

An Ecofair Trade Dialogue Discussion Paper:

Human Rights in EU Trade Policy – Between Ambition and Reality

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INTRODUCTION¹

Promoting human rights is one of the explicit goals of EU trade policy. This was underlined by the EU Commissioner for Trade Karel De Gucht even before he took office, in a hearing before the European Parliament. According to Mr De Gucht, promoting human rights is an 'integral part' of his approach to trade policy.² Similarly, the European Parliament never tires of calling for respect for human rights in EU trade policy. It regularly insists on this in the context of ongoing negotiation processes for bilateral trade agreements, for instance with South Korea, Peru, Colombia and India. On 25 November 2010 it also adopted a resolution of its own concerning respect for human rights in EU trade policy (EP 2010).

Declarations of this kind are more than mere rhetoric. This is because since the mid-1990s the EU has developed a systematic strategy and a sophisticated array of instruments to promote human rights in its trade policy. The main elements of this are human rights clauses in bilateral trade agreements, and comprehensive human rights criteria in the Generalised System of Preferences (GSP). The EU deploys these instruments in an attempt to achieve its ambition of upholding and promoting human rights in trade policy. This ambition is not only of a political nature; it is also of a legal nature too. This is because on the one hand the member states, and thus the EU itself, are also obliged to uphold the rights contained in international human rights in their foreign policy. Furthermore, the Treaty of Lisbon obliges the EU to maintain a coherent foreign policy with respect to human rights, and explicitly so in the context of trade.

On the other hand, the effectiveness and credibility of the EU's approach to human rights in its trade policy is being called into considerable doubt by many developing countries and non-governmental organisations (NGOs), as well as by UN human rights institutions (e.g. FIDH 2006). These criticisms are directed in

the first instance at the narrow focus and arbitrary application of the aforementioned human rights instruments. Above all, though, the criticisms revolve around the almost exclusive orientation of the EU's own trade policy toward European economic interests, as reflected in the 'Trade, Growth and World Affairs' strategy and in the bilateral trade agreements (EC 2010). The most recent evidence of this criticism is found in the concluding observations on the fifth report of Germany of May 2011, in which the UN Committee on Economic, Social and Cultural Rights expressed its 'deep concern' regarding the impact of the EU's agriculture and trade policies on the right to food (CESCR 2011, Paragraph 9).

In their proposal for world trade reform published in 2008 as part of the Ecofair Trade Dialogue – 'Slow Trade Sound Farming' – MISEREOR and the Heinrich Böll Foundation had already identified respect for human rights as a central principle (Sachs and Santarius 2008: 21). In light of the progress made in this debate, the present Ecofair Trade Dialogue discussion paper now addresses the issue of whether and to what extent the EU has lived up to its ambition and its legal obligation to promote human rights in trade policy. The normative point of departure is provided by the EU's human rights obligations under international and European law, which are explained in the *first* section. This provides a basis for the *second* and *third* sections, which outline the key objectives of the current EU trade strategy, and with reference to a number of case examples identify areas of potential conflict with the human right to food. The *fourth* section analyses the objectives and effectiveness of human rights clauses and GSP+ as the key EU trade policy instruments to support human rights. The *fifth* section summarises reform proposals currently being debated that could lead to a more coherent EU trade policy for human rights.

1 I would like to express my sincere thanks to Thomas Braunschweig, Michael Frein, Gisèle Henriques, Rolf Künnemann, Anja Mertineit, Theodor Rathgeber and Kesuma Saddak for their valuable comments on a previous draft.

2 International Trade Committee: Hearing of Karel de Gucht, Commissioner-designate for Trade, 12.01.2010, p. 20: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-439.244+01+DOC+PDF+V0//EN&language=DE> (accessed on 19.7.2011).

1 HUMAN RIGHTS OBLIGATIONS FOR EU TRADE POLICY

The EU's obligation to protect human rights in its foreign trade policy arises in the first instance from the obligations of its member states under international law. All EU member states have ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the other key human rights conventions. Consequently, they must respect, protect and fulfil the rights enshrined therein in all policy fields. The UN Committee on Economic, Social and Cultural Rights, the UN Human Rights Council, the Office of the UN High Commissioner for Human Rights and several UN Special Rapporteurs have repeatedly emphasised that these obligations incumbent upon states apply not only with respect to people within the territorial boundaries of those states, but also to people outside them (extraterritorial state obligations – ETOs). In turn, this applies not only to the bilateral foreign policy of states, but also to their policy within international organisations. Moreover, the European Court of Justice takes the view that the EU itself must also comply with the general legal principles and human rights conventions that its member states have ratified.³

In his report on the World Trade Organization (WTO), the UN Special Rapporteur on the Right to Food, Olivier De Schutter, draws attention to the fundamental problem of the fragmentation of international law (De Schutter 2009a: 15-16). According to this view states are often exposed to conflicting obligations arising from various international agreements, for instance on international trade, investment, environment, labour rights or human rights. When such conflicts arise, states often tend to accord priority to those obligations whose violation would lead to sanctions, which is the case for instance with the dispute settlement mechanism of the WTO, though is only very rarely the case in the UN human rights system. De Schutter counters this by emphasising that under international law human rights enjoy priority over all other legal obligations, such as those arising from trade agreements. He bases his argument on the UN Charter of 1945, which defines the promotion and encouragement of respect for human right as one of the purposes of the UN (Article 1, Paragraph 3),

³ See Opinion 2/94, Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms, [1996] ECR I-1759, Para. 33, as well as Case C-540/03, Parliament v Council, [2006] ECR I-5769, and: FIDH 2008, p. 7.

and accords the obligations arising from the Charter precedence over all other international obligations of its member states (Article 103). Moreover, according to Articles 53 and 64 of the Vienna Convention of the Law of Treaties any international agreement should be considered null and void where it violates a 'peremptory norm of general international law', which without a doubt includes the Universal Declaration of Human Rights.

With the EU the legal situation is further underlined by the fact that human rights are enshrined in the Treaty on European Union. This Treaty defines 'respect for human rights' as one of the fundamental values 'on which the Union is founded' (Article 2). Article 3.5. also elevates these values, making them the basis for the Union's 'relations with the wider world'. This is reaffirmed in Article 21, which states explicitly: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Article 21 expressly obliges the EU to ensure 'consistency' with these principles in all areas of its external action. Moreover, concerning the common commercial policy of the EU Article 207 of the Treaty on the Functioning of the European Union refers directly to these values and principles of the EU, and clearly stipulates: 'The common commercial policy shall be conducted in the context and principles of the objectives of the Union's external action' (see also Woolcock 2010: 13f.).

We may therefore conclude that the EU has a clear obligation, both under international and under EU law, to protect human rights in its foreign trade policy (see also Bartels 2009: 577-578). Yet what does that actually mean? Generally speaking, all human rights impose three levels of obligations upon states. States must first of all *respect* human rights, i.e. they must not take any measures that themselves may lead to a violation of human rights. Secondly, states must *protect* human rights. In other words they must take measures to protect the population against human rights violations committed by third parties, such

as private businesses. Thirdly, states must *fulfil* human rights. This means they must make exhaustive use of all means available to gradually uphold and guarantee the rights of those people whose rights are not yet realised.

Applying this to trade agreements, according to De Schutter we then have the following categorisation. Given their *duty of respect*, states must not ratify any trade agreements obliging them to implement measures that would impact negatively on human rights. Examples of possible violations mentioned by De Schutter include excessive tariff reductions where this would lead to the destruction of small producers' livelihoods, and overly strict intellectual property rights where this would make it more difficult to gain access to seed or medicines. Given their *duty of protection*, states must not ratify any agreements making it more difficult for them to ensure that private actors comply with human rights, for

instance by introducing too sweeping protection for foreign investors. Finally, given their *duty of fulfilment* states must refrain from ratifying any agreements that make it more difficult for them to fully uphold human rights, for instance through customs and taxation losses that might lead to an underfunding of social security systems. With respect to all three levels of obligation, De Schutter emphasises that these apply not only to states' own populations, but also to the population outside their territory. Consequently, states must not ratify any agreement that impedes another state in upholding human rights (De Schutter 2011, paragraph 8).

On the basis of the categorisation proposed by De Schutter, we will now examine whether and to what extent the EU meets its ambition and its legal obligation to respect, protect and fulfil human rights in its trade policy.

2 THE EU TRADE STRATEGY: CORPORATE RIGHTS BEFORE HUMAN RIGHTS?

In its resolution of 8 November 2010, the European Parliament emphasised with respect to Article 207 of the Treaty on the Functioning of the European Union that the common trade policy must serve the overarching goals of the union. The EP explicitly called therefore, 'for the European Union's future trade strategy not to envision trade as an end itself', but as 'an instrument for fair trade' (EP 2010: paragraph 1). On 9 November 2010, in other words a day later, the EU Commission published its new trade strategy entitled 'Trade, Growth and World Affairs' (EC 2010a), which supersedes the 'Global Europe' strategy of 2006 (EC 2006), makes the external dimension of the Europe 2020 strategy more specific and thus makes an important contribution toward 'smart, sustainable and inclusive growth' (EC 2010d).

'My aim is to ensure that European business gets a fair deal and that our rights are respected so that all of us can enjoy the benefits of trade', declared Commissioner for Trade Karel De Gucht when the strategy was published.⁴ This wording arouses the suspicion that the Commission is calling for a 'fair deal' and respect for rights first and foremost for European businesses. And it is indeed the case that the strategy contains a long list of demands addressed to trading partners, including developing countries, which would significantly enlarge the leeway and potential profits of transnational European companies.

In both the old and new trade strategies, the lowering of tariffs on EU agricultural and industrial exports remains an important goal (EC 2010a: 4). This must be reciprocal, and encompass substantially all the trade. According to an accompanying study on the new strategy, the lowering of tariffs in the course of the ongoing negotiation processes will stimulate trade even more than the removal of non-tariff trade barriers (EC 2010c: 5). Nonetheless, as in 2006 the Commission sees the latter category as presenting the key challenges for 'intelligent growth':

- *Services* now account for 70 per cent of economic output worldwide, though only 20 per cent of world trade. As the

global market leader in this area, the EU intends to 'seek [...] by all means available, greater openness for our service providers'.

- The Commission intends to integrate into trade agreements greater protection and market opening for European *investment*, first and foremost vis-à-vis Canada, Singapore and India.
- In industrialised countries *public procurement* accounts for over ten per cent of gross domestic product, while in developing countries the figure is even as high as 20-30 per cent (EC 2010b: 20). With regard to procurement in the fields of public transport, medical products, medicines and green engineering, the Commission says: 'We will continue to press for more opening of procurement abroad, and we will in particular fight against discriminatory practices' (EC 2010a: 10).

The Commission's priorities also include securing a 'sustainable and undistorted supply of *raw materials* and energy', to which end it intends to use trade rules 'to the maximum', to employ a monitoring mechanism for export restrictions and to negotiate stricter rules at the bi-, pluri- and multilateral levels (EC 2010a: 8). To help ensure 'sustainability' and climate change mitigation it calls for the removal of barriers to trade in *environmental goods and services*. With regard to *intellectual property rights* the Commission intends to 'safeguard and enhance the competitiveness in the knowledge economy' of 'our companies and rights holders'. To this end it intends to negotiate a level of protection in trade agreements that is 'identical [...] to that existing in the EU while taking into account the level of development of the countries concerned' (EC 2010a: 13).

Most of these priorities are not new. Basically they reflect the agenda that the Commission had already outlined in 2006 in Global Europe, and pursued energetically in bilateral negotiations with the ACP Group of States, the Andean states, South and Southeast Asia, South Korea, India and others. What is new in comparison to 2006 is the positive commitment to negotiations

⁴ Press release by Karel De Gucht of 9.11.2011: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=636&serie=382&langId=en>

with individual countries where 'complex intra-group dynamics' threaten to lower the levels of ambition (EC 2010b: 23), i.e. where some countries within this group do not wish to accept the EU's far-reaching demands. In actual fact the EU has long since taken this step with respect to many ACP states, Colombia, Peru, Singapore and Malaysia, which is highly problematic for regional integration. Another new element is the stridently defiant tone that runs throughout the document: 'The EU will remain an open economy, but we will not be naive'. Elsewhere, we learn that the EU intends to 'act vigorously against any protectionist tendencies that may harm our interests' (EC 2010a: 4 and 12). The new strategy thus devotes significantly more attention to instruments of enforcement than it did in 2006. The Commission sees the WTO in the first instance as a 'shield against protectionist backsliding'. It hopes to strengthen the WTO's surveillance and monitoring capacity and dispute settlement system, and intends to promote the integration of strategically key countries such as Russia.

Beyond the WTO, the strategy contains a separate chapter on the enforcement and implementation of the EU trade agenda. As well as quite harmless instruments such as 'naming and shaming' through the G20, this chapter also contains the tangible threat of responding to export restrictions more forcefully in the future through import protection measures (EC 2010a: 13). To force more concessions from trade partners concerning public pro-

urement, services or investment, in its Global Europe progress report the Commission even considers threatening 'to temporarily reduce the EU's level of openness' (EC 2010b: 23). The EU implies that it will take a tougher approach especially toward the larger developing countries: 'Trade policy will not gain public support in Europe if we do not have fair access to raw materials, or if access to public procurement abroad is blocked' (EC 2010a: 4). The Commission expects efforts 'in a spirit of reciprocity and mutual benefit' not only from developed, but also from emerging partners. The Commission evidently intends to extend this principle of reciprocity, which hitherto had only applied to developing countries in the context of bilateral agreements, to other areas. According to a progress report, before the Doha Round can be concluded there will be a 'need to reach a general agreement on key issues of ambition, balance and reciprocity' (EC 2010b: 5).

It is striking that almost all the demands contained in the trade strategy are geared exclusively to the interests of European companies. By contrast, in the new (and in the old) trade strategy the fundamental values of the European Union, which the Treaty of Lisbon prescribes as stipulations for trade policy, are given very little importance. In the 21-page strategy human rights are mentioned on a total of two occasions (EC 2010a: 8 and 15), both times in relation to the GSP system and clauses in trade agreements. These two instruments are dealt with below in section 4.

3 AREAS OF CONFLICT BETWEEN EU TRADE POLICY AND THE RIGHT TO FOOD

It may seem quite natural that EU trade policy aims among other things to improve market access for European companies. However, this is problematic in that the possible impacts on the population in partner countries caused by the strengthening of corporate rights is not mentioned anywhere at all. In actual fact, impact assessments by NGOs and independent scholars in the last few years have concluded that the trade agreements concluded by the EU do in certain areas pose a serious threat to social human rights in developing countries. In some cases, violations of this kind have already taken place. Taking the human right to food as an example, we will now identify three critical areas of conflict.

3.1 Forced market opening for European agricultural exporters

In the negotiations for Economic Partnership Agreements (EPAs) with the African, Caribbean and Pacific (ACP) states – as with other bilateral trade agreements – the EU demands a prohibition on quantitative import restrictions and a removal of tariffs for ‘substantially all the trade’, in which context it refers to Article XXIV of the General Agreement on Tariffs and Trade (GATT). The WTO does not have a recognised definition of ‘substantially all the trade’. This is why the EU is able to interpret this provision quite arbitrarily, depending on its interests (South Center 2010: 8-11).

Specifically, the EU is demanding that the ACP states, which hitherto had enjoyed extensive unilateral tariff preferences in the EU under the Lomé agreements, now remove 80 per cent of all tariffs on imports from the EU in the spirit of reciprocity. For other countries such as South Korea the figure is even as high as up to 97 per cent (see Reichert et al. 2009). Least Developed Countries (LDCs) are also affected by these obligations. By way of comparison, we note that under the WTO between 1995 and 2004 developing countries were required to lower their self-defined upper limits (*bound* tariffs) by an average of 24 per cent, though they were often not required to lower the tariffs actually levied at the time (*applied* tariffs), to which today’s demands refer. LDCs were exempted from obligations to lower tariffs completely. A further element that is harsher than the previous WTO obligations is the so-called standstill clause contained in the bilateral agreements. This stipulates a general prohibition on the levying of tariffs above the level cur-

rently applied, even if the bound tariff under WTO rules is significantly higher. In some agreements, such as those with Ghana and Cote d’Ivoire, this prohibition also relates to ‘sensitive’ products (which account for 20 per cent). For these products, although the existing applied tariffs are allowed to remain in place, they can no longer be raised, which severely limits options for responding to world market price fluctuations, for instance.

These provisions greatly restrict the scope of states to protect small farmers’ income and their right to food (see Bread for the World et al. 2011: 4-12). This applies to Ghana, for example, which has been flooded with poultry parts for years, a big share of which come from the EU. These poultry parts are becoming increasingly difficult to sell in the EU due to consumption patterns. Rather than dispose of them, companies export them at unrivalled low prices, especially to West Africa. In 2003 the Ghanaian parliament recognised the problem, and in order to protect the country’s farmers decided to raise the poultry tariff from 20 to 40 per cent, in accordance with WTO conditions. However, in response to pressure from the International Monetary Fund (IMF) this was promptly reversed, even though according to WTO an increase to up to 99 % is permissible (Paasch, Garbers and Hirsch 2007: 33-36). This has since resulted in a complete collapse of the poultry industry in Ghana. Poultry producers, including large numbers of small farmers, have lost their market for broilers, and thus a large part of their income. As a case study by FIAN and Germanwatch shows, the incomes of poultry farmers around the port of Tema have fallen to such an extent that they have been forced to reduce the number, quality and quantity of the meals they eat. Their right to adequate food has thus been heavily curtailed (Issah 2007 and Paasch 2008). Increases in customs duty, such as were prevented in 2003 by unfair pressure from the IMF, will in future be prohibited as far as the EU is concerned by the aforementioned standstill clause in the EPA interim agreement.⁵ And although the agreement has so far not been ratified, the Ghanaian government most recently rejected the repeated call of the poultry association for a tariff increase, drawing attention to the future Interim Economic Partnership Agreement (IEPA). Even before its ratification, the agreement is evidently proving to be an obstacle to protection of the poultry farmers’ right to food.

⁵ Article 15 of the IEPA, as at 15 August 2008: http://bilaterals.org/IMG/pdf/Ghana-EC_EN_150708_Council-EU_Agreement-establishing-a-stepping-stone-EPA.pdf (accessed on 21.7.2011).

There are also signs of threats to the right to food emerging from the IEPAs in other countries. In Côte d'Ivoire, for instance, a massive increase in imports of pork parts from the EU since 2000 has led to a collapse of local pork production. Here too, according to the German Church Development Service (EED), the Ivorian government rejected a call by the pig farmers' association APORCI for a quantitative limit on imports by explaining that a measure of that kind would no longer be possible under the IPEA that the Côte d'Ivoire had already signed. Colombian dairy farmers also feel threatened due to the fact that the trade agreement signed in April 2011 demands the removal of all milk tariffs vis-à-vis the EU within 15 years, even though European powdered milk is still being exported at prices below production costs (Fritz 2010: 16 and Reichert 2011).

In India too the EU is insisting on a massive removal of tariffs. This would threaten poultry and dairy farmers, among others. Around 90 million people live from dairy farming in India, and 3.5 million from poultry farming. Most of them are small farmers who are in any case already affected or threatened by poverty and hunger (Misereor et al 2011: 31-42). Large European dairies are already lying in wait to exploit the Asian market. The Deutsches Milchkontor GmbH (DMK) company that recently emerged from a merger of Humana and Nordmilch has indicated that it intends to double its annual turnover to between 700 and 900 million within three years in emerging economies, especially in Asia and the Middle East.⁶ We can only hope that the Commission follows the call of the European Parliament to 'respect sensitivities linked to agricultural trade' and seek market opening in 'areas of complementarity'. With respect to dairy and meat products the EP unfortunately only insists on considering possible negative effects on European agriculture (EP 2011, Paragraphs 9 and 19). However, what applies to European agriculture should certainly also apply in India, a country for which this area is so sensitive.

Applying Olivier De Schutter's categories, we can interpret the EU's massive pressure to open markets described above as a violation of its extraterritorial obligation to respect the right to food. This is because it is demanding measures by the state in partner countries that jeopardise farmers' right to food. The fact that such pressure has been exerted is beyond all doubt, especially with respect to the ACP countries. At the EU-Africa Summit in December 2010, when the EPAs were being further negotiated, the EU's unwillingness to compromise was almost scandalous. In a joint declaration issued in the run-up to the summit, the African trade ministers had expressed unusually harsh criticism of the 'severe pressure' put on them by the EC to sign agreements that did not sufficiently reflect their own concerns and interests.⁷ The Commission is currently once again threatening as of 1 January 2014 to withdraw its trading preferences from those ACP countries that have not ratified an IPEA by then, and are not included among the LDCs.

We must also fear a violation of the duty to fulfil social human rights. In the opinion of a study commissioned by the EU itself, upon fully implementing the tariff reductions demanded by the EU (i.e. between 2022 and 2025) the ACP states would lose a total of EUR 2 billion in public revenues. Hardest-hit would be

the Economic Community of West African States (ECOWAS), with losses of EUR 700 million (see Reichert 2009: 9). Given the high rates of poverty and hunger in West Africa, and the budget constraints that already exist, the states concerned would have even less scope to fulfil social human rights for their population were they to ratify the EPAs.

The fears of NGOs and farmers' organisations are also shared by the UN Committee on Economic, Social and Cultural Rights. In its concluding observations on the fifth report of Germany of May 2011 it states: 'The Committee notes with deep concern the impact of the State party's agriculture and trade policies, which promote the export of subsidised agricultural products to developing countries, on the enjoyment of the right to an adequate standard of living and particularly on the right to food in the receiving countries'. It therefore urges Germany to apply 'a comprehensive human rights-based approach to its international trade and agriculture policies' (CESCR 2011: Paragraph 9).

3.2 Intellectual property rights for commercial plant breeders

According to the established interpretation of the UN Committee on Economic, Social and Cultural Rights, access to the means of production is an inherent component of the human right to food. In agriculture the key means of production include not only land and water, but also seed. Traditionally, farmers avail themselves of this right by removing from their crop sufficient seed for the next sowing period, further developing it by means of selection, adapting it to their own particular needs and changing environmental conditions, and exchanging it among themselves. This is still the customary practice for approximately 1.4 million farmers (Goodman 2009).

However, in the course of technical progress and the forward march of private seed companies, parallel to that a gigantic market in commercial seed has developed. Increasingly, this market has also included small farmers. One key milestone in this process was the development of hybrid seed, which enables particularly mechanised and large-scale farms to produce standardised crop plants and higher yields. Hybrid seed is also profitable for large seed companies because its yield drops significantly every year when re-sown, thus forcing farmers to acquire fresh seed. For a number of commercially significant plants such as wheat and soya, however, this hybridisation does not work. This means that many farmers also purchase commercial seed only once, then propagate it in the traditional fashion, sow it, further develop it, exchange it with other farmers and sell it. For decades the seed industry has employed technological and legal means to try to exploit precisely this gap, which is currently still limiting opportunities for commercial profit. The technological approaches include for instance genetic manipulation of seed to prevent it from germinating, although this is meeting with strong resistance within society and has not yet gained a broad foothold. What has proved successful, though, is the attempt to push through legislation imposing stricter intellectual property rights in the seed sector.

What functioned as a key catalyst in this context was the link between patent rights and international trade law established in 1995 by the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement (within the WTO), which imposes minimum standards for national legislation on member states.

⁶ Article in the Frankfurter Allgemeine Zeitung newspaper: Largest dairy concern formed in the North, 4.2.2011.

⁷ Resolution of the 92nd Session of the ACP Council of Ministers held in Brussels, Belgium, from 8th to 10th November 2010, Paragraph N: http://www.stopepa.de/img/ACP_Council_resolution_EPAs_101110.pdf (accessed on 26.7.2011).

Pursuant to TRIPS, patent protection must be granted for a period of 20 years for products and processes in all areas of technology, provided that these are new, inventive and capable of industrial application. Pursuant to Article 27.3 (b) of the TRIPS Agreement this also applies on a binding basis to micro-organisms as well as microbiological and non-biological processes for the production of plants or animals (Frein 2009: 19). One important concession to the developing countries under the TRIPS agreement was the fact that they were also able to introduce instead of patent protection an 'effective *sui generis* system' more suited to the special development needs of the country in question. The lack of a clear definition of the term 'effective' in the TRIPS agreement thus leaves states with a certain latitude for protecting in their national legislation the rights of farmers to also preserve, re-sow, exchange and sell commercial seed.

It is precisely this latitude that the EU (like the USA, among others) is now seeking to restrict through bilateral trade agreements. Many of these agreements oblige developing countries to prescribe the standards of the Union for the Protection of Organic Varieties (UPOV) as amended in 1991 as the only possibility for a *sui generis* system. According to this the partner countries had to pass legislation prohibiting the exchange and resale of commercial seed during the 20-year period of a plant variety right, and to permit re-sowing only subject to the payment of re-seeding fees (De Schutter 2009b: 5f. and Frein 2009: 19).

These obligations are included for instance in the trade agreement between the EU and Colombia and Peru, which was signed in April 2011.⁸ Peru had previously not signed the UPOV agreement at all, while Colombia had signed only the significantly less problematic version of 1978 (Fritz 2010: 18). Several important crop plants such as potatoes, sweet potatoes, cassava, capsicum, tomatoes, beans, maize, quinoa and amaranth originated in the Andes or occur there in particularly great diversity. The re-sowing, exchange and resale of seed (including commercial seed) have hitherto been customary practice among small farmers, and so far have been permitted without restriction in Colombia and Peru. If this were to be banned, production costs would inevitably rise, which would pose a major threat to the independent livelihoods, the income and ultimately the right to food of the farming families. By contrast, the potential beneficiaries of stricter intellectual property rights include multinational seed companies such as Monsanto and Syngenta, as well as the German company BayerCrop Science, which manufactures and markets seed in Colombia.

In the negotiations for the trade agreement with India too, the EU from the outset pressed for an obligation to implement UPOV 1991. India, where 85 per cent of seed is freely exchanged between farmers, is the only major economic power that has not yet signed a UPOV agreement (De Schutter 2009b: 6). By mounting a broad campaign Indian farmers' organisations, NGOs and academics succeeded in having a law passed in 2001 – the Protection of Plant Varieties and Farmers' Rights Act – that made more or less exhaustive use of the scope for a *sui generis* system to protect farmers rights, setting an international precedent. Under this law farmers are expressly permitted to preserve, use, sow, resow, exchange and sell the products and the seed itself. Essen-

tial elements of this law would now be called into question if India were forced to implement the standards of UPOV 1991 as a result of the trade agreement (Suhai 2008: 11f. and 21f.). Right now it looks rather unlikely that the Indian government will accept a UPOV obligation in the agreement, although the EU still seems to be exerting pressure in this direction (Bhutani 2011: 4f.).

According to the categories of UN Special Rapporteur Olivier De Schutter outlined in section 2 above, both the EU and its partner countries are violating their duty of respect for the human right to food when they include provisions in trade agreements that make it more difficult for vulnerable groups to gain access to seed. In a report on seed policies to the UN General Assembly, De Schutter emphasised: 'The introduction of legislation or other measures which create obstacles to the reliance of farmers on informal seed systems may violate this obligation [the duty of respect], since it would deprive farmers of a means of achieving their livelihood' (De Schutter 2009b: 4). Patenting obligations in trade agreements are also problematic from the right to food perspective because they strengthen the control over seed wielded by major companies, and thus the dependency of farmers. They are also problematic because by promoting homogeneous seed varieties and monocropping they reduce the biological diversity available to farmers, which is so crucial in making them resistant to crises (De Schutter 2008: 13).

Nor can such provisions be justified from a human rights perspective by the protection of intellectual property rights, which is enshrined in Article 15.1 c) of the International Covenant on Economic, Social and Cultural Rights. For this right refers to the originators of an invention as individual or groups of individuals, but not to companies as patent holders. And above all the responsible UN Committee in its General Comment No. 17 of 2005 makes clear that intellectual property rights must not be viewed in isolation from the other rights recognised by the Covenant. State should therefore ensure that laws to protect scientific, literary or artistic products 'constitute no impediment to their ability to comply with [to fulfil] their core obligations in relation to the rights to food, health and education' (CESCR 2005: Paragraph 35). The Committee explicitly recommends one possible specific countermeasure: '...excluding inventions from patentability whenever their commercialisation would jeopardise the full realisation of these rights'. However, it is precisely this option that the EU is attempting to undermine through its bilateral agreements with several developing countries

3.3 Deregulation for investment by European supermarket chains

A third area of conflict between EU trade policy and the human right to food is the planned deregulation of services and investment by European companies in foreign countries. Here – according to its new trade strategy – the EU intends to use 'all means available'. It intends to reach bilateral trade agreements with its partner countries that include provisions on deregulation going far beyond the WTO General Agreement on Trade in Services (GATS). It is true that GATS in principle encompasses all four modes of service, i.e. 1) cross-border trade in services (e.g. postal services from one country to another), 2) consumption abroad (where the user enters the service provider's country), 3) commercial presence (where a service provider delivers his services abroad) and

⁸ See: Trade Agreement between the European Union [and its Member States] and Colombia and Peru, Art. 232: <http://www.bilaterals.org/spip.php?article19268&lang=en> (accessed on 26.7.2011).

4) the presence of natural persons. Consequently WTO members must, in accordance with the principle of most-favoured nation status, treat equally providers from all foreign member states in all sectors, where they have entered into obligations.

However, under GATS it is still possible to treat foreign and domestic providers unequally, except in those sectors where a member state has entered into specific obligations. Moreover, member states may enter into different obligations with respect to the four modes of delivery for a certain sector, or may exempt certain measures from deregulation in a sector. The consequence of the latitude inherent in this bottom-up approach is that most developing countries have not yet entered into any obligations in those areas which are sensitive for them (Frein and Reichert 2008: 29).

One example where the EU now intends to push through comprehensive deregulation of the service sector also in sensitive areas is the planned free-trade agreement with India. In this context the EU has focused particular attention on the Indian retail sector, which according to the Global Retail Development Index of AT Kearney represents the most attractive market for global retailers in the emerging countries. The opening up of this market is seen as a top priority by European lobbying associations such as EuroCommerce (IBEF 2009: 2, and Eberhard and Kumar 2010: 22f.). So far, foreign companies have been able to operate freely in India only in the wholesale sector. For retail companies with only a single brand (e.g. Adidas) there is a threshold of 51% for participation by foreign companies, while for retailers with several brands foreign participation is banned entirely (DIPP 2010: 1).

In the negotiations for the trade agreement, the European Commission is now demanding a maximum deregulation of the participation of European companies in multi-brand retail. An opening of this kind would be problematic because according to official estimates the retail sector in India currently employs 35.06 million people, making it the second most important sector for the labour market after agriculture (Joseph et al 2008: 7). Not least, these include the staff of the approximately twelve million small retailers (*kiranas*), plus an estimated ten million street vendors, a significant proportion of whom are women. According to a study commissioned by the ILO, street vending by the urban poor is 'one important means of earning a livelihood, as it requires minor financial input and the skills involved are relatively low' (Ghosh et al. 2007: 52).

It is chiefly these small vendors and owners of small retail outlets who are protesting against an opening up of the sector, because they fear for their jobs and livelihoods. Their fears are substantiated among other things by a study conducted by the Centre for Policy Alternatives. The authors estimate that around 8 million jobs would be destroyed if supermarket chains were to take over 20 per cent of the Indian market (Guruswamy and Sharma 2006: 25). A study by the Indian Council for Research on International Economic Relations (ICRIER), which is actually receptive to the idea of opening the market, also concedes that in the past, small vendors in the vicinity of newly opened Indian supermarkets suffered average sales revenue losses of 14 per cent during the first 21 months, which has already caused many to abandon their operations (Joseph et al 2008: 31ff.). It is also anticipated that many small retailers in the vicinity of supermarkets would have to close down within 10 years (Joseph et al 2008b: 47f.).

European supermarket chains play down the issue by arguing that they would themselves create many jobs in return. Yet their promises do not sound particularly credible. In a government consultation, for instance, Carrefour claims that the supermarket chains would create 1.8 million jobs within the next five years.⁹ According to Carrefour's own figures in 2010 it maintained 15,937 branches worldwide, 756 of them in Asia, employing a total of 471,000 people.¹⁰ Even Walmart, the world's largest group (not only in the retail sector) employed just two million staff at its 8,400 locations in 2010 (ETC Group 2008: 24)¹¹. Looking at these figures, the promises made by Carrefour can only be interpreted as an attempt to manipulate public opinion. At least we must hope so, because according to MISEREOR's calculations the creation of 1.8 million jobs by supermarkets would require an eighteen- to twenty-fold increase in the existing sales area of the formal sector. In this scenario the creation of 1.8 million jobs in the formal sector (which would be much more efficient than jobs in the informal sector) would entail a loss of between 2.9 and 6.7 million jobs in the informal sector (Misereor et al 2011: 45-48).

This would also pose a threat to the small farmers who supply the small retailers and street vendors with food indirectly through the traditional wholesale markets (*mandis*). Given the high product and efficiency standards it is highly unlikely that these small farmers would gain access to the supply chains of European supermarkets (Wiggerthale 2009). This is also confirmed by ICRIER. The study does conclude that supermarket suppliers overall achieve higher profit margins than is the case with most traditional distribution channels. However, it also emerges that so far only those farmers have benefited from this opportunity who have access to land, artificial irrigation, the best education, credits and infrastructure such as transport vehicles (Joseph et al. 2008: 61-67). The farmers will face a further threat if European supermarkets, in the wake of the concurrent tariff reductions in the goods sector, then import a large proportion of their products from Europe (most of which are more highly processed). It is true that Carrefour declares that it will procure the vast majority of products locally. However, Carrefour also intends to accept a legal minimum requirement for local procurement from small and medium-sized enterprises in India, such as the one currently being discussed, of at most less than ten per cent.¹²

In other words, in this case too the livelihoods and thus the human right to adequate food of sections of the population who are in any case poor, face an acute threat from the demands made by the EU in bilateral trade agreements. Those who would profit from this are European supermarket chains such as Tesco, Carrefour and the German Metro group, which has already been operating in the wholesale sector in India for a number of years, where it faces massive protests from small retailers. In an interview published in the *Frankfurter Allgemeine Zeitung* newspaper, Metro indicated that it was planning to pursue an 'even more aggressive strategy with investments in China, India and Indonesia', and open a further 20 outlets in these countries in 2011 alone.

9 Carrefour: Discussion Paper on FDI on FDI in Multi-brand Retail, 30. July 2010, p. 15.

10 Carrefour: Coordinated Financial Statements: <http://www.ecobook.eu/carrefour/2011-ok1/rfuk/>, and: 2010 Annual Activity and Sustainability Report, p. 44: <http://www.carrefour.com/cdc/finance/publications-and-presentations/annual-reports> (accessed on 2.8.2011)

11 Walmart Annual Report 2010: http://cdn.walmartstores.com/sites/AnnualReport/2010/PDF/08_WMT%202010_StoreCount.pdf und http://walmartstores.com/sites/annualreport/2010/financial_highlights.aspx (accessed on 2.8.2011)

12 See footnote 9, p. 8.

4 HUMAN RIGHTS INSTRUMENTS IN EU TRADE POLICY

All this begs the question as to where the human rights are actually to be found in the EU's trade policy. There are basically two instruments that the EU uses to promote human rights in its trade policy: the human rights clauses in bilateral trade agreements, and the Generalised System of Preferences (GSP). Both instruments are described below, and their effectiveness evaluated in the light of experiences to date. On this basis we will then finally address the issue of whether and to what extent the EU's existing human rights instruments are appropriate for resolving the conflicts between EU trade policy itself and human rights, as described above in section 3 in relation to the right to food.

4.1 Human rights clauses in bilateral trade agreements

The EU's approach of tying international agreements to respect for human rights originally goes back to a massacre in Uganda in 1977. In response to that massacre the then European Community decided to withdraw development funds that had already been committed. It justified this step by arguing that European funds should never be allowed to help sustain a policy that leads to human rights violations. To prevent such situations arising in the future, for the first time human rights clauses were included in the subsequent versions of the Lomé agreements. In the 1980s, however, these did not go beyond mere rhetoric. A human rights clause that could be operationalised emerged for the first time in 1990 in a cooperation agreement with Argentina, at the request of Argentina itself (Bartels 2008: 2).

Since 1992 it has been common practice to include such clauses as 'essential elements' in all bilateral agreements of the European Community/European Union. According to these clauses the fundamental human rights laid down in the Universal Declaration of Human Rights must form the basis for the domestic and foreign policies of the respective parties to the agreements (EC 2001: 10). The sanction mechanisms can vary widely, however. The 'Baltic clause' gives the party states the right to suspend the entire agreement forthwith in case of a serious violation of human rights. The 'Bulgarian clause', which first appeared in agreements with Bulgaria and Romania in 1993, is much less drastic, and provides

for various stages of escalation before sanctions are imposed. This clause provides for immediate suspension of the agreement only in cases of particular urgency. Otherwise the procedure involves first of all requesting information, examining that information and the circumstances, and seeking a solution by mutual agreement. Moreover, those measures must be selected from among the possible options that interfere least with the operability of the agreement. In 1995 the Commission developed a standard clause modelled on the Bulgarian clause (EC 1995: 12-14).

The clause considered the most far-reaching in an international agreement to date is found in Articles 9 and 96 of the Cotonou Agreement between the EU and the ACP states of 2000 (which has since undergone two revisions) (Bartels 2008: 3).¹³ The clause prescribes as an 'essential element' of the agreement that 'Cooperation shall be directed towards sustainable development' and that 'this entails respect for and promotion of all human rights' (Article 9, Para. 1). It refers to the international obligations of the parties, emphasises the universality and indivisibility of human rights, and also explicitly mentions economic, social and cultural rights (Para. 2). It emphasises that human rights obligations apply to both the domestic and international policies of the parties. And it explicitly states that 'The Partnership shall actively support the promotion of human rights' (Para. 4). Moreover, in Article 96 the agreement describes in a comparatively high degree of detail the steps to be taken in case of a violation of these essential elements of the agreement. These largely correspond to the Bulgarian clause outlined above, and allow the agreement to be suspended as a 'last resort'.

In actual fact human rights clauses in international agreements have led the European Community/European Union to take measures against human rights violations on repeated occasions (Bartels 2008: 11). This is particularly true with respect to the various Lomé agreements and the Cotonou Agreement, in the context of which the EU has held formal consultations with Togo, Niger, Guinea-Bissau, the Comoros, Côte d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, the Central African Republic and Mauritania

¹³ Cotonou Agreement of 23.6.2000: <http://www.acpsec.org/en/conventions/cotonou/accord1.htm> and revisions at: http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm (accessed on 28.7.2011).

respectively. Development funds have been withdrawn from the Palestinian Authority and diverted to civil society organisations. Aid to Belarus was suspended in 1996 due to setbacks in the democratisation process, as was aid to Russia in 1999 due to human rights violations in the war against Chechnya. In other cases, such as Israel, Algeria and Viet Nam, the EU has rejected measures that had been called for by the European Parliament and/or NGOs. In a resolution adopted in 2008 the European Parliament accused the European Commission of 'double standards' in its use of sanctions (EP 2008).

Even more contentious than this lack of coherence, however, is the effect of the sanctions. In a study conducted on behalf of the European Parliament, Lorand Bartels reaches the unequivocal conclusion that 'EU action in cases of human rights violations has, as a rule, been unsuccessful (e.g. Russia, Belarus and Liberia)'. On the other hand he does testify to the success of measures taken in response to coups or flawed elections in the Central African Republic in 2005, Côte d'Ivoire in 2001-2, Fiji in 2003, Haiti in 2001 and Togo in 2006. He attributes these positive results to the fact that new regimes tend to be more heavily dependent on support and international recognition, and therefore make more concessions. Basically, though, Bartels views the effectiveness of 'negative conditionalities', i.e. those that entail sanctions, as minimal. Against this background he also considers it warranted that the EU has so far never imposed trade sanctions under a bilateral trade agreement (Bartels 2008: 14). He concludes that sanctions are also problematic because imposing them might in turn lead to job losses and in some cases violations of social human rights. He therefore recommends that trade sanctions should only ever be imposed in cases where a human rights impact assessment has already been carried out beforehand (Bartels 2008: 17).

Recently, in some bilateral trade agreements human rights clauses have in any case either not been included at all, or if so then only in a weakened form. In the agreement with Peru and Colombia human rights are mentioned among the 'essential elements' of the agreement. However, the provisions on the fulfilment of obligations in Article 8 are worded much less forcefully than those in the Cotonou Agreement. Although urgent meetings and examinations of the situation are provided for, no explicit mention is made of a suspension of the agreement as a possible measure. The social standards in the agreement with Colombia are significantly weaker than those in the agreement with South Korea, and are not included among the 'essential elements' of the agreement (Zimmer 2011). In other words, while human rights violations can theoretically be punished, in the event of violations of environmental agreements or core labour standards of the ILO this is not the case. This is also problematic because when the agreement comes into force Colombia and Peru will leave the GSP+, which includes comprehensive protection for labour rights and environmental agreements (see below). In this regard the agreement clearly worsens the situation (Fritz 2010: 23).

The human rights clause is not included at all in the EU agreements with Canada or South Korea (initialled in October 2009). The latter merely contains a section on sustainable development, which includes social and labour standards. Human rights are only

mentioned in a general way in the Preamble.¹⁴ It is highly uncertain at present whether or not a human rights clause will be included in the EU agreement with India, given the country's categorical rejection. In a resolution of May 2011 the European Parliament emphasises that '...human rights, democracy and security are essential elements of the relationship between EU and India', but does not unequivocally call for the inclusion of a human rights clause as an 'essential element' of the agreement itself (EP 2011, Article 31).

4.2 The Generalised System of Preferences (GSP)

The second instrument with which the EU seeks to promote human rights as part of its trade policy is the Generalised System of Preferences (GSP). Under the GSP the EU grants developing countries easier market access to the EU by offering lower tariff rates than those offered to the remaining WTO members. The GSP dates back to a proposal made by the United Nations Conference on Trade and Development (UNCTAD). In 1971 the then European Community was the first to implement it (EU 2010). Since the early 1990s the system has been further elaborated and expanded to include a positive conditionality (Bartels 2008: 7-8). In 1991 the EU granted tariff reductions to Bolivia, Colombia, Ecuador and Peru that went far beyond the overall GSP. This was designed to promote conversion from the planting of drug crops to other agricultural products. In 1994 the EU introduced a further system of incentives that tied customs preferences to compliance with certain labour standards and/or agreements on tropical timber.

It was only after the preferences granted to fight illegal drug cultivation were declared to be non-compliant with the WTO following a complaint by India in 2004 that the EU created today's GSP+ system, to which any state can gain access if it has ratified and 'effectively implemented' a total of 27 international agreements on human rights, core labour standards, sustainable development and good governance. As early as 2001 the GSP had already been broadened by the Everything But Arms (EBA) initiative, which grants the Least Developed Countries (LDCs) tariff-free market access for all products except arms and ammunition. Today's GSP, the provisions of which are laid down in a regulation of 2008,¹⁵ thus encompasses three variants and grants preferences to a total of 178 states. Of these the 46 LDCs enjoy tariff-free market access for all products except arms under the EBA initiative. Fifteen states have qualified for GSP+, which encompasses the easing of tariffs for 6,336 customs lines. The remaining states receive preferences for 6,244 customs lines under the overall GSP (EU 2010).

All three variants of the GSP include a human rights component. This is because Article 22 of the regulation in force allows a temporary suspension of preferences for the overall GSP if 'serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights or related to the environment or good governance (occur)'. Of particular interest from the human rights perspective, though, is the GSP+ system, which also prescribes the 'ratification and effective

14 Trade Agreement between the European Community and its Member States, of the one part, and the Republic of Korea, of the other part, initialled on 15.10.2009, Section 13: <http://www.bilaterals.org/spip.php?article16117&lang=en>.

15 Council Regulation (EC) No 732/2008, 22.6.2008.

implementation' of 27 agreements as a condition of access. These include for instance the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Rights of the Child.¹⁶ As far as ratification is concerned, the GSP+ must ultimately be accounted as a success. This is because of the 15 countries receiving preferences, only five of them had already ratified human rights conventions prior to launch of the GSP+. Eight countries had to ratify one convention in order to meet the GSP+ criteria, while two countries had to ratify two conventions each (Bartels 2008: 13).

However, it is questionable whether the GSP+ system, in addition to inducing ratification, has also contributed toward the 'effective implementation' of the human rights conventions. This is due first of all to the fact that there is no standardised process whatsoever by which the EU might evaluate the reports of the states on implementation of the 27 conventions. There is also a lack of clear criteria by which a 'serious and systematic violation' might be verified. This might explain why tariff preferences have only been removed in three cases, namely Burma since 1997, Belarus since 2007 and Sri Lanka since 2010. In Burma and Belarus the measure was based on violations of labour rights, and in Sri Lanka on violations of civil and political human rights, the UN Convention against Torture and the International Convention on the Rights of the Child.¹⁷ By contrast, Colombia – notorious for its catastrophic human rights record – has so far escaped sanctions. Nor have any sanctions being imposed on Honduras, even though in the context of the coup in 2009 there were proven cases of massive human rights violations and violations of good governance principles.

Yet even where sanctions have been applied, it is appropriate to doubt whether they were effective. In Sri Lanka, for instance, the suspension of tariff preferences in February 2010, which was initially limited to 6 months, did not have the desired effect. The government allowed all the deadlines to pass for submission of a plan of measures to meet the 15 conditions imposed by the European Commission and thereby avert a prolongation of the sanctions. At that point trade unions in Sri Lanka criticised their government's position because the government was thereby accepting negative impacts on workers in the apparel industry. Even then there were warnings that the withdrawal of preferences itself might have a negative effect on social human rights in Sri Lanka (Bartels 2008: 17). In August 2010 a national daily newspaper then reported on first factory closures in the apparel industry. According to the report, an unnamed government official estimated that 100,000 jobs are now at risk.¹⁸ It is difficult to predict how realistic these fears will turn out to be. What does give cause for concern, though, is the fact that the EU – according to a quote by the EU ambassador Bernard Savage in the same newspaper – did not undertake any estimate whatsoever of the possible impacts.

Even if sanctions do have negative side effects, this does not necessarily lead to the conclusion that they are unwarranted and should be lifted. From the EU standpoint it is entirely justified

or even imperative that it does not help to prop up a regime that is proven to have been associated with grave human rights violations. This is all the more true considering that the GSP+ is conceived as a system of positive incentives for states with a positive track record of human rights performance. Since the highly problematic experiences with the sanctions against Iraq, we have all become aware – if we were not already so – that a sense of proportion and sensitivity is imperative in this context. As called upon by the European Parliament, the EU should at least conduct Human Rights Impact Assessments (HRIA) of any punitive measures before imposing them (EP 2009).

4.3 Fundamental shortcomings of the human rights instruments of EU trade policy

In addition to the aforementioned problems of their poor transparency, inconsistency and dubious efficacy when applied, the human rights instruments of EU trade policy also display four basic problems.

The *first* core problem concerns the fundamental issue of whether the existing instruments are suited to averting potential *negative impacts of EU trade policy* itself. The answer to this question is clearly no, a fact that is linked to the underlying limited logic of these instruments. They are designed to incentivise the promotion of respect for human rights in partner countries, and permit sanctions in case of serious violations. However, these sanction measures are triggered by human rights violations that are committed independently of the trade agreements. What the instruments are not responsive to explicitly are the human rights impacts of the trade agreements themselves. Neither the GSP+ nor the human rights clauses in bilateral agreements will therefore be able to avert violations or threats to the right to food, as discussed in section 3 above. Only the Cotonou Agreement contains a positive approach in this respect; Article 9 paragraph 4) states that: 'The Partnership shall actively support the promotion of human rights'. Since this provision is among the 'essential elements' of the agreement, it could be argued that negative impacts on human rights could lead to consultations, and ultimately even to a suspension of the agreement. This might become relevant to the EU Economic Partnership Agreement (EPA) with the Caribbean states (Cariforum). In Part 1, Article 2 the EPA states that it is based on the essential and fundamental elements of the Cotonou Agreement, and in Article 3 goes on to relate these elements explicitly to implementation of the EPA itself.¹⁹ Steps of this kind would only be possible if the EU were to introduce regular Human Rights Impact Assessments (HRIAs) and procedures for dealing with their results (see section 5 below). It is regrettable that the Cotonou clause is not to be found in any other bilateral agreement in this form. This also applies to the interim EPAs that have so far been initialled or signed, which are restricted to trade in goods. The IEPA with Ghana also merely mentions human rights in the preamble as essential elements of the Cotonou Agreement, but does not incorporate them as such into the IEPA itself.²⁰

The *second* problematic issue is the use of EU tariff rules as a *sanction* or as an *incentive* to achieve human rights objectives.

16 Ibid., Art. 8 and Annex 3.

17 European Commission: Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka, Brussels, 19.10.2009, C(2009) 7999.

18 Najmuddin, Jamila: The story of one man and the catastrophe of the nation, in: Daily Mirror, 16.8.2010: http://www.dailymirror.lk/index.php?option=com_content&task=view&id=5867&Itemid= (accessed on 29.7.2011).

19 Economic Partnership of the Cariforum States, of the one part, and the European Community and its Member States, of the other part: <http://www.bilaterals.org/spip.php?article10956&lang=en> (accessed on 29.7.2011).

20 See footnote 5.

The raising of tariffs, a sanction instrument available both through the GSP and through human rights clauses in bilateral agreements, can itself jeopardise social human rights, as is currently feared for instance in Sri Lanka. Conversely, however, it is also conceivable that the granting of tariff preferences itself increases the likelihood of human rights violations. This criticism has been raised in a specific context in Cambodia by the human rights organisation Bridges Across Borders Cambodia (BABC). There, land concessions for 80,000 hectares had led to a massive expansion of sugar plantations. The activities of the companies involved, so it was claimed, had already led to human rights violations and environmental damage affecting 12,000 people. According to statements made by representatives of these companies, the EBA provided them with an important incentive to expand their production (BABC 2010: 1 and 8). BABC is therefore demanding that the EU conduct a comprehensive investigation of human rights violations in the Cambodian sugar industry. It is also demanding that the EU call on the Cambodian government to take counter-measures and, if no action is forthcoming, to suspend the preferences. The EU has refused to do this. Against this background, the fundamental question arises of whether the lowering of EU tariffs as an incentive and the raising of tariffs as a sanction really are appropriate ways of upholding human rights. At the very least, before applying its human rights instruments the EU ought to carefully and sensitively weigh up the possible positive and negative impacts on human rights in each specific context.

The *third* problematic aspect of the human rights sanctions provided for in trade agreements is the fact that in practice they affect *only developing countries*. This is due to the fact that human rights violations within the EU itself rarely go so far as to fall foul of the human rights clauses in trade agreements. The actors that escape sanctions include not least transnational European companies that are possibly partly responsible for – and profit from – human rights violations. It is extremely difficult to sue European companies in courts in the EU for human rights violations abroad, if those violations are committed by subsidiaries or suppliers (Saage-Maaß et al. 2011). This is compounded by the fact that the human rights clauses in trade agreements are designed not least to protect European companies from cheap foreign competition. This one-sidedness has so far led many NGOs and trade unions in developing countries to reject in principle the introduction of human rights clauses and social standards in trade agreements, because they see this as an instrument of EU protectionism.

Nonetheless, it must be said in favour of the GSP that the tariff preferences have so far been granted without any trade policy benefits being provided in return, which is not the case with the bilateral trade agreements. However, this may *fourth* soon change in the course of the *GSP reform* that is currently being debated. If governments systematically make access to raw materials more difficult for European companies, then according to the European Commission's proposal for a regulation this would be interpreted as an 'unfair trading practice' that could lead to exclusion from

the GSP.²¹ If this *economic policy conditionality* were to become part of the final Regulation, this would be a clear case of abuse of a trade instrument designed to protect human rights. Using it as a means to exert pressure the EU might then urge governments to lower export tariffs, thus significantly reducing their scope for regulating this sector, which is so sensitive with respect to both human rights and ecological concerns. This would also cause financially weak developing countries to lose public revenues that are urgently needed there, ultimately to fulfil social human rights. In a position paper on the EU trade strategy the German government had argued explicitly in favour of this problematic change (German Federal Government 2010: 5). A further consequence of the planned reform is that in future instead of 15 only 10 countries would then qualify for the GSP+ due to the stricter economic criteria. In total, only 103 states would benefit from the GSP in the future as opposed to the existing figure of 178. Obviously, this possibility of exclusion is designed to increase the pressure on the countries concerned to agree to a reciprocal trade agreement. Such an agreement would require them to lower tariffs and implement other deregulation measures vis-à-vis the EU, thus damaging their interests. This applies for instance to 13 countries that are currently still negotiating EPAs with the EU, as well as Brazil, Uruguay and Argentina, which are negotiating a trade agreement with the EU in their capacity as Mercosur members.

To conclude: In section 2 above we saw that the trade strategy Trade, Growth and World Affairs contains primarily measures and demands on partner countries that are designed to strengthen corporate rights. We then saw in section 3 that a number of these demands pose a considerable threat to the human right to food, as well as to other human rights. With regard to the goals of sustainability, poverty reduction and the protection of human rights, the trade strategy merely drew attention to the clauses in bilateral agreements and the GSP system. The strategy announced a proposed reform of the GSP, declaring its aim to be 'to focus the benefits on those countries most in need and on those which effectively implement international labour standards and principles of human rights, environmental protection and good governance' (EC 2010a: 8). The draft for the GSP reform now reveals three things: that economic policy conditionalities have been added to the human rights conditionalities, that in future developing countries will be excluded which meet the human rights criteria, and that the focus on 'those countries most in need' primarily means that other countries will be excluded. We also noted above that the wording of the human rights clauses in bilateral agreements has, with the exception of the Cariforum EPA, come to be diluted. Thus in practice the new EU trade strategy not only includes a significant strengthening of corporate rights in sensitive human rights areas, but also an erosion of its own human rights instruments. In other words it takes a step backwards with regard to the protection of human rights, which must be seen as highly problematic under international law.

21 European Commission: Proposal for a regulation of the European Parliament and of the Council applying a scheme of generalized tariff preferences, 10.5.2011 (COM(2011/0117 (COD))), p. 2 and 19: http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/com_2011_0241_en.pdf (accessed on 29.7.2011).

5 ELEMENTS OF A COMPREHENSIVE APPROACH TO HUMAN RIGHTS IN TRADE POLICY

The gaps and contradictions identified clearly demonstrate that a fundamentally new and comprehensive human rights approach is needed in EU trade policy, as has been explicitly called for from Germany by the UN Committee on Economic, Social and Cultural Rights. This implies first of all that the human rights logic of the EU in this area needs to be reversed. EU trade policy must be made subject to a clear aim: it must (among other things) help fulfil the human rights of endangered populations and sections of populations. Under no circumstances may trade agreements infringe the duty to respect and protect human rights, i.e. they must not lead to any retrograde steps in the implementation of human rights. To this end, the policy space that governments require in order to respect, protect and fulfil all human rights must be maintained and where necessary extended, especially in developing countries, but also in rich countries. The burden of proof that trade agreements meet these human rights criteria should rest with the EU and the governments of the partner countries themselves. From the perspective of the EcoFair Trade Dialogue the following measures and instruments might play a key role in improving the coherence of EU trade policy vis-à-vis human rights:

1. Within the WTO the EU should press for a **revision of GATT Article XXIV** to abolish the provision for liberalising 'substantially all the trade' under bilateral trade agreements on the basis of 'reciprocity'. This provision does not take adequate account of the inequality of economic and social circumstances between poor and rich countries, and can restrict the leeway governments need in order to uphold social human rights in developing countries in the field of trade in goods. As long as Article XXIV remains in force, the EU must always interpret it under the premise of the protection of human rights. There is no clear quantitative definition of 'substantially all the trade'. This means there is no compelling reason for the EU to call for a complete market opening of 80 per cent of all tariff lines in the case of the ACP states or over 90 per cent in the case of India and other countries that still have high rates of poverty. Other demands that are problematic from a human rights perspective such as the standstill clause, the deregulation of public procurement markets, investments and services, the lowering of export taxes and the tightening up of intellectual property rights cannot be justified by Article XXIV. In these areas the EU should not pressurise developing countries and should not include such provisions in trade agreements without assessing their impacts on human rights.
2. The EU's obligation to respect, protect and fulfil human rights in trade policy automatically implies an obligation to conduct systematic and timely **Human Rights Impacts Assessments (HRIAs)** before concluding trade agreements. Because without having assessed the impacts of such agreements on human rights, the EU will find it difficult to avert potential violations. Accordingly, in its resolution of 8.11.2010 the European Parliament called on the European Commission 'to conduct human rights impact assessments in addition to sustainability assessments' (EP 2010: Paragraph 19). The UN Special Rapporteur Olivier De Schutter has drawn up a set of draft guiding principles for implementing these HRIAs, which are currently the subject of consultations with the UN organisations (De Schutter 2011, also covered in further depth by Walker 2009, Harrison 2010 and Berne Declaration et al. 2010). On the basis of these guiding principles the EU should develop a standardised procedure for systematic HRIAs of its trade and investment agreements. The institution commissioned to conduct these HRIAs must be independent from the Commission and from the national government of the partner country concerned. The research teams will need to possess multidisciplinary expertise (including human rights expertise). The HRIA process itself must display a maximum degree of transparency, and must involve in an appropriate manner all the relevant stakeholders within society, including those sections of the population potentially threatened. HRIAs must be conducted before the negotiations (*ex ante*), and thereafter (*ex post*) following a certain phase of implementation of the agreement. The results and recommendations of the HRIAs must be publicly debated both within the EU and in the partner country. Decisions on the political consequences for the respective trade mandate of the EU

should be taken in the European Parliament and possibly also in national parliaments. Unlike the US Congress, for instance, according to the Treaty of Lisbon the European Parliament so far does not have the right to authorise the respective negotiation processes on trade mandates or to define their objectives. However, since the Parliament must ultimately approve trade agreements, it is able to communicate to the Commission at an early stage its terms for issuing that approval (Woolcock 2010: 11).

3. **Human rights clauses** must be included in all EU trade agreements. These should be reworded such that they encompass above all the impacts of the trade agreements themselves. As explained above, good practice examples in this respect include the Cotonou Agreement and the Cariforum EPA, according to which the agreements themselves must promote respect for universal and indivisible human rights. However, trade agreements would also need to prescribe regular assessments of their impacts on human rights as well. A provision of this kind is included for instance in the most recent trade agreement between Canada and Colombia, and the modalities are spelled out in a supplementary explanatory note.²² Human rights clauses must define a clear procedure whereby certain stipulations of the trade agreement are invalidated if there is a warranted suspicion that they are contributing toward human rights violations. The EU should revise the Commission's standard clause of 1995 in this spirit and prescribe corresponding minimum standards for all trade agreements. The detection of human rights violations or threats to human rights should not be left to governments alone. UN human rights institutions should be involved, as should independent civil society actors in the partner country concerned. A **rendez-vous clause** must prescribe an *ex post* HRIA after a certain period of implementation, and allow revisions of problematic provisions of the agreement in light of the results.

4. The **sanction mechanism** in the GSP and as a part of human rights clauses must be revised. This should focus not least on human rights violations that are committed as a result of implementation of the agreement. Where this is the case,

this should entail revision of the problematic provisions. Sanctions against signatory states on the grounds of other human rights violations independent of the trade provisions should nevertheless remain possible. However, a standardised procedure and clear indicators and criteria should be introduced to determine how the reports of states are to be evaluated, and when a 'serious and systematic violation' of human rights has taken place that warrants sanctioning. In a process of this kind it is important to ensure effective participation by civil society stakeholders and procedures for complaint by possible victims. Before higher tariffs are imposed as a sanction, an HRIA must be conducted for these measures themselves, and the pros and cons from a human rights perspective carefully weighed up. In the future, though, sanctions should not only affect states. They should also be made possible for European companies that have been involved in human rights violations abroad and profited from that involvement. As proposed by the European Coalition for Corporate Justice (ECCJ), the EU and its member states should therefore introduce legal reforms to improve the duty of care and accountability as well as liability rules for parent groups vis-à-vis their subsidiaries and suppliers (Gregor 2010). These should be based on the 27 conventions on human rights, environment and labour laws that currently apply as conditions to join the GSP+.

5. The **GSP system** should not be restricted with respect to the number of beneficiaries as a result of the current reform, but should rather be actively used as an instrument to promote development and human rights. Partner countries should be actively encouraged and supported in qualifying for the GSP plus. Under no circumstances should the GSP be misused through economic policy conditionalities to facilitate easier access to raw materials or other economic policy interests. Conditionalities of this kind, for instance in the mining sector, might themselves increase the risk of human rights violations, and may also entail the loss of sensitive public revenues in developing countries. As outlined above, transparent procedures and criteria and HRIAs should be introduced to determine when sanctioning is appropriate. Sanctions should also be imposed particularly where the easier market access to the EU facilitated by the GSP itself leads to human rights problems.

²² Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia, 27.5.2010, Bogotá.

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