

Samantha Velluti

The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations

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With Contributions from Francesca Martines

 Springer

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All this world is heavy with the promise of greater things, and a day will come—one day in the unending succession of days—when beings who are now latent in our thoughts and hidden in our loins will stand upon this earth as one stands upon a footstool, and laugh and reach out their hands amidst the stars.

*H. G. Wells, 'The Discovery of the Future',
Lecture delivered to the Royal Institution
of Great Britain, London, United Kingdom,
24 January 1902.*

In memoriam E. V. Velluti

Preface

The focus of this book—the European Union (EU) as a good global actor and its promotion of non-trade values beyond its borders, specifically human rights and international labour standards through trade—continues to attract scholarly attention and still sparks heated debates and controversy. EU human rights conditionality, the human rights impact of EU (trade) measures, the viability and desirability of the trade–labour linkage, the *vexata quaestio* of the extraterritoriality of EU law, just to name a few, are all topics which require ongoing investigation. Above and beyond the key constitutional, institutional and substantive reforms of the 2009 Treaty of Lisbon, the global, national and local contexts within which the EU acts are changing dramatically. Within this constantly evolving setting, the *ancien régime* is confronted with new challenges and problems that require a rethinking of existing approaches and measures. Additionally, at the time of writing, the United Kingdom (UK) has left the EU.

Against this backdrop, the book provides new insights into the promotion and protection of human rights and international labour standards in the EU's external trade relations, building on and stimulating further the already well-engaged scientific dialogue on the nexus between the EU, human rights, labour and trade, i.e. EU human rights and social conditionality.

While writing this book I have come across many people with whom I had the privilege and pleasure to discuss many aspects of this book. I am grateful to all for helping me develop, refine and revisit the various ideas, concepts and arguments presented in this book.

A special thanks to Sue Millns and Donald McGillivray, former and current Head of Sussex Law School. Both have been incredibly supportive and encouraging during the writing of this book. I am also particularly indebted to Francesca Martines who accepted to step in at a later stage and for her key and insightful contributions to the completion of the book.

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Brighton, UK
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Samantha Velluti

Contents

1 The Promotion of Human Rights and International Labour Standards After Lisbon: An Introduction	1
Samantha Velluti	
1.1 Background and Context	1
1.2 Aims and Significance of the Book	3
1.2.1 Aims	3
1.2.2 Significance	5
1.3 Structure, Methods and Methodology of the Book	6
1.3.1 Research Methodology and Methods	6
1.3.2 Structure of the Book	6
References	8
2 The EU as a Global Actor in an “Inter-Polar” World	11
Samantha Velluti	
2.1 Introduction: Theoretical Understandings of the Nature, Powers and Role of the EU in the World	11
2.2 The Multi-Faceted Conceptions of the European Union and Its Role as a Global Actor	15
2.3 The European Union’s Promotion of Normative Objectives in Its External Trade Policy	20
2.4 The European Union’s Deep Trade Agenda and Narratives of Self-Projection	24
2.5 Conclusion: The Role of the European Union as a Global Actor in the Age of Brexit and Anti-Globalism	29
References	31
3 The Legal Framework of the Common Commercial Policy After the Entry into Force of the Treaty of Lisbon	39
Samantha Velluti	
3.1 Introduction: Aims and Structure	39

- 3.2 The Shift Towards a Global Approach and the “New” Common Commercial Policy 40
- 3.3 Principles and Objectives of the CCP After Lisbon 46
- 3.4 The Scope of the Common Commercial Policy After the Entry into Force of the Treaty of Lisbon: Substantive Reforms 49
 - 3.4.1 New Fields of the Common Commercial Policy 49
- 3.5 The Expanding Competence of the EU in the Area of the Common Commercial Policy 63
 - 3.5.1 Overview 63
 - 3.5.2 The European Union’s Exclusive Competence in the Field of the Common Commercial Policy 64
 - 3.5.3 The Negotiation, Signature, Provisional Application and Ratification of International Trade Agreements 65
 - 3.5.4 The Decision-Making System in the Council of Ministers After the Entry into Force of the Treaty of Lisbon 67
 - 3.5.5 Brexit, European Union International Agreements and the United Kingdom 69
 - 3.5.6 The Democratising Role of the European Parliament and the Promotion of Non-commercial Objectives in the Common Commercial Policy 77
- 3.6 Conclusion 84
- References 85
- 4 EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries 97**

Francesca Martines

 - 4.1 Introduction: Unpacking the Notion of External Conditionality 97
 - 4.1.1 Structure and Rationale of Conditionality Mechanisms 99
 - 4.1.2 The Standard of Behaviour Required by the Donor as a Condition for Granting Benefits or Avoiding Punishment 102
 - 4.1.3 Positive and Negative Conditionality 103
 - 4.1.4 Monitoring Compliance with the Conditions Established by the Donor 107
 - 4.2 The European Union’s Conditionality Tool-Kit to Promote Non-trade Values 108
 - 4.2.1 Conditionality in the EU GSP Schemes 108
 - 4.2.2 Conditionality in Financial Instruments 109
 - 4.2.3 Conditionality Clauses in EU International Agreements 112
 - 4.2.4 The EU’s Competence to Include Conditionality Clauses in Its External Agreements and in Unilateral Acts 117

4.3	The Type of Behaviour Required in Conditionality Clauses	123
4.3.1	Human Rights	124
4.3.2	Democratic Principles	128
4.3.3	Rule of Law	131
4.3.4	Other Non-trade Values as Standards of Behaviour	133
4.3.5	Sustainable Development as a New Form of Conditionality?	137
4.4	Behaviour Required in GSP Arrangements	139
4.5	EU Conditionality Tools and International Law	141
4.5.1	Conditionality Clauses and International Law	141
4.5.2	The Adoption of “Appropriate Measures”	145
4.5.3	The Application of Conditionality in the Framework of Agreements not Incorporating the Clause: The <i>Passerelle Clause</i>	149
4.5.4	GSP Conditionality and the Conclusion of International Agreements	153
4.5.5	GSP Positive and Negative Conditionality and WTO Law	154
4.6	Monitoring and Enforcement in EU Conditionality Tools	158
4.6.1	Monitoring and Enforcement in EU Conditionality Clauses	158
4.6.2	Monitoring in the GSP Scheme	163
4.7	Conclusion	166
	References	167
5	The Promotion of Social Rights and Labour Standards in EU External Trade Relations	181
	Samantha Velluti	
5.1	Introduction—The Role of the EU as a Global Social Actor	181
5.1.1	Labour Rights, Labour Standards and Social Clauses	183
5.1.2	Thematic Scope, Aims and Structure of the Chapter	184
5.2	The Foundations of the Trade-Labour Linkage	186
5.2.1	The Debate on the Trade-Labour Linkage	187
5.2.2	The Trade-Labour Linkage Rationales	193
5.3	Social Trade as an “Unobjectionable Norm” and the EU’s Promotion of Social Rights and Labour Standards Through Its External Trade Instruments	199
5.3.1	Unilateral Trade Arrangements: The GSP Scheme	200
5.3.2	Regional and Bilateral Trade Agreements	226
5.3.3	An Overview of Selected Proposals for Strengthening EU Social Conditionality	254
5.3.4	Recommendations	264
5.4	Conclusion	268
	References	270

6 The Nature of the European Union’s Human Rights Obligations in Its External Trade Relations After Lisbon 293
Samantha Velluti

6.1 Introduction 293

6.2 Understanding Extraterritoriality 298

6.2.1 Introduction 298

6.2.2 The Extraterritoriality of Human Rights Obligations in International Law and the EU Legal Context: Opening Pandora’s Box? 301

6.3 Territoriality, Territorial Extension and Human Rights Due Diligence Obligations 307

6.3.1 The Concept and Role of Due Diligence as a Positive Human Rights Obligation 307

6.3.2 From Extraterritoriality to Territoriality: “Territorializing Extraterritorial Obligations” 314

6.4 Human Rights Compliance as a Condition of Legality of EU Action 319

6.5 Revisiting the Doctrine of Implied Powers as a Judicial Tool to Protect Human Rights in EU External Action 325

6.6 Conclusion 330

References 333

7 Conclusion—The Merits of EU Conditionality in a World of Contrasts 347
Francesca Martines and Samantha Velluti

7.1 The Common Commercial Policy After Lisbon 347

7.2 The EU in the World: In Pursuit of Non-trade Values...the *Will* but not the *Way*? 349

7.3 Recommendations for Change 351

7.4 Some Final Reflections on the Status Quo and the Road Ahead 355

References 357

Abbreviations

AA	Association Agreement
AB	Appellate Body
ACP	African, Caribbean and Pacific Group of States
AFL	American Federation of Labor
AFSJ	Area of Freedom, Security and Justice
AGOA	US African Growth and Opportunity Act
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BLA	Bangladesh Labour Act
CAFTA-DR	Dominican Republic—Central America—United States Free Trade Agreement
CARIFORUM	The Caribbean Forum of the African, Caribbean and Pacific Group of States
CARIS	Centre for the Analysis of Regional Integration at Sussex, University of Sussex, UK
CAS	ILO Committee on the Application of Standards
CAT	UN Convention against Torture
CCC	Clean Clothes Campaign
CCP	Common Commercial Policy
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention for the Elimination of Discrimination against Women
CERD	Convention on the Elimination of All forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CET	Common External Tariff
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CIO	Congress of Industrial Organizations
CJEU	Court of Justice of the European Union

CLS	Core Labour Standards
CPA	Cotonou Partnership Agreement
CRC	UN Convention on the Rights of the Child
CSCE	Conference on Security and Cooperation in Europe
CtRC	UN Committee on the Rights of the Child
CU	EU Customs Union
DAG	Domestic Advisory Group
DCFTA	Deep and Comprehensive Free Trade Agreements
DCI	Development Cooperation Instrument
DG	Directorate General
DG DEVCO	DG for International Cooperation and Development
DRD	Declaration on the Right to Development
DWA	ILO Decent Work Agenda
EANO	Economic Assessment of the Negotiated Outcome
EBA	Everything But Arms
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EDF	European Development Fund
EEAS	European External Action Service
EEC	European Economic Community
EGAF	European Globalization Adjustment Fund
EIDHR	European Instrument for Democracy and Human Rights
EMU	Economic and Monetary Union
ENI	European Neighbourhood Instrument
EO	European Ombudsman
EP	European Parliament
EPA	Economic Partnership Agreement
ESI	European Structural and Investment
ESPCA	EU-Singapore Partnership and Cooperation Agreement
ETS	EU Emissions Trading System
ETUC	European Trade Union Confederation
EU	European Union
EU-CAAA	EU-Central American Association Agreement
EUCFR	European Union Charter of Fundamental Rights of the European Union
EUSFTA	Free Trade Agreement between the EU and Singapore
EVFTA	EU-Vietnam Free Trade Agreement
FCCC	UN Framework Convention on Climate Change
FDI	Foreign Direct Investment
FIDH	International Federation for Human Rights
FPI	Foreign Portfolio Investment
FTA	Free Trade Agreement

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Court
GDP	Gross Domestic Product
GPA	WTO Agreement on Government Procurement
GSP	Generalized Scheme of Preferences
GSP+	GSP incentive scheme
HEC	École des Hautes Études Commerciales
HRC	UN Human Rights Committee
HRIA	Human Rights Impact Assessment
IA	Impact Assessment
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
IFC	International Finance Corporation
IIA	International Investment Agreement
ILC	International Labour Conference
ILO	International Labour Organization
ILS	International Labour Standards
IMF	International Monetary Fund
INTA	Committee on International Trade of the EU Parliament
IPA	Investment Protection Agreement
IR	International Relations
ISDS	Investment-State Dispute Settlement
ITLOS	International Tribunal for the Law of the Sea
ITM	Informal Technical Meetings
LABPTA	Labour Provisions in Trade Agreements
LDCs	Least Developed Countries
MFN	WTO Most Favoured Nation principle
MPE	Market Power Europe
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organization
NPE	Normative Power Europe
NYU	New York University
OAS	Organization of American State Charter
OCTs	Overseas Countries and Territories
OECD	Organization for Economic Cooperation and Development
OHCHR	UN High Commissioner for Human Rights
OJ	Official Journal
OSPAR	Convention for the Protection of the Marine Environment of the North-East
PCA	Partnership and Cooperation Agreement

PCIJ	Permanent Court of International Justice
PPM	Process and Production Method
RMG	Ready-made Garment Industry
RTA	Regional Trade Agreement
SALW	Small Arms and Light Weapons
SDG	Sustainable Development Goal
SFPA	Sustainable Fisheries Partnership Agreement
SIA	Sustainable Impact Assessment
TBR	EU Trade Barriers Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TGWA	EU Trade, Growth and World Affairs Strategy
TL	Treaty of Lisbon
TPC	Trade Policy Committee
TPEA	US Trade Preferences Extension Act
TPP	Trans-Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership between the EU and the USA
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USAID	US Agency for International Development
USJFTA	US-Jordan Free Trade Agreement
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WCL	World Confederation of Labour
WCO	World Customs Organization
WCED	World Commission Development on Environment and Development
WCSDG	World Commission on the Social Dimension of Globalization
WIPO	World Intellectual Property Organization
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

Chapter 1

The Promotion of Human Rights and International Labour Standards After Lisbon: An Introduction



Samantha Velluti

1.1 Background and Context

The book is the culmination of research spanning a period of four years during which the interconnectedness of the economy and the pace of change has increased at majestic levels with rising uncertainty, social concerns and new regulatory challenges for states and international organisations alike. The strong opposition across many European countries against the conclusion of so-called “mega-regional” trade agreements such as the Transatlantic Trade and Investment Partnership Agreement between the European Union (EU) and the United States of America (US), i.e. TTIP,¹ and the withdrawal of the United Kingdom from the EU—commonly known as “Brexit”—²represent a vivid manifestation of the kind of problems that the EU currently faces and the challenges that lie ahead, in-between change and continuity.³

Just as politics permeates every aspect of our lives, so too do human rights. There is no facet about life that is not framed in human rights terms or that does not have a human rights dimension or connotation. The level of protection and promotion of human rights thus denotes the level of acceptance of power: human rights as legitimating ideals of democracy still retain a powerful theoretical and ideational supremacy. It is for this reason that ‘human rights in modern international relations represent both the best and the worst of times.’⁴ Amid this climate of uncertainty

¹For detailed information, European Commission, ‘TTIP—News Archive’, Department for Trade (DG Trade), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>, accessed on 14 June 2020; for a critique of TTIP, see De Ville and Siles-Brügge (2017); specifically in relation to the implications of TTIP for labour rights and standards, Tyc (2017).

²The departure of the UK from the EU is referred to more commonly with the term of “Brexit” from the amalgamation of the words “British” or “Britain” and the word “exit”, see further Sect. 3.5.5 in Chap. 3 of this book.

³On the complexities of regulating in times of uncertainty in the EU context, see Larik (2013); specifically in relation to trade, Young (2017).

⁴Forsythe (2018), p. 4.

and difficult times, the long-term vision that emerges for human rights *lato sensu* is open-ended and depends on agency in context.⁵ From this perspective, the twenty-first century holds both dangers to, and promise for, human rights⁶ insofar as the future of human rights should not be considered as being predetermined by structural or systemic factors but is instead dependent on and determined by public choice, decisions of a given polity's institutions and bodies.

The incorporation of human rights into international law, via the adoption and ratification of treaties, is considered by many one of the most significant achievements of contemporary history. International human rights law is meant to provide individuals with invaluable protections. And yet, it is hard to refute the conclusion that governments world-wide continue to violate human rights with impunity. Why do more than 150 states (out of 193 that are members of the United Nations (UN), including liberal democracies) still engage in torture? Why does child labour continue to exist in so many countries? Why are millions of people still forced against their will to work? Why does slavery continue to plague most modern economies? Violent suppression of peaceful demonstrations and violations of other fundamental civil, political and internationally recognised labour rights also remain widespread across the globe. The traditional champions of human rights, such as Europe, have floundered amid ongoing economic downturns or slow growth. This state of affairs is not new, nor the recognition that individualist and abstract rights-based formulations of justice are intrinsically problematic and cannot fully capture the multi-faceted forms of human rights breaches taking place in this globalising world.⁷ It is evident that ratification of treaties is not the answer, but rather their (effective) enforcement.

Linked to this first set of challenges concerning solely human rights, is the even more vexing question about their interaction with trade. Market regulation has become conspicuously contentious. Lamy -former Director-General of the World Trade Organisation (WTO)—once famously said that trade is often depicted as a villain, 'a symbol of mercantilism, capitalism, the tool through which powerful multinational corporations impose their law over human beings, impairing their economic, social and cultural rights.'⁸ Similarly, trade experts and proponents of globalisation often dismiss the human rights impact of trade.⁹ This "mutual ignorance" continues to permeate the interaction between human rights and trade to this day, and even more so in the case of social trade. Any attempt at establishing a fruitful relationship between non-trade values and trade is mired in tension and reciprocal suspicion.

The book is situated within this overarching "mutual misunderstanding" and looks at the difficult conceptual problem concerning the relationship between human rights and international labour standards, and trade in EU external (trade) relations. Here, the intended aim is to help diminish this mutual ignorance. To this end, it examines the EU's role in strengthening and promoting the human rights and social dimension

⁵Ibid., at p. 7.

⁶Ibid.

⁷For an excellent critique from the perspective of justice, see Kochenov et al. (2017).

⁸Lamy (2010).

⁹Stiglitz (2002), at p. 5.

of globalisation, identifying its limitations and suggesting ways of overcoming them. Linked to this, it critically evaluates the way the EU has been steadily positioning itself as a key international player in the attempt to improve global governance, through increased cooperation with other international organisations. In this context, as the book will go on to show, the EU not only exports its own norms and policies, uploading its internal *acquis* to the international sphere, but it also employs its various instruments—whether unilateral, bilateral, regional or multilateral- to support the adoption and implementation of international law. Cremona sums it up neatly in saying that, ‘the EU maintains a complex web of relations founded on and operating within international law, and these relations mediate between EU law and third countries and international organisations.’¹⁰

For these reasons, the increased role of the EU as a global actor in the promotion of human rights in its external (trade) relations provides a focal point of analysis not only for EU and International Relations (IR) scholars but also for International and human rights lawyers. Within the copious literature on the international role of the EU¹¹ it is possible to find learned assessments with rather opposite but equally persuasive conclusions about its place in the world.

1.2 Aims and Significance of the Book

1.2.1 Aims

Following the 2009 Treaty of Lisbon (TL)¹² reforms, the EU’s Common Commercial Policy (CCP) is explicitly included as one of the six exclusive competences of the Union and the European Parliament has been given a stronger role in relation to the EU’s international agreements. Moreover, the TL has introduced two new Titles (Title V TEU, and Part Five, Title 1 TFEU) which aim at ensuring, among others, more consistency in EU external action. Significantly, the respect for the rule of law, protection of human rights, and the strict observance and development of international law (including respect for the principles of the UN Charter)¹³ have now been included among the EU external action’s overall objectives and mission statement.¹⁴ The changes introduced by the TL confirm, therefore, that the EU intends to have a significant role outside its territory, not only in relation to the external dimension of its internal market, but also in relation to normative objectives of global justice, such as human rights.

¹⁰Cremona (2019), at p. 64.

¹¹Chapter 2 of the book offers a detailed literature review of the EU’s role as a global actor.

¹²Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

¹³United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.un.org/en/sections/un-charter/un-charter-full-text/>, accessed on 20 February 2020.

¹⁴Articles 3(5) TEU and 21 TEU.

To put it differently, according to its new mandate post Lisbon the EU is ‘morally, politically and legally held to pursue equality amongst wealthy and poorer nations, to support their development and ensure “fairness” between them,’¹⁵ in particular by fostering sustainable economic, social and environmental development. The EU is to be guided by the principles, which inspired its own creation and which it seeks to advance in the world. This mission, which could be equated to a kind of Kantian dogma for the Union’s external action, is in many respects the external projection of its internal reality: the EU’s single market and the European integration process have been progressively constructed through a variety of legal processes that were based on forms of multilateralism and the rule of law, as a means of responding to geo-political and socio-economic challenges faced by European states after the end of World War II.¹⁶

However, in relation to the CCP, it should be noted that while Article 207(1) TFEU requires the EU to take into consideration also the general objectives set out in Article 21 TEU in conducting its external trade policy, Article 206 TFEU—which outlines the specific trade policy objectives of the CCP—places a strong emphasis on liberalization.¹⁷ In addition, as the European Commission has itself long recognized,¹⁸ human rights and labour requirements, included in the EU’s various external trade instruments, are perceived by non-EU countries as protectionist and asymmetrical instruments that seemingly work to the advantage of developed countries. The role the EU has committed itself to in relation to the promotion of human rights, social rights and international labour standards in its international trade agreements, therefore, raises many complex questions in relation to competence, consistency/coherence and effectiveness as well as legitimacy of EU external action, all of which are the focus of analysis of this book.

To sum up, the changes introduced by the TL to the EU’s external competence combined with the legally binding status of the 2000 EU Charter of Fundamental Rights (EUCFR)¹⁹ forces European scholars and lawyers to rethink the role of the EU in global governance, the functioning of the EU system (including the new inter-institutional balance) and the way the promotion of human rights is being pursued through trade internationally.

The book is a timely contribution to the fervent debate about the role of the EU as a global trade and human rights actor and follows an already distinguished body of work on EU human rights conditionality,²⁰ including the trade-labour linkage,²¹ as well as the nature of the EU’s human rights obligations when it acts beyond its

¹⁵Van Vooren et al. (2013), p. 2.

¹⁶Ibid.

¹⁷Article 206 TFEU provides that the Union shall contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

¹⁸European Commission (2004).

¹⁹Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

²⁰E.g. Fierro (2002), Bartels (2005).

²¹E.g. Addo (2015), Orbie and Tortell (2011).

borders.²² The book shows that the EU human rights framework post Lisbon can be operationalized within the realm of the EU external relations regime and specifically in EU external trade policy, in spite of concrete legal (and political) limitations. In this context, the book suggests some proposals for reform to strengthen the EU's human rights obligations in its external trade relations and offers some points for further reflection.

The book addresses a further set of related questions and associated aims.

- (i) the definition of adequate strategies to reconcile its internal tensions which manifest themselves most visibly in the gap or mismatch between what the EU purports itself to be, namely its carefully construed image and identity of an organization with a clearly identifiable and enforceable common set of European values, principles and human rights and its practices—in both its internal and external spheres of action—which seem to suggest a different reality;
- (ii) the development of credible and valuable linkages between trade and human/social rights (for example, defining acceptable conditionalities which are not considered discriminatory or protectionist in nature), thus ensuring a system of international trade which genuinely promotes more equitable global trade and sustainability, is founded on discourses of social responsibility and justice and is no longer limited to the pursuit of free trade and open market economies.

1.2.2 *Significance*

The book provides new insights into the promotion and protection of human rights and international labour standards in the EU's external trade relations, building on and stimulating further the already well-engaged scientific dialogue on the nexus between the EU, human rights, labour and trade, i.e. EU human rights and social conditionality. In particular, it provides the basis for developing a new analytical lens for better understanding the role of the EU in promoting human rights and international labour standards in global trade and for critically examining the extent to which and how normative considerations have actually influenced the adoption of EU legal instruments and policy decisions. Its findings seek to act as a prelude to considering how change might be effected and, in particular, they aim at helping to identify criteria and assessment standards that make it possible to qualify, substantiate or reject the claim that the EU is a normative and ethical power.

To recap, the significance of the intended book lies chiefly in subjecting the theoretical assumptions of the EU's role as a global actor to further interrogation in order to assess the legal, political and economic rationales underpinning the role of the EU in promoting human rights and international labour standards in its external trade relations and, more broadly, to evaluate the purported role of the EU as a normative and ethical power. The analysis carried out throughout the book uncovers the extent

²²E.g. Bartels (2015), Velluti and Tzevelekos (2018).

to which the EU shapes and influences the evolving legal processes, principles, values and institutions of global governance in order to effectively promote the protection of human rights.

1.3 Structure, Methods and Methodology of the Book

1.3.1 Research Methodology and Methods

The fuzziness of the EU's nature, which eschews clear-cut categorisations, requires an overarching research approach that is distinctively interdisciplinary, using insights from political science, IR and law. The book is essentially a legal study blended with a contextual approach, which also embraces social, political and economic analyses. The multi-disciplinary perspective combined with a holistic and explorative analytical approach provides a fresh in-depth examination of the role of the EU as a global player in human rights. The various theoretical and analytical approaches which make up the bulk of the book's overall methodology are presented in key individual chapters, where required for analytical purposes.

This study has relied on a series of documents, papers and reports. First, official documentation of the EU Institutions such as Protocols annexed to the EU Treaties, Presidency Conclusions of the European Council, Communications, Green and White Papers of the Commission, Decisions, Directives, Recommendations and Resolutions of the Council of Ministers and European Parliament, working papers and reports, as well as the decisions of the General Court and the Court of Justice of the EU (CJEU). The investigation also extended to the examination of documents of the International Labour Organisation (ILO) such as Global reports, Working Papers and Meeting documents, the World Trade Organisation (WTO) such as WTO agreements, dispute settlement reports and related documents, WTO selected studies, reviews and profiles and other international organisations. With regard to human rights, some of the chapters of the book also provide coverage of the judgments of the European Court of Human Rights (ECtHR), the Human Rights Committee (HRC), the Inter-American Court of Human Rights (IACHR) and the International Court of Justice (ICJ). Lastly, the book relied on an array of materials that can be categorized as soft law, which has contributed to the development of key arguments or recommendations.

1.3.2 Structure of the Book

As Williams aptly puts it: 'half a century after the EU was formed there is still doubt and angst about the nature of its constitution. We are perhaps no nearer a clear understanding of what the EU is for or the values that govern its development and practice

than we were in 1957.²³ To this day, the EU still has an “uncertain soul”,²⁴ which remains a conundrum for all EU scholars. The opening chapter (Chap. 2) thus examines selected IR literature on the EU’s active engagement with the international legal order, namely, the role, place and position of the EU within the international legal order and how the EU is also (re-)shaping it. While the analysis carried out is intentionally descriptive it serves an important purpose to the research aims of the book as it helps to unpack the reasons for the uneven and incoherent promotion of human rights (including social rights) and labour standards. In so doing, it helps to fathom the different, even conflicting objectives that said promotion is said to serve. In this context the study also looks at the EU’s “deep trade agenda” and how the CCP in many ways represents the move at international level towards so-called “managed globalization”. The main argument put forward is to develop and apply a revisited notion of Normative Power Europe (NPE) to the EU and its external action, which departs from a dichotomic approach towards the relationship between values and interests.

Chapter 3 provides a detailed analysis of the legal framework of the CCP in the light of the constitutional, institutional and substantive changes introduced by the TL, which are particularly important for the conclusion of the EU’s international trade agreements and its unilateral trade arrangements. The main purpose of this chapter is to shed light on the significance of these changes with particular reference to the complex question of EU competence in the field of the CCP. In so doing, it takes into account other salient reforms at global, European and domestic levels which impact directly on the further development of the CCP. The analysis shows how the TL changes reflect a broader conceptualization of trade and constitute a response to the challenges of the evolving international trading system and globalization. Particular attention is paid to the effects that Brexit will have on the conclusion of the EU’s international trade agreements as well as the increased powers of the European Parliament (EP), its democratizing function in the context of the CCP and the growing importance of the role of national parliaments, *qua vox populi*, in the negotiation and ratification of international trade agreements.

Chapter 4 offers a detailed account of the EU’s political conditionality, which is used to promote non-trade values encompassing the EU’s human rights conditionality, and to be distinguished from the narrower form of economic conditionality. The analysis covers its origins and the models used for the human rights clause in EU bilateral agreements as well as its underpinning rationales. In this context, the chapter provides a thorough study of positive and negative conditionality and it identifies the problems of establishing effective monitoring mechanisms. Significantly, the analysis considers the lawfulness of EU political conditionality in accordance with both the Union’s internal rules and international law. The examination draws on a series of regional and bilateral trade agreements as well as unilateral trade arrangements to illustrate how EU practice includes both positive and negative conditionality. Ultimately, the chapter shows how EU political conditionality is the litmus test for EU external action, straddling between *realpolitik* and its normative aspirations.

²³Williams (2010), at p. 1.

²⁴Ibid.

Chapter 5 examines in detail the trade-labour linkage and starts by looking at its foundations and history. It then assesses the EU's increased practice of promoting social rights and international labour standards in its external trade relations, unilaterally through the Generalised System of Preferences (GSP; and largely under its incentive scheme, known as the GSP+), and at regional and bilateral levels via international agreements, which encompass reciprocal or non-reciprocal preferential trade links with third countries. In this context, the chapter unpacks and addresses the tensions in and limitations of the discourse and practice of the EU's promotion of social rights in its external trade relations. It concludes by putting forward recommendations to strengthen the effectiveness of the operationalization of EU social conditionality on the basis of the capabilities approach.²⁵

Chapter 6 shifts the focus of analysis to the nature of the EU's human rights obligations in its external trade relations after Lisbon, particularly following the EUCFR's legally binding status. It specifically addresses the difficult question of whether the EU's obligations abroad can be categorized as extraterritorial. The chapter thus starts by providing an account of the phenomenon of extraterritorial jurisdiction by reference to the case law of the ECtHR. It then outlines the jurisdictional model embraced in the chapter and explains why it is an apposite lens for the uniqueness of the EU legal system. The analysis also includes key judgments of the EU Courts, where the legality of EU measures has been called into question by reference to fundamental human rights. Two arguments are presented in this chapter: first, an argument in favour of applying a narrow reading of the duty of due diligence to the EU with a concomitant duty to carry out *ex ante* human rights impact assessment of trade agreements together with *ex post* evaluation of the former's compliance with human rights and, second, a revised notion of the principle of implied powers in the field of human rights so as to better equip the EU with the required competence and instruments to act.

Chapter 7, the concluding chapter of the book, draws together the most salient points made throughout the book and presents some tentative recommendations for future research that address the main limitations of EU conditionality in its external trade relations.

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²⁵Sen (1999), Nussbaum (2011); for a detailed account of the capabilities approach in relation to labour law, see Langille (2019).

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Chapter 2

The EU as a Global Actor in an “Inter-Polar” World



Samantha Velluti

2.1 Introduction: Theoretical Understandings of the Nature, Powers and Role of the EU in the World

‘Our world today is more connected, contested and complex. The European Union needs to take a fresh look at this uncertain environment, in which opportunities and challenges coexist. This will help promote the European Union’s interests globally, and ensure our security at home and abroad.’

Federica Mogherini,

Former EU High Representative for Foreign Affairs and Security Policy

Brussels, June 2016

The complex dynamics of a constantly evolving world require an ongoing investigation into the EU’s (self-)image, the way it projects its identity and it operates globally. This study is particularly pertinent in the twenty-first century that is taking shape, ‘accommodating the rising powers and sensitive to the needs of the global south.’¹

It draws on Grevi’s notion of “inter-polar world”.² The chapter examines selected literature on the EU’s active engagement with the international (legal) order, namely, the role, place and position of the EU within the international (legal) order and how the EU is also (re-)shaping it.³ This chapter, belated as it is in entering the debate on the EU’s actorness in international relations (IR) and role in global governance,⁴

¹Howorth (2010), pp. 455–474.

²Grevi (2009); in a constantly evolving world multi-polarity on its own no longer captures the complex challenges faced by “poles” or “powers” due to the interconnectedness of many policy areas and the interdependence and need for cooperation that it creates among “poles” or “powers”.

³Kochenov and Amtenbrink (2013), pp. 1–18; Cremona (2008), pp. 1–9, at p. 9; Larik (2013), pp. 62–86.

⁴The following broad working definition of global governance is employed in the present chapter: ‘The complex of formal and informal institutions, mechanisms, relationships and processes between

has the benefit of some hindsight.⁵ The distinctive nature of EU external relations and action has become a “familiar question”,⁶ a staple for both EU lawyers and IR scholars. The chapter’s intended aim is not to coin and add a new theorization of the EU’s role as a global actor to the existing literature. The heterogeneity of the EU’s composite nation makes it difficult to elaborate any one size fits all grand theory or single ideal-type of the EU that can provide the basis for an effective, coherent, value-based system of global governance. As Cremona posits, ‘the EU should be seen not as a static model, but as a dynamic experiment, a process or a laboratory in which new methods of integration, multi-level and multi-centred governance and new constitutionalism are being worked on and bargained, and are evolving.’⁷ Moreover, the various roles of the EU are the result of a balance or tension between different interests, agendas and players within the Union, namely the member states, the EU institutions and non-state actors, all constituting a bundle of interests and values. Even though it is possible to envisage a Union identity behind the multi-faceted roles that the EU has it is necessary to have a more considered integration of its different roles to meet the consistency and coherence of external relations required by the Treaties.⁸

While the analysis carried out is intentionally descriptive it serves an important purpose to the research aims of the book as it helps to unpack the reasons for the uneven and incoherent promotion of human rights (including social rights) and labour standards. In so doing, it helps to fathom the different, even conflicting objectives that this promotion is said to serve. Equally, it eschews ‘any claim that the EU is in some way more virtuous than other international actors, or that it is motivated mainly by values, principles or norms, rather than by its own interests.’⁹ A more realistic account is one that accepts and is built on the two-fold premise that the EU is not to be understood as replacing states, but rather ‘as a means to better manage their interdependence’ and that we live in a “partially globalized world”.¹⁰ In consequence, within governance institutions and international organisations values, principles and norms, namely normative standards, necessarily co-exist with self-interest.¹¹ The EU is no exception. At the same time, it should be recalled that the EU’s Common Commercial Policy (CCP), by relying increasingly on “governance through trade agreements”¹² with non-EU countries, needs to deal with two sets of inter-related questions: on the one hand, “functional necessities of international markets” and,

and among states, markets, citizens and organizations—both intergovernmental and nongovernmental—through which collective interests are articulated, rights and obligations are established, and differences are mediated’; see Thakur and Langenhove (2006), pp. 233–240, at 233.

⁵I have borrowed this expression from Hatzopoulos, see Hatzopoulos (2007), pp. 309–342.

⁶Búrca (2013), pp. 39–58, at p. 39.

⁷Cremona (2004), pp. 553–573, at 554.

⁸Ibid., p. 565.

⁹de Búrca, above no. 6, at p. 39.

¹⁰Keohane (2001), pp. 1–13.

¹¹Ibid.

¹²Bohnenberger and Joerges (2016), pp. 1–38, at 3.

on the other hand, “normative concerns prevailing in the participating polities” in order to create a transnational ordering of markets.¹³ As Polanyi explains, economies are socially embedded and reflect the social concerns and political preferences of a polity.¹⁴ Accordingly, the functioning of an economy cannot be fully understood without taking into account the social context in which it is embedded. Hence, the EU and the transnational ordering of markets that derives from its international trade agreements, need to be understood as parts of larger, historically derived, institutional, or social structures. It follows that accepted normative concerns, that is, the belief that they ought to be followed, need to be part of the EU’s external trade policy. The institutional and legal framework arising from the EU’s trade agreements, therefore, must be able to subsume liberalisation and normative objectives in which the economies of the participating parties are embedded. However, tensions inevitably arise between the functional necessities of the markets and the normative concerns of the parties that participate.

Additionally, as will be shown throughout the book, the EU pursues different and often conflicting goals, objectives and agendas,¹⁵ such as for example a neoliberal agenda versus a human rights agenda, whose contradictions, in turn, are reflected in the adoption of conflicting measures: either promoting or furthering liberalisation or, on the other hand, regulating or demoting it. The existence of these opposing goals can be seen also in relation to the underlying reasons for the EU’s increasing interest in becoming a key player on the international plane. To some extent the EU’s motivations are hegemonic and protectionist, i.e. it seeks to exert political and economic domination over other non-EU countries because the failure to export the standards developed within its internal market to others outside the EU would put European firms at a competitive disadvantage. Moreover, by acting as a global regulator, the EU can defend its social preferences without compromising the competitiveness of its industries. At the same time, however, the EU’s externalization of its regulatory preferences is driven by altruistic purposes reflecting the legal traditions of those member states with strong constitutional safeguards for the protection of human rights. As it pursues conflicting objectives, oscillating between supranationalism and intergovernmentalism, the EU is a complex and contradictory actor whose “transformative power” remains limited.¹⁶ As Meunier and Nicolaidis put it, the EU is a “conflicted trade power”¹⁷ rather than ‘an idealized actor whose preference for norms is seen as a guarantee of its good faith and disinterestedness.’¹⁸

In this context, the 2009 Treaty of Lisbon (TL)¹⁹ reform constitutes an attempt to address the above complexities by simplifying the structure of the EU and the way it

¹³Ibid, p. 9.

¹⁴Polanyi (1957), pp. 243–270; see also Polanyi (1944).

¹⁵E.g. Borzel and Hullen (2014), pp. 1033–1049.

¹⁶On the EU’s transformative power, see García (2015), pp. 621–640.

¹⁷Meunier and Nicolaidis (2006), 906–925.

¹⁸Laïdi (2009), pp. 1–20, at p. 18.

¹⁹Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

operates. The most significant change has been the merging of the EU and the European Community (EC) into one legal entity, that is the EU, which now has a single legal personality.²⁰ The changes made to the EU and its external action's legal and institutional framework aim at guaranteeing more clarity, coherence and democracy. It should be noted that, while important, these changes have not introduced a new legal basis for EU external relations rather they have amended the Treaties already in force, reinforcing the EU's external (commercial) competence.²¹ In this regard, the expansion of exclusive competence in the field of trade and investment policies is decisive for the strengthening of the role of the EU as a global actor.²² In particular, clearer competences and the broadening of the scope of the CCP,²³ are meant to ensure a more modernised trade policy, allowing the EU to become a stronger and more effective global player in the pursuit of its interests.²⁴ As will be shown, this is yet to be fully achieved.

The TL also injected a normative dimension into the EU's international relations thus advancing values, principles and objectives that are emphatically presented as "European" and seeking their universal application via explicit reference to the respect for international law.²⁵ Moreover, the objective of consistency has also been included in the CCP with the obligation for the Union to conduct its policy within the broader context of the principles and objectives of the Union's external action.²⁶ Overall, the TL 'signifies an *evolutionary* but not a *revolutionary* step'²⁷ in the development of the EU project.

Nevertheless, these changes have reignited debates on certain aspects of EU external relations law and practice, such as its constitutional nature, the competence of the EU to act on the international plane, the legal status and effect of decisions of international organizations in the EU legal order and their communitarization through the jurisprudence of the Court of Justice of the European Union (CJEU)²⁸ as well as the overall consistency and coherence of EU external action.²⁹ As pointed

²⁰ Article 47 TEU.

²¹ Article 3(1)e TFEU and Articles 206 and 207 TFEU and 218 TFEU (in relation to the increased powers of the European Parliament (EP) in the CCP); for critical commentary, see Dimopoulos (2008), pp. 101–129; Dimopoulos (2010), pp. 153–170; Müller-Graff (2008), pp. 188–291; Hoffmeister (2011), pp. 83–95; Puig and Al-Haddab (2011), pp. 289–301.

²² Wessel and Takács (2017), pp.103–117, 106.

²³ Woolcock (2008), pp. 1–6, at 2.

²⁴ Hoffmeister, above no. 20, at p. 95. However, the phenomenon of "mixed agreements", examined in Chapter 3 of the book, constitutes a challenge to exclusivity.

²⁵ Articles 3(5) and 21(1) TEU.

²⁶ Articles 207(1) TFEU; 3(5) TEU.

²⁷ Crowe (2008), pp. 163–208. Emphasis in italics added by the authors.

²⁸ Lavranos (2004); Kuijper and Bronckers (2005), pp. 1313–1355; Búrca and Scott (2001), pp. 1–30.

²⁹ European Commission, Communication on *Europe in the World—Some Practical Proposals for Greater Coherence, Effectiveness and Visibility* COM (2006) 278 final; Herlin-Karnell and Konstantinides (2012/13), pp. 139–167; Hillion (2008), pp. 10–36; Portela and Raube (eds) (2008), pp. 1–10, and specifically on the changes made by the TL, see Cremona (2008), pp. 11–36; in relation to the question of consistency in the EU's CCP, see Müller-Graff, above no. 20, at p. 192.