

Policy Department External Policies

THE APPLICATION OF HUMAN RIGHTS CONDITIONALITY IN THE EU'S BILATERAL TRADE AGREEMENTS AND OTHER TRADE ARRANGEMENTS WITH THIRD COUNTRIES

INTERNATIONAL TRADE

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Author: **Dr Lorand Bartels**

Responsible Official: **Levente Császi**
Directorate-General for External Policies of the Union
Policy Department
BD4 06 M 055
rue Wiertz
B-1047 Brussels
E-mail: levente.csaszi@europarl.europa.eu

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Dr L Bartels, University of Cambridge

Address for correspondence:

Dr L Bartels
Trinity Hall
University of Cambridge
CB2 1TJ
United Kingdom

Tel: +44 774 878 5618

Fax: +44 870 130 1008

Email: lab53@cam.ac.uk

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1 Introduction

The EU frequently imposes sanctions on countries that violate human rights and democratic principles in third countries. It does this most frequently within the context of the Common Foreign and Security Policy (CFSP), which usually, but not always,¹ implements action taken by the UN Security Council.² Additionally, the EU conditions economic benefits which it provides to third countries on the compliance of those countries with human rights and democratic principles. This practice of conditionality, on which the present study focuses, takes two main forms. On the one hand, the EU disposes over a range of conditionality clauses permitting the withdrawal of privileges in the event that the beneficiary country violates human rights and democratic principles. On the other, in the area of trade preferences, the EU provides positive incentives to countries that comply with human rights (and other) norms. This study discusses these systems of negative and positive conditionality, with a focus on their consistency, effectiveness, legitimacy and legality. Annex I contains a set of recommendations arising out of the study.

It is also useful to place these issues in the broader context of the EU's economic relations with developing countries, and how these relations affect the enjoyment of human rights in those countries. The EU's approach to conditionality, as described in this study, is essentially based on two assumptions: first, that economic benefits are privileges to be granted to developing countries that comply with democratic principles and human rights, and to be withdrawn from those that do not; and, second, that the EU should not, via its economic policies, contribute to any violations of these core principles. As this study demonstrates, in practice the EU conditionality policy implements both of these rationales with a general degree of effectiveness. But it is also the case that the EU's conditionality policies tend to exclude any systematic consideration of the actual effects of these policies on the enjoyment of human rights – particularly economic and social rights – in those countries. It is true that the EU follows a policy of not withdrawing benefits that might harm the populations of the countries affected, but in most cases this is a bare policy prescription rather than a legally binding rule. In addition, there does not appear to be any system in place for ascertaining the human rights impacts of the EU's economic policies on developing countries, including their positive impacts. The European Parliament has recommended that the EU's GSP (and GSP+) programs be subjected to generalized impact assessments,³ a recommendation which this study fully endorses. But it must also be ensured that such impact assessments are applied to the full range of the EU's economic policies, that they take full account of the situation of economic and social

¹ An exception is the recent adoption of trade sanctions imposed on Myanmar/Burma, which is not specifically authorized by the UN Security Council: Council Regulation (EC) No 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006 [2008] OJ L66/1, which implements Common Position 2007/750/CFSP of 19 November 2007 [2007] OJ L308/1.

² The legality of such measures is not guaranteed: see Joined Cases C-402/05P and C-415/05P, *Kadi*, 3 September 2008. The present study only refers to CFSP practice incidentally.

³ European Parliament, Report on the proposal for a Council regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, Committee on International Trade, Rapporteur: Helmuth Markov, A6-0200/2008, 29.5.2008, and Legislative Resolution, P6_TA(2008)0252, 5.6.2008, Amendments 34-36.

rights in the affected countries,⁴ and that they focus not only on the negative effects of economic liberalization⁵ but also on its positive effects, and on the negative effects of a suspension of that liberalization. The carrying out of such assessments would provide useful guidance for all decision-makers needing to ascertain how any given conditionality policy – positive or negative – is likely to affect the human rights of those populations subjected to the policy.⁶ Overall, such assessments would enable a more holistic perspective on the extent to which the EU’s conditionality policies do, in fact, achieve their objectives.

2 Conditionality provisions in international agreements

2.1 Origins of the EU’s policy

The EU’s policy of conditioning its relations with third countries on compliance with human rights conditions dates from the late 1970s. Until then, the Community’s policy was based on the view, conventional at the time, that development was a precondition of respect for human rights rather than *vice versa*. In 1977 the Community changed its approach after a massacre in Uganda, withdrawing promised payments of development aid from the government of Uganda. This action had two purposes. The first was coercive, but alongside this was a concern that Community funds should not themselves contribute to human rights violations. The Community expressed this concern in its so-called ‘Uganda Guidelines’, in which it stated its determination that ‘any assistance given by the Community to Uganda does not in any way have as its effect a reinforcement or prolongation of the denial of basic human rights to its people’.

This reversal of Community policy was not without legal difficulties. It was namely far from clear that the Community was able to suspend already promised development aid. And indeed, the Community did not even attempt to prevent the payment to Uganda of STABEX funds, to which Uganda had an automatic entitlement under the Lomé Convention. As a direct result of this situation, the Community sought to establish a formal legal basis in the Lomé Convention that would permit the suspension of benefits to third countries involved in similar situations in the future. This effort took the form of drafting ‘human rights clauses’ for inclusion into the successive versions of the Lomé Conventions, but during the 1980s it proved impossible to give these much more than rhetorical force. In fact, the first human rights clause of an operative nature is to be found in a 1990 EEC-Argentina cooperation agreement (at Argentina’s request). Similar clauses were included in other agreements over the next few years, and in a Communication of 23 May 1995⁷

⁴ The EU’s Sustainability Impact Assessments (SIAs) do not have a human rights approach: for criticism see FIDH, *Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union*, Position Paper, February 2008, www.fidh.org/IMG/pdf/positionpaperFIDH-HRIA_finalfevrier2008.pdf, 12-16.

⁵ For a general discussion, see S Aaronson and J Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (CUP, 2008); also, from a legal perspective, L Bartels, ‘Trade and Human Rights’ in D Bethlehem et al, *Oxford Handbook of International Trade Law* (OUP, forthcoming 2009).

⁶ For a recent study, see J Harrison and A Goller ‘Trade and Human Rights: What Does “Impact Assessment” Have to Offer?’ *Human Rights Law Review Advance Access*, doi:10.1093/hrlr/ngn026.

⁷ Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final, 23.5.1995.

the Commission formalized a policy of including human rights and democracy clauses in agreements with all third countries. The Council endorsed this policy, stating that ‘a suspension mechanism ... should be included in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights.’⁸

2.2 Geographical and sectoral coverage of conditionality provisions

Since 1995, the EU has systematically included conditionality clauses in its most comprehensive international agreements. The most wide-ranging of these clauses is Article 96 of the Cotonou Agreement,⁹ which governs political and development relations between the EU and 79 African, Caribbean and Pacific (ACP) countries.¹⁰ There are also conditionality clauses in all of the EU’s free trade agreements with the Mediterranean countries (an agreement with Syria is awaiting ratification) as well as in free trade agreements with Mexico, Chile, and South Africa. There are also conditionality clauses in cooperation agreements with countries in Latin America, the former Soviet Union countries, and many (though not all) Asian countries.

But although impressive, the geographical coverage of the EU conditionality clauses is not universal. There are in particular no human rights and democracy clauses in any trade or cooperation agreements with any developed countries. Of the 30 OECD countries only Korea and Mexico have agreements with the EU that contain human rights clauses. This can in part be explained by the fact that most EU agreements with developed countries predate its policy on conditionality clauses. On the other hand, there is some evidence to suggest that the very reason for this state of affairs is the EU’s conditionality policy itself. In 1997, both Australia and New Zealand refused to conclude EU cooperation agreements specifically because of the EU’s insistence that these agreements had to contain human rights and democracy clauses. Another explanation is that the EU simply considers it inappropriate to base its relations with developed countries on compliance with human rights and democratic principles. There is for example no conditionality clause in the EU’s 2006 instrument for cooperation with industrialised and other high-income countries and territories.¹¹ And the San Marino customs union and the Andorra cooperation agreement, both concluded since 1995, also lack conditionality clauses.

There are also certain agreements with developing countries that lack conditionality provisions. In many cases, this can be explained on the basis that the agreement predates the EU’s conditionality policy, and in any case, the EU is in the process of negotiating new cooperation and free trade agreements with a number of these

⁸ EU Council Conclusions of 29 May 1995.

⁹ Article 96 is triggered by a violation of the principles set out in Article 9 of the Cotonou Agreement. There are also provisions on political dialogue.

¹⁰ The Economic Partnership Agreements (EPAs) and Interim EPAs being concluded with a number of ACP countries contain clauses expressly allowing for trade-related measures to be adopted in accordance with Article 96 (as well as Article 11(b) on terrorism and Article 97 on good governance) of the Cotonou Agreement: see eg Article 241(2) of the Cariforum-EU EPA. This, incidentally, supports the view, traditionally disputed by the European Commission, that conditionality clauses are limited to the suspension of the agreement in which they take place.

¹¹ Council Regulation (EC) No 1934/2006 of 21 December 2006 establishing a financing instrument for cooperation with industrialised and other high-income countries and territories [2006] OJ L405/41.

countries (eg Korea, China, ASEAN and India), reportedly in accordance with its normal conditionality policy. In some cases, this is also precisely because of that country's human rights record (eg Syria, Turkmenistan, Cuba and Burma). A more complicated case is that of the 1995 Association Council Decision establishing a customs union with Turkey, which also lacks a conditionality provision, though this issue is now (at least politically) absorbed into Turkey's negotiations for accession to the EU.

In sum, the EU has successfully adhered to its 1995 policy of systematically including conditionality clauses in its international agreements. But this conclusion is subject to one major exception, which is that the EU does not include human rights and democracy clauses in sectoral trade agreements on matters such as fisheries, steel and textiles. More worryingly, this is also the case when these agreements are concluded with countries that have a demonstrated difficulty in complying with human rights and democratic principles. The European Parliament has repeatedly criticized this anomaly,¹² but there is little sign that it is being remedied.

A recent example demonstrates the point: on 15 July 2008 the EU approved a financial protocol to the 2006 EU-Mauritania Fisheries Partnership Agreement (FPA) providing for large payments to Mauritania from 1 August 2008 in exchange for fishing opportunities. Three weeks later, on 6 August 2008, there was a coup in Mauritania. The EU's response was to suspend cooperation with Mauritania under Article 96 of the Cotonou Agreement, except for humanitarian measures or measures that directly benefit the population.¹³ As to the envisaged FPA payments, the Commission stated merely that it 'is currently verifying whether the conditions for implementation of the Fisheries Partnership Agreement and its recently revised protocol are still met. Following this verification, it reserves the right to take any action which may be necessary in accordance with the Fisheries Partnership Agreement with Mauritania.'¹⁴ And indeed, after a short delay, payments have been made. Quite obviously, the EU's own interest in an FPA differs significantly from its interest in development aid. Nonetheless, there is a striking similarity between the case of Mauritania and the situation which led to the EU's conditionality policy in the first place. As STABEX payments continued to be paid to Uganda (a transaction that also benefited the Community), FPA payments continue to be paid to Mauritania. From an economic perspective, this might be justifiable, but from the perspective of human rights and democratic principles this is clearly insupportable.

¹² Eg European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)), 14 February 2006, [2006] OJ C290E/107, para 8.

¹³ Commission Communication to the Council on the opening of consultations with Mauritania under Article 96 of the Cotonou Agreement, COM (2008) 537 final, 2.9.2008; Opening of consultations with the ACP side on the Islamic Republic of Mauritania under Article 96 of the Cotonou Agreement (Paris, 20 October 2008), EU Council Conclusions, Brussels, 23 October 2008, 14663/08. See also the European Parliament resolution of 4 September 2008 on the coup in Mauritania, P6_TA-PROV(2008)0411, in which the Parliament called for political dialogue under Article 8 of the Cotonou Agreement, followed if necessary by the freezing of aid (with exceptions) under Article 96.

¹⁴ Ibid, COM (2008) 537.

2.3 Variations in conditionality provisions in the EU's international agreements

The form of conditionality provisions included in the EU's international agreements has also been remarkably consistent, with most variations explicable in terms of an evolution borne of experience. The first is the 'basis' clause in the 1990 Argentina cooperation agreement, which clause stated that the agreement was 'based on the respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Argentina'. To this clause three 1992 agreements added an 'essential elements clause' stating that the principles of human rights and democracy also 'constitute an essential element of the present agreement' and a 'Baltic' suspension clause stating that '[t]he parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present agreement'. The 1993 Europe agreements with Romania and Bulgaria retained the 'essential elements' clause but replaced the 'Baltic' suspension clause with a 'Bulgarian' non-execution clause. This clause, intended to provide greater flexibility than a mere suspension clause, was adapted almost verbatim from safeguards clauses in the EU's bilateral agreements, providing that:

If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.

This 'Bulgarian' clause established the model for subsequent conditionality clauses in the EU's bilateral international agreements, though there have also been some refinements, notably on the meaning of 'special urgency' and 'appropriate measures'.

Two variations are particularly deserving of note. First is the elaborate nature of the conditionality clause that has been developed in the Cotonou Agreement. Following revisions made in the 2005 amendments to that agreement, the Cotonou Agreement now presides over a sophisticated system for applying human rights conditionality to partner countries. This system is especially notable for its mechanism of political dialogue and consultations prior to the adoption of any 'appropriate measures'. Also worthy of mention is the fact that the dispute settlement systems established under the respective agreements have in recent times been made inapplicable to disputes concerning the conditionality provisions. The Europe and Euro-Mediterranean association agreements (except for the recent Syria agreement), the agreement with South Africa, the Cotonou Agreement and the recently signed Cariforum-EU Economic Partnership Agreement all provide for binding dispute resolution of 'any dispute relating to the application or interpretation' of the agreement.¹⁵ This includes all matters concerning the implementation and interpretation of human rights and

¹⁵ The Cariforum-EU Economic Partnership Agreement provides for weaker remedies and additional procedures for disputes involving violations of labour and environmental standards.

democracy clauses. However, other recent agreements, including the association agreements with Mexico, Chile, Syria, Croatia, FYROM, exempt their conditionality provisions from binding dispute settlement procedures. Whether this is desirable deserves careful consideration.

2.4 Conditionality clauses in non-EU agreements

The EU is virtually unique in its policy of including human rights conditionality clauses in its international agreements. Some of the free trade agreements of the European Free Trade Area (EFTA) have copied the EU model, with conditionality clauses including non-execution clauses and dispute settlement.¹⁶ On the other hand, recent EFTA agreements with Chile (2003), Korea (2005), SACU (2006), Egypt (2007) and Canada (2008) do not include any conditionality clauses.¹⁷ This indicates that EFTA's commitment to the idea of human rights conditionality is on the wane.

There are no other direct analogies to the EU's conditionality policy. In Latin America, the Mercosur countries (Argentina, Brazil, Uruguay and Paraguay), Chile, Bolivia, and, since 2005, Peru and Venezuela,¹⁸ are party to a protocol providing that any disruption of democracy in a member state may lead to the suspension of that state's right to participate in Mercosur organs and the suspension of its rights under the preferential trade instruments promulgated by the organization.¹⁹ These countries also have a policy on labour standards, though without a sanctions mechanism. The closest other analogies to conditionality clauses in international agreements are clauses on labour standards in various free trade agreements, originally found in the NAFTA labour side agreement, but now spread throughout the world.²⁰

3 Conditionality clauses in the EU's autonomous instruments

As mentioned, the EU's policy on human rights conditionality originated as a means of enabling it to suspend its treaty relations with other states in the event that they violated human rights or democratic principles. But once this policy was established, the EU adopted a parallel practice of introducing similar clauses in the instruments under which it grants financial and trade benefits to third countries. The following will discuss these clauses as they appear in the EU's instruments on financial aid and on trade preferences (most particularly in its GSP program).

¹⁶ Relatively recent examples include agreements with Croatia (2001) and Lebanon (2004): see <http://www.efta.int/content/legal-texts/third-country-relations>.

¹⁷ See <http://www.efta.int/content/legal-texts/third-country-relations>.

¹⁸ Mercosur Decisions 15-16/2005, www.mercosur.int/msweb/portal_20_intermediario/es/index.htm. Colombia joined a Presidential Declaration to similar effect: Mercosur Decision 14/2005.

¹⁹ Protocol of Ushuaia, www.mercosur.org.uy/espanol/snor/varios/protocolo_ushuaia.htm; note also the Asuncion Protocol on the MERCOSUR Commitment to the Promotion and Protection of Human Rights. See F J Garcia, 'Integrating Trade and Human Rights in the Americas' in F M Abbott et al (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (Michigan: University of Michigan Press, 2006) 336.

²⁰ See L Bartels, 'Social Issues: Labour, Environment and Human Rights' in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge: CUP, 2008) 342-366.

3.1 Financial aid

For around a decade, the EU has included conditionality clauses in the autonomous instruments under which the EU grants financial aid to third countries. There are conditionality provisions in the European Neighbourhood and Partnership Instrument (ENPI), the Instrument for Pre-Accession Assistance (IPA), and the Development Cooperation Instrument (DCI) and the Overseas Association Decision.²¹ The form of these clauses is adapted from the standard ‘Bulgarian’ clause described above.

3.2 Trade preferences

The EU also includes conditionality provisions in its autonomous instruments under which it grants trade preferences to developing countries, primarily the GSP Regulation.²² As opposed to the clauses in the financial instruments, these were developed independently from the conditionality clauses discussed so far and their rationales and drafting is rather different. The following will outline the two forms in which conditionality takes in this instrument: the first is a system of ‘positive conditionality’ according to which beneficiary countries that comply with certain non-trade norms are entitled to ‘GSP+’ benefits; the second is a system of ‘negative conditionality’ under which preferences (including GSP+ preferences) may be withdrawn from countries that fail to comply with certain non-trade norms.

Positive conditionality

The EU’s policy of positive conditionality dates from 1991, when the EU granted additional trade benefits over and above the usual GSP preferences (duty-free market access) to Bolivia, Colombia, Ecuador, and Peru. The idea, though unsuccessful in practice,²³ was to encourage the planting of substitute crops instead of narcotic drugs. In 1992, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama and in 1995 Venezuela were added to this scheme, which was now justified on the basis that it applied not only to countries involved in combating the production of drugs, but also those involved in combating the trafficking of drugs. It was not however ever entirely clear how these preferences would affect drug trafficking. In 2001 Pakistan was added to the list of ‘drugs arrangement’ beneficiaries.

A separate system of positive conditionality was instituted in 1994, according to which GSP beneficiaries would be entitled to apply for additional preferences if they effectively ratified and implemented certain labour and/or tropical timber

²¹ On the other hand, as mentioned, there is no equivalent clause in the instrument for cooperation with industrialised and other high-income countries and territories: Council Regulation (EC) No 1934/2006 of 21 December 2006 establishing a financing instrument for cooperation with industrialised and other high-income countries and territories [2006] OJ L405/41.

²² The current regulation, due to come into force as of 1 January 2009, is Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 [2008] OJ L211/1 (the ‘GSP Regulation’). It does not differ markedly from the existing regulation: Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] OJ L169/1.

²³ According to the Opinion of the European Economic and Social Committee on the ‘generalized system of preferences (GSP)’, adopted 25 February 2004 [2004] OJ C110/34, para 6.6.2, ‘there is no evidence that the special incentive arrangements for combating the production and trafficking of drugs ... has had any impact whatsoever on the drug trade’.

conventions. Sri Lanka and Moldova were granted preferences for compliance with labour standards, and applications were filed by Georgia, Mongolia, Russia, Ukraine, and Uzbekistan. China filed an application for preferences for compliance with tropical timber conventions.

In 2004, the ‘drugs arrangement’ was ruled WTO-inconsistent, after India filed a complaint, sparked by Pakistan’s inclusion in the list of beneficiaries, that that arrangement was discriminatory. In response, the EU revised both its drugs arrangement and its labour and environment arrangement. Under this new ‘GSP+’ regime, the EU grants full duty-free market access on all GSP products to eligible countries²⁴ that have ratified and implemented a list of 27 conventions on human rights, sustainable development and good governance. These countries also need to give an undertaking to maintain such ratification and implementation, and accept regular monitoring and review of its implementation record in accordance with the implementation provisions of those conventions.²⁵ At present, the original eleven countries benefiting from the drugs arrangement (minus Pakistan) as well as Moldova, Sri Lanka, Mongolia and Georgia benefit from GSP+ preferences.²⁶ For these and any other countries to benefit from the new GSP+ regime as of 1 January 2009, they will need to have reapplied for benefits by 31 October 2008.²⁷ It is as yet too early to know which countries have made such applications.

The legality of this GSP+ regime will be discussed below. At present, it must be noted that the procedure according to which the EU decides to grant GSP+ preferences is lacking in transparency. It is also far from clear what standard of review the EU will apply to the reports adopted in accordance with the implementation provisions of the relevant conventions. For example, it is not known whether a minor infraction of one of the 27 conventions will be sufficient to render an applicant ineligible for preferences. To be sure, the Commission is not able to operate in a complete vacuum: it must, on request, give reasons to any beneficiary country that is not granted GSP+ preferences,²⁸ and presumably this degree of transparency will have some positive effect on the Commission’s decision-making. But it would be far preferable to have greater clarity and transparency in this process, both *ex ante*, and for that matter, *ex post* (after all, it is not certain that an unsuccessful applicant country will wish to make public the reasons for the decision, which are otherwise not made public). The European Parliament made various proposals seeking to bring greater transparency to the latest GSP+ system²⁹ but regrettably these proposals were not taken into account in the final draft of that instrument.

²⁴ Only economically ‘vulnerable’ countries are eligible: Art 8(1) GSP Reg, above at n 22.

²⁵ Art 8(2) GSP Reg, *ibid*.

²⁶ Commission Decision No 924/2005 of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences [2005] OJ L337/50.

²⁷ Art 9(1)(a) GSP Reg, above at n 22.

²⁸ Art 10(4) GSP Reg, *ibid*.

²⁹ European Parliament, Report, A6-0200/2008, 29.5.2008, and Legislative Resolution, P6_TA(2008) 0252, 5.6.2008, above at n 3, Amendments 20 and 22.

Negative conditionality

The system of negative conditionality in the EU's GSP Regulation is twofold. On the one hand, GSP+ preferences may be withdrawn from a GSP+ beneficiary that fails to implement the necessary conventions (or if its legislation no longer incorporates the substance of the 27 conventions).³⁰ On the other, normal GSP preferences (as well as GSP+ preferences, if applicable) may be withdrawn on other grounds, including when a beneficiary country is responsible for a 'serious and systematic violations of principles' set out in the human rights conventions used as a basis for the special incentives or if the country exports products made by prison labour. This is however merely a subset of reasons permitting the withdrawal of preferences. Others include fraud, failure to comply with rules of origin or failure to cooperate in the administration of the different GSP arrangements, serious shortcomings in customs controls on export or transit of drugs, failure to comply with international conventions on money-laundering, serious and systematic 'unfair trading practices' (subject to a relevant WTO determination), and serious and systematic infringements of the objectives of regional fishery organizations or arrangements concerning the conservation and management of fishery resources.³¹ It bears noting also that preferences are being withdrawn from Myanmar and Belarus, the reason being described in the preamble to the GSP Regulation as '[d]ue to the political situation'.³² In fact, the original reason for withdrawing preferences from these countries was due to their violations of labour standards, so it is somewhat odd that the stated reason for continuing this withdrawal should be different.³³

In addition to the GSP regulation, the EU occasionally grants additional autonomous trade preferences to selected developing third countries. A recent example is the 2008 regulation granting autonomous trade preferences to Moldova, which is predicated on Moldova complying with the conditions applicable to GSP+ beneficiaries.³⁴ On the other hand, there is no similar condition in the 2007 EPA Regulation, under which the EU is presently granting trade preferences to ACP countries that have concluded negotiations on an EPA or Interim EPA with the EU.³⁵ There is no obvious explanation for this omission.

A point of importance concerns the mechanism for applying these provisions. The actual decision to suspend preferences lies with the Council, on the recommendation of the Commission, but the GSP Regulation also gives a role to other actors. The investigation procedure is triggered '[w]here the Commission or a Member State receives information that may justify temporary withdrawal and where the

³⁰ Art 15(2) GSP Reg, *ibid*.

³¹ Article 15(1) GSP Reg, *ibid*.

³² Recital 23 GSP Reg, *ibid*.

³³ See also C Portela, *The Efficacy of Sanctions of the European Union: When and Why do they Work?* (PhD dissertation, EUI, 2008), 247.

³⁴ Council Regulation (EC) No 55/2008 of 21 January 2008 introducing autonomous trade preferences for the Republic of Moldova and amending Regulation (EC) No 980/2005 and Commission Decision 2005/924/EC [2008] OJ L20/1.

³⁵ Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements [2007] OJ L348/1.

Commission or a Member State considers that there are sufficient grounds for an investigation'.³⁶ This would appear to give a role not only to non-state actors, such as trade unions and human rights groups, but also to the European Parliament. In its proposals on the GSP Regulation the Parliament proposed that this role should be strengthened,³⁷ and that the Parliament should itself have the right to initiate an investigation.³⁸ Such an amendment would seem to be desirable, and in general the idea of involving actors other than the Commission in decisions on conditionality might also be emulated in conditionality provisions in the EU's international agreements. There should also be far greater *ex post* transparency, as also recommended by the European Parliament, also unsuccessfully.³⁹

3.3 Conditionality clauses in non-EU autonomous instruments

The EU's system of conditionality in its GSP policy was foreshadowed by a similar policy adopted by the United States. In 1974, the US Congress passed legislation recommending that development aid be made conditional on respect for human rights⁴⁰ and it also soon prohibited security assistance and foreign aid to government that engaged in a consistent pattern of gross violations of internationally recognized human rights unless (in the latter case) it could be shown that the aid would directly benefit the needy.⁴¹ This legislative program, though for a time ignored by the executive, was taken up by the Carter administration, and remains largely in place. The United States also conditions its autonomous trade preferences on compliance with worker rights, both in its GSP program⁴² and in a variety of other autonomous trade preference programs.⁴³ However, the EU and the US remain alone in this respect: no other GSP programs are conditioned on compliance with human rights and democratic principles or even labour standards.

4 Effectiveness of conditionality provisions

The application of conditionality provisions in the EU's autonomous instruments falls into two broad categories: (a) the suspension of cooperation and/or redirection of financial aid; and (b) the granting and/or withdrawal of trade preferences under the GSP regulation on the basis of compliance with non-trade norms. Due to differences

³⁶ Art 17 GSP Reg, above at n 22.

³⁷ European Parliament, Report A6-0200/2008 and Legislative Resolution, P6_TA(2008)0252, 5.6.2008, above at n 3, Amendment 26.

³⁸ Ibid, Amendment 24. The Parliament also suggested that the Commission should itself regularly check on implementation (Amendment 23), and should do so automatically in the event of a negative ILO report (Amendment 25).

³⁹ Ibid, Amendments 27-29.

⁴⁰ Foreign Assistance Act of 1973, 87 Stat 714; amending the Foreign Assistance Act of 1961.

⁴¹ Foreign Assistance Act of 1974, 22 USC s2304 (security assistance); International Development and Foreign Assistance Act of 1975 22 USC s2151n (development aid; the 'Harkin amendment'); both amending the Foreign Assistance Act of 1961.

⁴² 19 USC s2462 (GSP).

⁴³ Eg the Andean Trade Preferences Act (19 USC s3202(c)(7)) and the Caribbean Basin Initiative (19 USC s2702(b)(7) and (c)(8)). The United States' general trade legislation also contains conditionality provisions (19 USC s2411).

in the mechanisms and rationales for these two systems of conditionality, they are treated separately in this section.

4.1 Suspension of cooperation and/or redirection of financial aid

The chief instrument applied by the EU is the suspension of financial aid and other forms of cooperation, such as technical meetings. In some cases, these measures are accompanied by a redirection of payments to civil society in a manner that bypasses the government. An example of this is the establishment of the Temporary International Mechanism (TIM) for direct assistance to the Palestinian population, which bypasses the Hamas government. In cases in which the EU does suspend development aid, it is careful not to target the population as a whole, while exerting maximum pressure on the leadership responsible for the measures.

Most of the cases in which the EU has adopted such measures have fallen under the Cotonou Agreement and its predecessor, the Lomé IV Convention. Formal consultations have been held under these agreements with a significant number of African countries, as well as Haiti and Fiji.⁴⁴ But this is not a complete picture. The EU suspended aid (and redirected aid to civil society) to Belarus in 1996 in response to democratic setbacks, it suspended aid to Russia (and redirected aid to civil society) in response to the Chechnya war in 1999 and it suspended technical meetings with Uzbekistan in an effort to allow an independent investigation into a suspected serious human rights violation in 2005. It is not therefore the case that the EU limits the application of its conditionality policies to its ex-colonies.

But it is also true that, despite calls for it to be activated, the EU's conditionality policy has remained dormant in numerous other situations. The European Parliament, among others, has called for the suspension of the EU-Israel Association Agreement in reaction to Israel's activities in the Occupied Territories. NGOs and other private persons have called for the suspension of other agreements, including with Algeria and Vietnam (this latter case even being the subject of a 2005 Ombudsman decision) on grounds of violations of human rights.⁴⁵ MEPs, and sometimes the Parliament, have cited conditionality provisions in connection with a large variety of human rights violations, including violations of minority rights, women's rights, gay rights, indigenous rights, the right to travel, freedom of speech and to be politically active, as well as child sex tourism, trafficking in women, violations of impunity from prosecution for human rights violations, the treatment of detainees and dissidents, and core labour standards. None of these cases has caught the attention of the EU Council.

Double standards?

The European Parliament, among others, has long deplored the EU Council's inconsistency in applying its conditionality policies.⁴⁶ Recently it criticized the

⁴⁴ The countries concerned are Togo, Niger, Guinea-Bissau, Comoros, Cote d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, Central African Republic, Guinea and Mauritania.

⁴⁵ European Ombudsman Decision on complaint 933/2004/JMA against the European Commission, 28 June 2005.

⁴⁶ See European Parliament resolution, above at n 12.

Council for applying ‘double standards’.⁴⁷ Certainly, if one looks at the matter geographically, this appears to be a valid criticism. However, one there are other valid factors that need to be taken into consideration, most notably the likely effectiveness of any withdrawal of benefits. These emerge from a study of the effectiveness of the EU’s sanctions, including measures adopted under the CFSP.⁴⁸

The EU has tended to act in two main situations. The first, and most common, is when there is a crisis in the overall political situation within the target country. Typically this involves a coup d’état or a flawed elections, though in one case (Gaza) the crisis arose from the election of a government that failed to meet with the EU’s approval. The second involves sudden and grave human rights violations. This accounts for the cases of Uzbekistan, Liberia and Russia. By contrast, the EU does not (with certain exceptions) act in situations of ‘mere’ human rights abuses unless there is a sudden deterioration or political crisis. While from a human rights perspective this limited practice may appear to be undesirable, it can be justified in terms of the likely effectiveness of any sanctions. Here it is notable that EU action in cases of human rights violations has, as a rule, been unsuccessful (eg Russia, Belarus and Liberia). This contrasts with its actions in cases of political crisis, where the success rate has been far higher. One can point to successes in the case of EU action in response to coups d’état and electoral failures in the Central African Republic (2005), Ivory Coast (2001-2), Fiji (2003), Haiti (2001) and Togo (2006). In all these cases, the target has desired closer relations with the EU.

One may wonder why the EU should have such influence on new and illegitimate regimes. The answer is that, paradoxically, such regimes frequently seek (or purport to seek) the legitimacy – and possibly financial rewards – that can be conferred by such engagement.⁴⁹ Thus, EU action against Zimbabwe has failed, due to President Mugabe’s complete lack of interest in any rapprochement with the EU. Furthermore, this explains the success of EU’s mix of disincentives and a promise of new incentives, once certain conditions are met, chiefly under Article 96 of the Cotonou Agreement. In sum, if one puts this together, the EU’s practice in applying its conditionality policies is less inconsistent than it might first seem. If it is only in a limited set of cases (desired engagement with the EU) that a policy of conditionality is likely to have any effect, there is a ready explanation for the EU’s caution in applying this policy. Seen in this light, the many cases of non-action may be considered as cases of failures foregone.

But this still leaves open the question why the EU suspends cooperation in some cases of human rights violations, even though, by the standard measure, such acts are likely to be unsuccessful. One possible answer to this question is that the success of the EU’s actions cannot simply be measured in terms of achieving foreign policy objectives. Another reason for acting is to prevent any EU participation in armed conflicts⁵⁰ or in any continuing human rights abuses: indeed, this was the thrust of the

⁴⁷ European Parliament Report on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights (2008/2031(INI)), Committee on Foreign Affairs, Rapporteur: Hélène Flautre, A6-0309/2008, 15.7.2008, para 21.

⁴⁸ See, generally, Portela, above at n 33.

⁴⁹ *ibid*, p 197.

⁵⁰ See Commission Communication on Co-operation with ACP Countries Involved in Armed Conflicts, COM 1999 (240) final, 19 May 1999.

original ‘Uganda Guidelines’ described above. This is also not only a matter of moral nicety. The EU operates under obligations, both under international law and under EU law, not to contribute to any violations of human rights or democratic principles in third countries.⁵¹ Therefore, in this limited sense, acts such as redirecting aid from repressive governments to civil society or individuals must be considered a success even if it does not have the effect of forcing change in the target government itself. Judged by this measure, the EU’s policies under conditionality provisions are more successful than they might at first appear.

4.2 Trade preferences

Positive conditionality (GSP+)

As far as positive conditionality under the GSP+ arrangement is concerned, the EU’s application of its policy has been somewhat effective. As the special incentives are only available to countries that already comply with the required human rights, good governance and environmental conditions there is an incentive for prospective beneficiaries to comply with these standards. This may be measured by looking at the countries that have applied for the preferences, and to see whether, to obtain these benefits, the prospective beneficiaries have indeed met these conditions. There is evidence that the system of special incentives did, indeed, have this effect. Of the fifteen beneficiaries, only five (Costa Rica, Ecuador, Panama, Peru, and Sri Lanka) had ratified all of the required human rights conventions before the arrangement was announced. Eight beneficiaries (Bolivia, Colombia, Georgia, Guatemala, Honduras, Moldova, Nicaragua, and Venezuela) needed to ratify one outstanding convention, and two (Mongolia and El Salvador) needed to ratify two. In this sense, the system can be accounted a success.

Negative conditionality

Since the experience with UN sanctions against Iraq, which demonstrably harmed the Iraqi population, the international trend has been to shy away from large-scale economic sanctions. The EU has joined this consensus, in general avoiding this type of sanctions regime and preferring ‘targeted sanctions’.⁵² It is official EU policy to refrain from measures that are likely to have detrimental effects on a target population,⁵³ and this is even spelled out in one conditionality clause.⁵⁴ This moral position is also supported by practical considerations. It is well known that, with very rare and special exceptions (eg apartheid South Africa), general economic sanctions are not effective in terms of changing the policies of the target state. It is one of the

⁵¹ L Bartels, *The Competences of the Proposed Fundamental Rights Agency with Respect to Human Rights Violations outside of EU Territory* (DGExPo/B/PolDep/STUDY/2005_21).

⁵² See fn 1 for a partial exception in the case of Burma/Myanmar.

⁵³ EU Council, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc 15114/05, 2 December 2005, para 9.

⁵⁴ A Joint Declaration to the EU-South Africa Trade, Development and Cooperation Agreement states that ‘[i]n the selection and implementation of these measures, the Parties will pay particular attention to the circumstances of the most vulnerable groups of the population and will ensure that they are not unduly penalised.’ Other agreements require the measures to be ‘proportional to the violation’ (eg Art 96(2)(c) of the Cotonou Agreement), which does not necessarily speak to the same objective.

axioms of the literature on sanctions that outside interventions invariably produce a so-called ‘rally round the flag’ effect which can insulate the target regime from any negative effects of the sanctions.⁵⁵

All of this explains why trade sanctions have not yet been applied under a conditionality clause in a trade agreement. It may also explain the EU’s reluctance to apply the negative conditionality in its GSP program. There have indeed been only two cases in which the EU has applied this policy (Burma since 1997 and Belarus since 2007). In both cases, the initial rationale was that the target governments were responsible for labour rights violations, but in both cases there was also a political dimension, as the preamble to the 2008 GSP regulation acknowledges, and both countries were (and are) simultaneously targets of other EU measures. At the same time, given the antipathy of these regimes to the EU, and their lack of dependence on EU benefits, it is perhaps no surprise that these measures have been underwhelming.⁵⁶

By contrast, there has never been a case in which the EU withdrew trade preferences in response to violations of human rights or democratic principles in a situation without any more comprehensive political component. The closest that this was in 1995, when various trade unions petitioned the EU urging the suspension of GSP preferences from Pakistan because of labour rights violations. However, the matter was not pursued, perhaps also because of the EU’s own economic interests.⁵⁷ In sum, given the absence of data, it is difficult to assess the likelihood of success of a suspension of trade preferences from a country which is dependent on the EU market.

5 Legality of conditionality provisions

5.1 Conditionality clauses in international agreements

There are two key issues concerning the legality of conditionality provisions in the EU’s international agreements, but both are of rather academic interest. The first concerns the question of EU competence to include such clauses in its agreements, given the fact that such clauses impose positive human rights obligations on the EC, which the ECJ found *ultra vires* in *Opinion 2/94*.⁵⁸ The Treaty of Lisbon would solve this problem, but on the current state of the law this remains an issue.

The second issue concerns the WTO legality of any trade measures adopted under a conditionality clause. The problem in this respect is that WTO law does not unambiguously permit trade restrictions for the purpose of promoting respect for

⁵⁵ The *locus classicus* is J Galtung, ‘On the Effects of International Economic Sanctions, with examples from the case of Rhodesia’ (1967) 19 *World Politics* 378.

⁵⁶ Portela, above at n 33, at 243, 246.

⁵⁷ G Tsogas, ‘Labour Standards in the Generalized Systems of Preferences of the European Union and the United States’ (2000) 6 *European Journal of Industrial Relations* 349, at 362; cf Y Kryvoi, ‘Why European Union Sanctions Don’t Work’ (2008) 17 *Minnesota Journal of International Law* 209, 239-240. The European Parliament’s Committee on International Trade has expressed the view that ‘the application and evaluation of sanctions by the European Union for infringements of human rights must in principle prevail over any harm deriving from their application to the trading interests of the European Union and its citizens’: Opinion of the Committee on International Trade for the Committee on Foreign Affairs on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights (2008/2031(INI)), Draftsman: Vittorio Agnoletto, 24.6.2008, para 10.

⁵⁸ *Opinion 2/94* [1996] ECR I-1759. See, further, L Bartels, *Human Rights Conditionality in the EU’s International Agreements* (OUP, 2005), Ch 7.

human rights in third countries.⁵⁹ Nonetheless, this question is largely hypothetical, largely because it is difficult to see who would bring a complaint. The target of such measures is unlikely to bring such a matter before the WTO, given that this would mean effectively challenging the legality of its own trade agreement with the EU. And while third countries may conceivably be affected by the measure (though more as investors than as traders) it is difficult to envisage them bringing a claim.

In sum, while conditionality provisions are not without legal problems, it is unlikely that these will materialize.

5.2 Autonomous financial aid and trade instruments

Conditionality provisions in the EU's autonomous financial instruments do not raise any relevant legal issues. The situation is different however with trade preferences, even though these are voluntary and can, in principle, be withdrawn at any time. In *EC – Tariff Preferences*, the WTO Appellate Body made it quite clear that so long as trade preferences are granted, they must comply with WTO rules, including the non-discrimination condition in the WTO Enabling Clause. This has clear implications for conditionality in the EU's GSP program, which allocates preferences to developing countries based on various non-trade factors.

Special incentives

It is questionable whether the special incentives regime in the GSP regulation meets the conditions set out in the WTO Appellate Body Report in *EC – Tariff Preferences*. In this case, the WTO Appellate Body said that the EU's drugs arrangement discriminated between developing countries. This was because this arrangement was operated by means of a 'closed list' that precluded an assessment of the different situations of potential beneficiaries. The Appellate Body went on to say that, in principle, additional preferences would be permitted if they were offered to all similarly situated countries, and if they represented a 'positive response' to an objective 'development, financial or trade need'.⁶⁰

It is doubtful that the EU's GSP+ system is an appropriate implementation of these conditions.⁶¹ This is for four reasons.

1. The temporal condition on applications (once immediately and once eighteen months later) has the effect of creating a 'closed list' of beneficiaries, replicating the fatal characteristic of the drugs regime. Perhaps this might be justified on the basis of administrative convenience, but it is difficult to see why the EU should not accept applications for GSP+ benefits on a continuing

⁵⁹ This is acknowledged by the EU Council Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU CFSP: see above at n 53, para 11.

⁶⁰ WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS/246/AB/R, adopted 20 April 2004, para 167.

⁶¹ For an elaboration of this argument, with reference to the almost identical GSP+ system in the previous GSP Regulation, see L Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10 *Journal of International Economic Law* 869.

basis. After all, it did so in the former GSP system of special incentives for compliance with labour and environmental standards.⁶²

2. By defining the ‘vulnerability’ criterion in terms of their share of EU imports, and not in terms of the needs of the beneficiary at issue, it is hard to see how this relates to its ‘development, financial or trade needs’.
3. By requiring ratification of certain treaties as a condition of receiving benefits, the EU *a priori* excludes countries with the same objective development needs but who, for, whatever reason, do not wish to ratify the listed treaties. The ratification of treaties cannot be made a condition of granting preferences unless this formality can be described as a development need. It is difficult to see how such an argument can be maintained.
4. It is very difficult to see how the grant of preferences relates to at least some of the stated ‘development needs’. This applies in particular the ‘needs’ to prevent apartheid or genocide. The problem is not that there are no ‘needs’ to prevent apartheid and genocide, nor is it that these cannot be classified as ‘development needs’. They probably can. But this is not enough. Under the strict terms of the Appellate Body ruling in *EC – Tariff Preferences* it is also necessary that any grant of GSP+ preferences must be a ‘positive response’ to these needs. This implies that there must be a causal link between a grant of GSP+ preferences and the prevention of apartheid and genocide. Desirable as the goal of preventing apartheid and genocide might be, it is very difficult to see that GSP+ preferences would make any contribution to a developing country’s achievement of these goals. It follows that GSP+ preferences cannot be justified on this basis.

For this variety of reasons, one may with some confidence consider the GSP+ arrangement to violate WTO law. It is possible to devise a GSP+ program that does meet these conditions, but to do so is beyond the scope of the present study.

Negative conditionality

The EU’s system of negative conditionality in its GSP program is also legally problematic. As mentioned, in *EC – Tariff Preferences*, the Appellate Body said that any preferential treatment must be a ‘positive response’ to a development need. But once preferences are withdrawn from a country, the additional preferential treatment is being given to the remaining beneficiaries. The question is therefore not whether the withdrawal of preferences is a positive response to the needs of the country from which the preferences are being withdrawn. Rather, it is whether the continuing grant of preferences to the remaining beneficiaries is a positive response to *their* development needs. In other words, it is the same question as if these countries were being given additional GSP+ preferences. As in that case, but even more so, it is difficult to see how this continuing grant of preferences can possibly be justified.

⁶² It is relevant to note that the European Parliament Committee on Development has also recognized that this criterion is undesirable and possibly legally vulnerable to challenge: Proposed Amendment 43, Opinion of the Committee on Development for the Committee on International Trade, 6.5.2008, contained in European Parliament, Report, Report, A6-0200/2008, 29.5.2008, above at n 3. The proposed amendment was not adopted in the final legislative resolution, which proposed (unsuccessfully) annual deadlines instead: P6_TA(2008)0252, Amendments 5, 19, 21 and 25.

6 The EU's conditionality policy and human rights objectives

The EU's policy of linking trade preferences to compliance with human rights norms has obvious implications for the obligations of other countries to comply with human rights objectives. Insofar as the EU adopts a policy of positive conditionality, for example in its GSP+ program, the connections appear to be relatively straightforward. Greater market access for the third country will be economically beneficial to that country and, to the extent that the policy encourages that country to comply with human rights norms, there appears to be a positive effect in this respect as well. However, even in this situation it is important to recognize the negative effects of such a policy on competitor third countries. Benefits for the garment industry in Pakistan may be to the detriment of the garment industry in India, with consequent impacts on social and economic rights in that country. The strict rules imposed by the WTO on discrimination between similarly-situated developing countries are not without foundation, and it may be insufficient, both legally and factually, to claim that those other affected countries are themselves able to receive GSP+ benefits if they only ratify and implement the same conventions. For one thing, the application process is only open once every 18 months.

If positive conditionality cannot, without reservations, be considered to assist in the achievement of human rights objectives, the situation is even more problematic in the case of negative conditionality. Further, in this respect, no distinction can be drawn between the suspension of trade preferences under an agreement, the suspension of ordinary preferences under an autonomous instrument (negative conditionality, strictly speaking) and the suspension of GSP+ preferences (the withdrawal of positive conditionality). In each case, the result of suspending preferences will be to harm the economic situation of the target country, with clear effects on those populations working in affected export industries. Recent suggestions that Sri Lanka will lose its GSP+ status due to human rights violations are entirely to the point. Whatever the overall effect of such a measure on Sri Lanka's human rights policy, it is difficult to overlook the fact that many thousands of garment workers dependent on existing GSP+ preferences will suffer if these preferences are withdrawn. The inevitable conclusion is that any such action should only take place following a human rights impact assessment that is able to calculate the respective benefits and costs to changes in trade policy.⁶³

7 Conclusions

Consistency in overall policy

The EU's conditionality policy is far from perfect. In the first place, it does not cover sectoral agreements (especially fisheries partnership agreements), which is of particular concern when these agreements are concluded with countries that have or are engaged in violations of human rights and democratic principles. There is likewise no real consistency between the different parts of the EU's conditionality regimes. The standards that are applicable under conditionality clauses in international agreements, autonomous instruments, and the CFSP are highly variable, as is the identity of actors within the EU who are charged with administering these policies.

⁶³ See also above, Introduction.

Greater consistency on these points would greatly aid the EU's interests in managing a coherent external human rights policy. There may also be a role for the Fundamental Rights Agency in this respect, though this would obviously require a change to its present mandate, which does not extend to external relations.⁶⁴

Effectiveness

There is rather less criticism to be advanced of the EU's actual application of its human rights conditionality policies. While the EU is often criticised for selectivity in the application of these policies, much of this can be explained on the basis that conditionality policies are only effective in limited circumstances. This is not to exclude the possibility that in some cases supervening political considerations have been relevant in a decision not to invoke these provisions, but in many cases it is not necessary to resort to this explanation. Indeed, in those cases in which the EU has applied its conditionality policies, it has done so with a remarkable degree of success.

In reaching this conclusion, it also needs to be acknowledged that success can be measured according to a range of different standards. Whether the target country changes its behaviour is only one measure of success. Others are closer to home. The EU does not wish to involve itself in armed conflicts, nor does it wish to be responsible for any continuing human rights violations. Its desire to remain detached from directly contributing to such actions can mean that in these terms the suspension of cooperation with certain countries should be considered a success, even if this does not lead to a cessation of the activity. In this sense, calls for more sanctions simply in order to avoid a 'double standard'⁶⁵ may be overestimating the effectiveness of sanctions. Indeed, if the result of such a uniform policy is an unworkable regime, this may do more damage to the credibility of the EU's external human rights policy than the criticism of 'double standards'.⁶⁶

As to the types of measures deployed, it may be concluded that, where all other conditions are met, a combination of positive incentives and negative sanctions is most effective. In some cases, these incentives are only incentives because they follow on from a withdrawal of previously granted benefits. But where this is the case, it is the promise of restoring these benefits that seems to generate a change in the behaviour of the target country. For this reason, it is crucial that any negative measures that are imposed be accompanied by clear benchmarks and instructions on what must be done for the measures to be removed,⁶⁷ and by close consultations with the target country in order to assist that country in achieving those objectives.⁶⁸

Legitimacy

There are also legitimacy concerns. It would in the first place be desirable to see the European Parliament, with its greater democratic legitimacy and experience on human

⁶⁴ For considerations on such a mandate, see L Bartels, *The competences of the proposed Fundamental Rights Agency with respect to human rights violations outside of EU territory*, above at n 51.

⁶⁵ See European Parliament Report on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights (2008/2031(INI)), Committee on Foreign Affairs, Rapporteur: H el ene Flautre, A6-0309/2008, 15.7.2008, para 7.

⁶⁶ Cf *ibid*, para 21.

⁶⁷ Cf *ibid*, para 11 and para 32.

⁶⁸ Cf *ibid*, para 23.

rights issues, having a greater role in the implementation of the EU's conditionality policies.⁶⁹ As to the measures themselves, two recommendations are made: first, it is essential that before any such measures are imposed a proper assessment of the negative consequences of such measures be undertaken by way of a human rights impact assessment.⁷⁰ Second, any measures imposed should be subjected to an automatic 'sunset' review, thereby requiring a formal justification for the continuation of any measures. This recommendation, at odds with the view expressed in a previous European Parliament report,⁷¹ is based on a fact that conditionality measures inevitably cause harm, and a close monitoring of the effects of a measure is more likely to ensure that these effects harmful are not maintained without proper justification if the original justification disappears.⁷²

Legality

Other changes to the EU's conditionality policy should be made for legal reasons. Leaving aside questions as to the EU's competence to operate an external human rights policy, it cannot be considered trivial that the EU's use of trade preferences to promote non-trade objectives is of very dubious WTO legality. In principle, it is possible to design a system of special incentives that meets WTO rules. It is a matter of some wonder that in its most recent GSP Regulation the EU has chosen to adopt a formalistic and almost certainly insupportable (and even protectionist) set of conditions. As to the EU's system of withdrawing preferences for violations of non-trade norms, at least in the cases of Burma and Belarus this has been completely ineffective, and it is also very difficult to justify in terms of WTO rules. Whether such measures should be applied at all is a difficult question. But what is certain is that the reason for applying such measures must be recast in terms of the development needs of the beneficiaries, as required by WTO law.

⁶⁹ Cf *ibid*, para 3 and para 37.

⁷⁰ Cf *ibid*, para 30.

⁷¹ Cf *ibid*, para 13. But see also para 33, suggesting 'the systematic inclusion of a review clause which entails revisiting the sanctions regime on the basis of the established benchmarks and assessing whether the objectives have been met'. It is not clear how this differs from a 'sunset' clause under which the effectiveness of a sanctions regime would be periodically revisited.

⁷² An analogy would be the requirement to keep under review any precautionary measures adopted under Article 5.7 of the WTO SPS Agreement.

Annex: Recommendations for the EU's human rights conditionality policy

Consistency

1. Conditionality clauses must be included in all EU international agreements, including sectoral agreements. It is anomalous that development aid may be suspended under the Cotonou Agreement but a financial payment under a Fisheries Partnership Agreement cannot.
2. The wording of conditionality clauses in international agreements and autonomous instruments should be more consistent. Frequently, the same country will be subject to more than one of these provisions, which is awkward, both legally and practically.
3. Consideration should be given to whether conditionality clauses in international agreements should be made subject to the dispute settlement procedures in those agreements
4. Consideration should be given to the establishment of a common agency, perhaps the Fundamental Rights Agency, with a mandate to administer all of the EU's conditionality policies. At a minimum, greater transparency needs to be brought to the administration of these policies.

Effectiveness

5. Conditionality clauses should be time-limited with a sunset clause, in order that new measures are required to be justified.
6. At the same time, clear benchmarks must be established in the imposition of any measures under conditionality clauses sufficient to give the target country a clear indication of how the measures might be lifted.
7. It is inappropriate to impose sanctions simply for the sake of consistency in the application of the EU's sanctions policy. Whether sanctions are likely to be effective will depend on a number of variables, and an ineffective sanctions regime is worse than no sanctions regime at all.

Legitimacy

8. The European Parliament, with its greater democratic legitimacy and well-established expertise in human rights, should be given a role in the administration of any conditionality policies.
9. Any proposal to apply a conditionality policy should be subjected to a human rights impact assessment. This applies not only in the case of negative measures, but also to the likely effect of positive measures on competitive third countries.
10. Measures that are applied must similarly be kept under review and terminated if they contribute to a worsening of the human rights situation in affected countries.

Legality

11. All conditionality policies should be verified for consistency with WTO law. In the case of measures adopted under trade agreements, there is a great degree of flexibility. However, conditionality provisions in autonomous instruments

granting trade preferences, such as the GSP program, are more easily vulnerable to challenge at the WTO. A human rights impact assessment, as mentioned above in paragraph 9, may insulate such measures against the charge of non-objectivity.

12. Conditionality policies must also be verified for consistency with human rights norms in accordance with human rights impact assessment mentioned above in paragraph 9.