Art. 21 (1) TEU.

40 Art. 21 (2 lit. b, d and e) TEU.

41 K. Schmalenbach, 'EGV Art. 177', in C. Calliess & M. Ruffert (eds), *Das Verfassungsrecht der Europäischen Union*, 3rd ed. (2007), marginal note 24; but see also W. Benedek, 'EGV Art. 177', in E. Grabitz & M. Hilf (eds), *Das Recht der Europäischen Union*, (2003), 49.

European Parliament and the Council are meant to enact measures 'necessary' to accomplish the objectives laid down in Art. 208 TFEU. Measures in this context can be instruments of secondary law like directives and regulations or just political measures without legal force. Art. 209 (1) TFEU provides for the so-called 'ordinary legislative procedure'.[42] This means that in development policy the European Parliament has a broad right to have a say.[43] In practice European development policy shows that Parliament makes extensive use of that right, *e.g.*, lately in the discussion concerning the establishment of a new secondary law framework for development aid.[44] After an intense debate between the European Commission and the concerned committee of the European Parliament several regulations became effective in 2007. They now form the legal fundament for development activities of the European Union beneath the level of primary law.[45]

42 For a survey of the institutions involved in the decision making process in European Development Politics see P. Hoebink, 'From 'particularity' to 'globality': European development cooperation in a hanging world', in P. Hoebink (ed.), *The Treaty of Maastricht and Europe's Development Co-operation* (2005), 47; see also S. Vanhoonacker, 'The Institutional Framework', in Hill & Smith (eds), *supra* note 6, 75.

43 As far as international treaties are concerned, which base in the field of development policy on Art. 209 (2) TFEU (ex Art. 181 TEC), Parliament has similar rights; see Art. 218 (6) TFEU (ex Art. 300 [3] TEC); see D. Thym, 'Parliamentary Involvement in European International Relations', in M. Cremona & B. de Witte (eds), *EU Foreign Relations Law. Constitutional Fundamentals* (2008), 207. For a short survey of the Parliament's rights regarding the conclusion of international agreements see also Lenaerts & Van Nuffel, *supra* note 38, 393; P. Craig & G. de Búrca, *EU Law. Text, Cases and Materials*, 4th ed. (2008), 199.

44 See R. Passos & D. Gauci, 'European Parliament and Development Cooperation: Shaping Legislation and the new Democratic Scrutiny Dialogue', 43 *Europarecht* (2008) Beiheft 2, 138-158.

45 Council Regulation 1085/2006 OJ 2006 L 210/82; EP/Council Regulation 1638/2006 OJ 2006 L 310/1; EP/Council Regulation 1905/2006 OJ L 378/41 (2006); EP/Council Regulation 1717/2006, OJ 2006 L 327/1; Council Regulation (Euratom) 300/2007, OJ 2006 L 81/1; EP/Council Regulation 1889/2006, OJ 2006 L 386/1; Council Regulation 1934/2006, OJ 2006 L 405/41. In this context the already existing humanitarian aid instrument has to be added, Council Regulation 1257/96, OJ 1996 L 163/1. Another important political – not strictly legal – document is the so-called "European Consensus on Development", a Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union, of 20 December 2005, OJ 2006 C 46.

2. The 'Triple C'

a) The Demands of Complementarity and Coordination

From the legal point of view, several problems of European development politics are connected with the so-called 'Triple C' – the demands of complementarity, coordination and coherence.[46] According to Art. 208 (1) TFEU (ex Art. 177 TEC), the Union's development cooperation policy and that of the Member States are meant to complement and reinforce each other.[47] Thus, European Union law assumes parallel competences of the Union and the member states. In this context the demand of coordination – laid down in Art. 210 TFEU (ex Art. 180 TEC) – also becomes important. Thereafter, both the Union and the member states have to coordinate their activities in development cooperation and harmonize their foreign aid programs.[48] In fact the member states´ share of development aid makes about 80% of the European total.[49] Therefore the European Union is only one out of several stakeholders within the European partnership with the South. In various respects the different political programs of the member states compete with each other, as they usually do not base upon altruistic motives, but follow external – mostly economic – objectives. Of course, this competitive character is desirable to a certain

46 See generally P. Hoebink, 'Evaluating Maastricht's Triple C: An Introduction to the Development Paragraphs of the Treaty on the European Union and Suggestions for its Evaluation', in Hoebink, *supra* note 42, 1-24; N. Schrijver, ''Triple C' from the Perspective of International Law and Organisation: Comparing the League of Nations, United Nations System and the European Union Experiences', *id.*, 63-96; see also C. Loquai, *The Europeanisation of Development Cooperation: Coordination, Complementarity, Coherence* (1996); J. de Deus Pinheiro, 'Consistency, Coordination and Complementarity', *The Courier* NO 155 (1996), 20-21.

47 See M. Jorna, 'Complementarity between EU and Member State Development Policies: Empty Rhetoric or Substantive New Approach?', *The Courier* No 154 (1995), 78-80; J. Bossuyt *et al.*, *Improving Complementarity of European Union Development Cooperation: From the Bottom Up* (1999); L. Dacosta *et al.*, 'Complementarity of European Union Policies on Development Co-operation', in Hoebink, *supra* note 42, 97-134.

48 See G. Gill & S. Maxwell, 'The co-ordination of development co-operation in the European Union', in Hoebink, *supra* note 42, 135-182.

49 See OECD, Statistical Annex of the 2010 Development Co-operation Report, table 1 (2009), available at http://www.oecd.org/document/9/0,3343,en_2649_34447_1893129_1_1_1_1,00.html (last visited 18 December 2010).

extent, motivating the member states to a consistent improvement and widening of their North-South activities. But this competition also results in a large number of stakeholders with different priorities. Necessarily there will be losses of efficiency, if these activities remain uncoordinated. Consequently, deciding for complementarity on the one hand, this on the other hand requires a high degree of coordination and (if possible) cooperation.[50]

This fundamental problem of development partnerships, which is not unique to European donors, is discussed in the international arena primarily in the context of the 'Paris Declaration on Aid Effectiveness' of 2005[51] and the 'Accra Agenda for Action' being adopted at a follow-up conference in Ghana in 2008.[52] One of the basic principles of these documents relating to donors focuses on better adjustment and complementarity of aid programmes. The European Union has met these international obligations and self-imposed demands fixed in Art. 210 TFEU (ex Art. 180 TEC) by taking a number of actions – for example in 2007, when a code of conduct was passed which contained guidelines for a better division of work between the donors.[53]

b) Coherence

The two demands of the TFEU, complementarity and coordination in development aid, are important due to the fact that the donors to the global development partnership are an alliance of several states. Coherence is a further important criterion for each development partnership – irrespective of whether the donor consists of one or more partners. The criterion of

50 Political practice does not always reflect these legal requirements; see J. Orbie & H. Versluys, 'The European Union's International Development Policy: Leading and Benevolent?', in Orbie (ed.), *supra* note 22, 72: "Although the principles of complementarity and coordination are enshrined in the Treaty, they have been honoured more in their breach than in their observance."

51 This document, which has been adopted by the OECD´s Development Assistance Committee (DAC) and numerous developing countries in March 2005, is available at http://www.oecd.org/dataoecd/11/41/34428351.pdf (last visited 18 December 2010).

52 *Id*.; see furthermore the Commission Staff Working Paper of 8 April 2009, COM (2009) 160 final.

53 Commission Communication of 28 February 2007, COM (2007) 72 final.

coherence[54] can be found in the second sub-paragraph of Art. 208 (1) TFEU (ex Art. 178 TEC); furthermore Art. 21 (3) TEU (ex Art. 3 [2] TEU) stipulates the institute of coherence explicitly for all sub-sections of European foreign policy.[55] Art. 208 (1) TFEU requires that ' (t)he Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.' The wording of Art. 208 (1) TFEU shows the weak normative force of the rule. Development goals shall merely be taken into 'account' which does not guarantee their priority over other political objectives. In this regard, the TFEU gives Union institutions wide political scope for making their decisions – which most scholars on European Union law consider to be beyond judicial control.[56] The corresponding principle of coherence stated in Art. 21 (3) TEU is not much more precise. Furthermore, both regulations apply only to the Union and do not impose corresponding obligations on the member states.[57]

Art. 11 TFEU (ex Art. 6 TEC) demonstrates that coherence clauses or cross-section clauses can be drafted in a way that allows more normative

54 P. Hoebink, 'Policy Coherence in Development Co-operation: the Case of the European Union', in J. Forster & O. Stocke (eds), *Policy Coherence in Development Co-operation* (1999), 323-345; P. Hoebink, 'Evaluating Maastricht's Triple C: The ‚C' of Coherence', in Hoebink, *supra* note 42, 183-218; G. Ashoff, 'Enhancing Policy Coherence for Development: Justification, Recognition and Approaches to Achievement', 11 *German Development Institute (DIE) - Studies* (2005); M. Carbone, 'Mission Impossible: the European Union and Policy Coherence for Development', 30 *Journal of European Integration* (2008) 3, 323-342; J. Mackie *et al*., 'Coherence and effectiveness: Challenges for ACP-EU relations in 2008', *InBrief* No 20 (2008), 1-12. For a general discussion of the requirements of coherence (consistency) in European Foreign Policy see U. Schmalz, 'The Amsterdam Provisions on External Coherence: Bridging the Union's Foreign Policy Dualism?', 3 *European Foreign Affairs Review* (1998) 3, 421-442; P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 10 *European Law Journal* (2004) 1, 23-41; S. Nuttal, 'Coherence and Consistency', in Hill & Smith (eds), *supra* note 6, 91-112; Lenaerts & Van Nuffel, *supra* note 38, 899.

55 See F. Hoffmeister, 'Das Verhältnis zwischen Entwicklungszusammenarbeit und Gemeinsamer Außen- und Sicherheitspolitik am Beispiel des EG-Stabilitätsinstruments', 43 *Europarecht* Beiheft (2008) 2, 59.

56 K. Schmalenbach, 'EGV Art. 178', in Calliess & Ruffert (eds), *supra* note 41, 1; see also R. Lane, 'New Community Competences under the Maastricht Treaty', 30 *Common Market Law Review* (1993) 5, 978; M. Obrovsky, 'PCD – Policy Coherence for Development', *OEFSE-Briefing Paper* No 1 (2008), 5.

57 Carbone, *supra* note 54, 330.

power.[58] According to Art. 11 TFEU environmental protection requirements 'must be integrated into the […] implementation of the Union policies and activities'. This clause certainly does not provide a priority of environmental policy over other political areas but it at least allows limited actionability. Though it might not be possible to enforce certain environmental tasks, single legal acts can be challenged for alleged violations of provisions covered by Art. 11 TFEU before the European Court of Justice.[59] Due to the vague wording of Art. 208 (1) TFEU, such a form of judicial control presumably would not be very successful regarding the development coherence clause.

A legally strict definition of the demand of coherence is important in light of the fact that European development policy has more than once found itself the focus of various criticisms. In particular, agricultural policy causes a massive conflict regarding the goals of European development policy, given the vast subsidies for European farmers.[60] Similar coherence problems emerge in other policy areas. In foreign trade policy, development aid is usually linked to the delivery of goods and services from the donor country.[61] Regarding fishing policy, in the past efficient inshore fishing has been foiled by fishing quotas the European Union has agreed upon with

58 See also Schrijver, *supra* note 46, 84: "(C)omparing […] Art. 178 with Art. 6 on integration of environmental protection […] must lead to the conclusion that coherence of development policies is not of equal weight as integration of environmental protection for two reasons."

59 A. Käller, 'EGV Artikel 7', in J. Schwarze (ed.), *supra* note 36, 12; 18; see also N. Dhondt, *Integration of Environmental Protection into other EC Policies* (2003), 30; M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (2005), 44; P. Wenneras, *The Enforcement of EC Environmental Law* (2007), 201; J. H. Jans & H. H. B. Vedder, *European Environmental Law*, 3rd ed. (2008), 16.

60 K. Bertow & A. Schultheis, *Impact of EU's Agricultural Trade Policy on Smallholders in Africa* (2007); A. Matthews, 'The European Union's Common Agricultural Policy and Developing Countries: the Struggle for Coherence', 30 *Journal of European Integration* (2008) 3, 381-399.

61 G. Ashoff, 'Improving Coherence between Development Policy and Other Policies. The Case of Germany', *German Development Institute (DIE)-Briefing Paper* No 1 (2002), 2.

developing countries.[62] Finally, arms export policy often is contradictory to the conflict preventing programmes in development cooperation.[63]

Obviously, there is a gap between the legal claim for coherence, as set out in Art. 208 (1) TFEU on the one hand, and political reality on the other. But even though legal proceedings in order to control these shortfalls are not very promising given the current legal situation, Art. 208 (1) TFEU – (respectively the former Art. 178 TEC) – has not remained completely ineffective. The Union's institutions have taken up several initiatives in order to improve the coherence of their activities. In a memorandum of the European Commission published in 2005[64] twelve policy sectors are identified – trade, environment, security, agriculture, fishing, the social dimensions of globalization, migration, research and innovation, information technologies, transport and energy – in which so called 'coherence responsibilities for development' shall be effective. A first interim report issued in 2007 concerning the 'Policy Coherence for Development (PCD)' came to the conclusion that within the institutions of the European Union there was an increasing awareness for the effect of different policy areas on developing countries and that on the European Union level a greater progress in promoting policy coherence could be gained than in the member states.[65] However the European Union still finds itself, as the Commission itself acknowledged, 'at an early stage of PCD development'.[66] Political conflicts of priority and interest between the European Union member states and developing countries are considered to be the main barriers for policy coherence. In a communication published in September 2009, the Commission emphasized the need for a stronger concentration on select PCD priority areas, just as climate change, food security, migration, intellectual property rights and security questions.[67]

62 C. Bretherton & J. Vogler, 'The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy', 30 *Journal of European Integration* (2008) 3, 401-417.

63 G. Ashoff, 'Improving Coherence between Development Policy and Other Policies. The Case of Germany', *German Development Institute (DIE)-Briefing Paper* No 1 (2002), 2.

64 Commission Communication of 12 April 2005, COM (2005) 134 final.

65 Commission Working Paper of 20 September 2007, COM (2007) 545 final, 3.

66 *Id.*, 4; see also Obrovsky, *supra* note 56; Carbone, *supra* note 54, *334*.

67 Commission Communication of 15 September 2009, COM (2009) 458 final; for a critical analysis of this report see Concord (ed.), *The EC Commission Communication on Policy Coherence for Development and whole of the Union approach. What does it*

II. Development Policy of the European Union and the Requirements of Public International Law

1. Association Partnerships in Conflict with World Trade Law

The Union's development cooperation is governed not only by the supranational European Union law but also by the principles and rules of public international law which provide several constraints for stakeholders in Brussels when cooperating with Asian, African and Latin-American partners. The partnership with ACP-Countries recently made that plain. In the Lomé-Convention and the Cotonou-Agreement, the European Union granted ACP-countries unilateral trade preferences which essentially are incompatible with basic rules of the World Trade Organization (WTO). These preferences do not achieve the reciprocity demands of a free trade agreement and therefore discriminate against other developing countries. In the past, such a privilege has only been allowed in the case of special approval by the WTO partners – a so-called *waiver* under Art. IX:3 Agreement Establishing the WTO.[68] Once this approval terminated at the end of 2007, the European Union and ACP-countries, when negotiating the terms of the Cotonou-Agreement, settled on several 'Economic Partnership Agreements' (EPAs) which would replace the former trade regulations. These new agreements will be free trade agreements, connecting the European Union with single ACP-sub-regions.[69] According to Art. XXIV:8

mean for EU Development Policy? (2009), available at http://www.concordeurope.org/Public/Page.php?ID=69 (last visited 18 December 2010).

68 See with regard to the Cotonou Agreement WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, European Communities-The ACP-EC Partnership Agreement; WTO Doc. WT/MIN (01)/15, Decision 14 November 2001.

69 See generally A. Borrmann *et al.*, 'EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites', 40 *Intereconomics* (2005) 3, 169-177; C. Stevens, 'The EU, Africa and Economic Partnership Agreements: Unintended Consequences of Policy Leverage', 44 *Journal of Modern African Studies* (2006) 3, 441-458; S. Bilal, 'Concluding EPA Negotiations. Legal and institutional issues', *ECDPM Policy Management Report* No 12 (2007), available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/C04BB76BD86391E9C12573090047AF15/$FILE/PMR12-e.pdf (last visited 18 December 2010); A. Borrmann & M. Busse, 'The institutional challenge of the ACP/EU Economic Partnership Agreements', 25 *Development Policy Review* (2007) 4, 403-416; O. Morrissey, 'A Critical Assessment of Proposed EU-ACP Economic Partnership Agreements', in Mold (ed.), *supra* note 6, 199-220; D. Kohnert, 'EU-African

General Agreement on Tariffs and Trade (GATT), such free trade areas are legally allowed as an exception to the most favored nation principle as long as a deregulation of 'substantially all the trade' is intended.[70]

Up to now, negotiations regarding mutual reduction of trade barriers within these new partnership agreements have proven to be remarkably difficult. Thus far, the European Union has only been able to enter into one agreement with the Caribbean states. Other members of the ACP community accepted only interim agreements in order to keep up basic preference rules until the conclusion of a permanent agreement.[71] These difficulties are due to the fear, that a broad and efficient deregulation of

Economic Relations: Continuing Dominance Traded for Aid?', *GIGA Working Paper No* 82 (2008), 12-15; C. Stevens *et al., The new EPAs: comparative analysis of their content and the challenges for 2008. Final Report* (2008); Flint, *supra* note 10, 145-159; R. Kappel, 'Die Economic Partnership Agreements – kein Allheilmittel für Afrika', *GIGA Focus* (2008), No. 6; G. Faber & J. Orbie (eds), *Beyond Market Access for Economic Development. EU-Africa relations in transition* (2009); S. Bilal *et al.*, 'Global Financial and Economic Crisis: Analysis of and Implications for ACP-EU Economic Partnership Agreements (EPAs)', *ECDPM Discussion Paper No* 92 (2009).

70 Although the question what is meant by "substantially all the trade" in this clause has been discussed for more than sixty years, the problem is still not solved; see Appellate Body Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, 19 November 1999, para 48: "Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision." The WTO Appellate Body (id.) preferred a flexible interpretation by stating that substantially all the trade is "not the same as all the trade, and […] something considerably more than merely some the trade". For an analysis of this provision see generally M. Matsushita, 'Legal Aspects of Free Trade Agreements in the Context of Art. XXIV of the GATT 1994', in M. Matsushita & D. Ahn (eds), *WTO and East Asia: New Perspectives* (2004), 497-515; M. T. Hausmann, *Das Cotonou-Handelsregime und das Recht der WTO* (2006), 124; A. H. Qureshi, *Interpreting WTO Agreements. Problems and Perspectives* (2006), 102; M. Matsushita *et al., The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 568; S. Lester & B. Mercurio, World Trade Law (2008), 361-363; K. Nowrot, ‚Steuerungssubjekte und –mechanismen im Internationalen Wirtschaftsrecht', in C. Tietje (ed.), *Internationales Wirtschaftsrecht* (2009), § 2, 131; A. A. Mitchell & N. J. S. Lockhart, 'Legal Requirements for PTAs under the WTO', in S. Lester & B. Mercurio (eds), *Bilateral and Regional Trade Agreements. Commentary and Analysis* (2009), 93.

71 For detailed information on the current status of the EPA-negotiations see the „Trade Negotiations Insight" of the International Centre for Trade and Sustainable Development, available at http://ictsd.org/news/tni/ (last visited 18 December 2010).

bilateral trade relations might overcharge the adaptability of the ACP-countries´ national economies.[72]

It is not certain whether the differences between the negotiating parties can be settled and EU-ACP-partnerships according to WTO law can be maintained. Another solution could be the amendment of the relevant GATT regulations, in order to provide moderate reciprocity demands for free trade agreements between industrial and developing countries. In fact the GATT-regulations regarding trade preference regimes are part of the reform plans of the Doha Round. It is intended to provide an adequate scope for absorbing the adjustment costs of trade liberalization for developing countries. For instance, Art. XXIV:8 GATT, which is actually rather inflexible, could be redesigned according to the more modern equivalent in the General Agreement on Trade in Services (GATS)[73], which stipulates that the legitimacy of treaties on free trade areas with regard to trade in services has to be handled with 'flexibility […] in accordance with the level of development of the countries concerned'.[74] So it will mainly depend on the results of the WTO negotiations whether such a flexible provision can

72 A. Borrmann, H. Großmann & Georg Koopmann, 'The WTO Compatibility of the Economic Partnership Agreements between the EU and the ACP Countries', 41 *Intereconomics* (2006) 2, 115-116.

73 *Id*., 117; M. G. Desta, 'EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?', 43 *Common Market Law Review* (2006) 5, 1375; A. Zimmermann, 'Die neuen Wirtschaftspartnerschaftsabkommen der EU: WTO-Konformität versus Entwicklungsorientierung?', 20 *Europäische Zeitschrift für Wirtschaftsrecht* (2009) 1, 6; see also G. Thallinger, 'From apology to Utopia: EU-ACP economic partnership agreements oscillating between WTO conformity and sustainability', 12 *European Foreign Affairs Review* (2007) 4, 514-515; ACP Group, Developmental aspects of Regional Trade Agreements and Special and Differential Treatment in WTO Rules: GATT 1994 Art. XXIV and the Enabling Clause, Commission Communication by the Mission of Botswana on behalf of the ACP Group of States, WTO Doc. TN/RL/W/155, 28 April 2004. For a broader discussion of the compatibility of the EPAs with WTO rules see furthermore C. M. Obote Ochieng, 'The EU-ACP Economic Partnership agreements and the 'Development Question'', 10 *Journal of International Economic Law* (2007) 2, 363-395; *id.*, 'Legal and systematic Issues in the Interim Economic Partnership agreements. Which Way Now?', *ICTSD Issue Paper* No. 2 (September 2009), 7, available at http://ictsd.org/downloads/2009/11/ochieng_web_final.pdf (last visited 18 December 2010); L. Cernat *et al.*, 'RTAs and WTO compatibility: Catch me if you can? The case of EPA Negotiations', 23 *Journal of Economic Integration* (2008) 3, 489-517.

74 Art. V GATS.

also be incorporated into the law on the trade of goods and – as a consequence – North-South free trade agreements in future still deserve the name 'development partnerships'.

2. International Environmental Law and Human Rights Protection

In addition to international trade law, other fields of public international law also establish a framework for the development policy of the European Union. One important example in this context is international environmental law. Apart from reducing poverty, the problem of climate change certainly provides the major challenge in current development policy. It goes without saying that Europeans as much as most other industrial nations find themselves far away from having made all necessary efforts in this context, especially with regard to the vast industrial backlog demand of the developing countries. At the UN Climate Change Conference 2009 in Copenhagen, EU leaders announced the commitment of $ 3.6 billion per year until 2012 to help developing countries combat global warming.[75] NGOs, however, doubt that this contribution will be an adequate amount; according to Oxfam International at least $ 200 billion per year are needed to help poor countries reduce their emissions and adapt to a changing climate.[76]

International human rights protection is another example for the importance of public international law for global development partnerships. Here again, there are still deficits in the cooperation of the Europeans with their partners in the Global South. For instance it is doubtful, whether the European Union actually makes sufficient use of all instruments of human rights protection where it seems to be necessary. As already mentioned, the Cotonou-Agreement – like its predecessor, the Lomé-Convention – provides

[75] see http://en.cop15.dk/news/view+news?newsid=2933 (last visited 18 December 2010). See also para 8 of the Copenhagen Accord of 18 December 2009: „[…] The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010 – 2012 with balanced allocation between adaptation and mitigation."; available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (last visited 18 December 2010).

[76] http://www.oxfam.org/en/pressroom/pressrelease/2009-12-07/200bn-price-of-success-copenhagen (last visited 18 December 2010).

regulations for human rights protection. According to Art. 96 of the Cotonou-Agreement, the contracting parties can take 'appropriate measures' in case of violation of human rights. At the extreme, these measures can even comprise the suspension of the agreement with regard to a particular country. Such sanctions are also possible on the basis of other agreements or with regard to the Generalized System of Preferences.[77] However, in practice these instruments have not been exercised very often so far.[78] There definitely remains much scope for enhancing the importance that is accorded to human rights protection in the implementation of the EU's development policy.[79]

D. Conclusion: European Development Cooperation as Part of the International Law of Development

The topics discussed above – the legal framework of the TEU and the TFEU, the requirements of the WTO, the problem of climate change and the human rights clauses of partnership agreements – are just examples of a broad range of questions which come up when considering European

[77] See e.g. Council Regulation 552/97 of 24 March 1997, OJ 1997 L 85/8; see also *Portugal v. Council*, Case C-268/94 (Eur.Ct.J. 3 December 1996) ECR, I-6177, paras 23; see generally M. L. Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements', in N. Emiliou & D. O'Keeffe (eds), *The European Union and World Trade* (1996), 62-80; B. Bandtner & A. Rosas, 'Trade Preferences and Human Rights', in Ph. Alston (ed.), *The EU and Human Rights* (1999), 699-722; E. Fierro, 'Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?', 7 *European Law Journal* (2001) 1, 41-68; L. Bartels, *Human Rights Conditionality in the EU's Internationl Agreements* (2005); P. Leino, 'The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law', in Cremona & de Witte (eds), *supra* note 43, 259-290.

[78] See Bartels, *supra* note 77, 37: "Nonetheless, compared to the range of possible scenarios in which human rights clauses might be applied, their actual impact on the EU's external human rights policies has been relatively modest. There have been some positive measures in form of dialogue on human rights and democratic principles […] However, negative reactions under human rights clauses have been limited to the Cotonou Agreement and its predecessor, the Lomé IV Convention, and even there it has been the very poorest of ACP countries that have been targeted, usually in response to military coups."

[79] See also R. Gropas, *Human Rights and Foreign Policy. The Case of the European Union*, (2006), 132.

development policy from a legal perspective. But apart from the restrictions, being imposed on development policy by European Union law and public international law on the one hand, and, on the other hand, its impetus to the evolution of this political area, one should not lose sight of the fact that reciprocal effects can also be recognized: Political positions within North-South relations are decisive for the further development of the international legal framework, too. European development cooperation has made an important contribution to the establishment of a new field of law, the so-called 'international law of development'. Most scholars regard it as a new section of public international law which – as a cross-section discipline – comprises aspects of each part of international law referring to North-South relations.[80] Some experts on international law (especially in France and the North-African countries) even consider the international law of development as a new dimension of the international legal order, following the phases of international law of coexistence and international law of cooperation.[81] This new dimension is characterized by the fact that it is primarily dedicated to a special objective: overcoming the North-South contrast and global development disparities. This objective is to be reached primarily by the use of programmatic and prospective-working norms. Both states and international organizations are making efforts to establish the new legal structure, for example by formulating legal principles, that have to be substantiated further, or by mutual consent on political goals which are not explicitly fixed in legally binding treaties but remain – at least for a certain time – in a 'soft law' status, such as recommendations or resolutions.

80 For a general overview see, M. Kaltenborn, 'Entwicklungs- und Schwellenländer in der Völkerrechtsgemeinschaft', 46 *Archiv des Völkerrechts* (2008) 2, 205-232.

81 The main publications in this context are: Societé Française pour le Droit International (ed.), *Pays en voie de développement et transformation du droit international* (1974); M. Flory, *Droit international du développement* (1977); Office des Publications Universitaires d'Alger (ed.), *Droit international du développement* (1978); R.-J. Dupuy, 'Communauté internationale et disparités de développement', 4 *Recueil des Cours de l'Académie du Droit international de la Haye (*1979) 165, 11-231, 169; M. Bennouna, *Droit international du développement* (1983); M. Benchikh, *Droit international du sous-développement* (1983); M. Flory *et al.* (eds), *La formation des normes en droit international du développement* (1984); A. Pellet, *Le droit international du développement*, 2nd ed. (1987); G. Feuer & H. Cassan, *Droit international du développement*, 2nd ed. (1991). For a critical analysis of this approach see R. Sarkar, *International Development Law. Rule of Law, Human Rights and Global Finance* (2009), 75-148.

Quite often, international law of development is to a certain extent disregarded due to these specific characteristics. The mainly vague and indefinite legal principles, such as the right to development or the principle of solidarity in international economic law, and the non-binding declarations adopted by the General Assembly or other conferences held by the United Nations, are frequently dismissed as legally irrelevant. However, it has been proved by various experts on international law, that in fact these 'soft law' instruments have a great role in establishing new 'hard law' provisions.[82] Moreover, international law of development by no means only consists of 'soft' elements, but also has – as shown in this Article – a well accepted position within the 'hard' part of the international legal framework. The regulations on the competences and procedures of the European institutions fixed by the TFEU, the Cotonou-Agreement, the new Economic Partnership Agreements and last but not least by the WTO rules are all in all thoroughly legally binding and partly even enforceable provisions which the European Union has to respect while establishing global partnerships with developing countries. They are examples of a steadily increasing framework that, on the one hand, helps to structure and stabilize global development partnerships and, on the other hand, encourage international stakeholders both in the North and in the Southern countries to continue their work on establishing a 'just' world order.

[82] For a discussion of the functions of soft law in the international legal structure see e.g. U. Fastenrath, 'Relative Normativity in International Law', 4 *European Journal of International Law* (1993) 1, 305-340; J. Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996) 2, 167-182; H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *European Journal of International Law* (1999) 3, 499-515; K. Zemanek, 'Is the Term 'Soft Law' Convenient?', in G. Hafner *et al.* (eds), *Liber amicorum in honour of I. Seidl-Hohenveldern* (1998), 843-862; J. J. Kirton & M. J. Trebilcock (eds), *Hard choices, soft law: voluntary standards in global trade, environment, and social governance* (2007); A. Boyle & C. Chinkin, *The Making of International Law* (2007), 211-229; S. H. Nasser, *Sources and Norms of international Law: a Study on Soft Law* (2008); H. Neuhold, 'Variations on the theme of 'soft international law', in International law between universalism and fragmentation', in I. Buffard, *et al.* (eds), *Festschrift in honour of G. Hafner* (2008), 343-360; D. Shelton, 'Soft Law', in D. Armstrong (ed.), *Routledge Handbook of Internatiol Law* (2009), 68-80.