

## *Chapter Seven*

# **EU Values in EU External Relations: An Introduction to Current Legal Instruments**

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Values have always lain at the heart of EU integration among the EU Member States, and international norms have informed these values while the EU has also been a driver of values at international level. Political momentum has been gathering at EU level, driven by the EU and the Member States' concerns to reject protectionism in order to harness globalisation, while at the same time to preserve the successes of their integration over the last 60 years, spanning their own values at home as well as in their actions abroad. Mirroring the trust, engagement and integration that it has achieved through pursuing values over its lifetime, the EU is projecting values out into the world as integral to its global interests. This reveals the lessons in multilateral provision for institutions, procedures, rules and standards. This necessarily affects relations between Brazil and the EU, whether in the context of bilateral Brazil-EU relations or in the context of EU-MERCOSUL relations, or in international fora. The EU's values-based agenda in its external relations highlights the challenges of protecting democracies and national sovereignty, and public policy-making in a globalising world.

The EU's Treaty of Lisbon in 2009 clarified definitions of values in the EU's external actions. It also increased the capacity of the EU Member States for common international actions at EU level, in terms of the legal basis and financing for external EU actions and the institutional arrangements to implement them, notably with the creation of the European Union's External Action Service (EEAS). Currently, the values agenda of the EU in relations with third countries are progressively being worked out from bilateral—including at local levels—to multilateral level, including rules and institutions, including trade and investment treaties.

The evolution of the instruments agreed at EU level to support this new external relations agenda has been gathering momentum recently, notably since the European Union's 2016 Global Strategy on Foreign and Security Policy (EUGS), and its revision in 2017, which has its purpose to enhance the consistency of the EU's External Action. The 2017 EU GS includes

building resilience at home and in third countries, and it marks a shift away from crisis containment towards “a more structural, long-term non-linear approach to vulnerabilities, with an emphasis on anticipation, prevention and preparedness”.<sup>1</sup> It is rooted in the ten priorities fixed by European Commission President Jean Claude Juncker for his term in office (2014–2018), which included the priority to make the European Union a stronger global actor.<sup>2</sup> Juncker’s programme was more than a stock-taking of the economic and political crisis from which the EU was surfacing. It addressed the fact that the EU was ill-prepared for the global challenges ahead. It was already aiming to restore public confidence among EU citizens in the democratic legitimacy of the EU, including in the global arena. The upgrading of the role of the High Representative,<sup>3</sup> In terms of the context of the EU GS was published hot on the heels of the “Brexit” vote of the United Kingdom’s population and came at the time of rising populism and euroscepticism within the European Union, including societal resistance to international trade and investment agreements under negotiation at that time on ground of the threats they posed to democratic values, national sovereignty and the public policy space, among other things.

The “undivided and indivisible” political commitment of the EU Member States to the external agenda in the form of the *Rome Declaration* 2017<sup>4</sup>—which marked the 60<sup>th</sup> anniversary of the European Union at a time when the *White Paper on the Future of Europe* laid bare the indecision on their own internal agenda—is noteworthy. The political demand by the Heads of State and Government at European Council level in October 2017,<sup>5</sup> instructing follow up action on the Global Strategy to be taken by the relevant EU institutions, further underlines that commitment as does the review of a range of internal policy areas in order to reviewing

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1. See European Commission Joint Communication *A Strategic Approach to Resilience in the EU’s External Action*, JOIN (2017) 21 final of 7 June 2017
  2. For Juncker’s 2014 Political Guidelines of 15 July 2018, go to [https://ec.europa.eu/commission/publications/president-junckers-political-guidelines\\_en](https://ec.europa.eu/commission/publications/president-junckers-political-guidelines_en), last visited on 28 March 2018.
  3. See Juncker’s political, 14 July priorities 2014, *Ibid.*, at Priority 9.
  4. See, *Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission*, Rome, 25 March 2017, to be found at <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/>, last visited on 27 February 2018.
  5. See “concrete policy initiatives and action, focused on the five priorities for the EU’s external action identified in the strategy: strengthening security and defence; investing in the resilience of states and societies to our East and South; developing an integrated approach to conflicts and crises; promoting and supporting cooperative regional orders; and reinforcing a global governance based on international law, including the principles of the UN Charter, and the Helsinki Final Act”.

pre-existing strategies on climate diplomacy, energy diplomacy, economic diplomacy and cultural diplomacy to bring them into line with the EU GS. The December 2017 Joint Declaration of EP, Commission and Council of Ministers promises faster decision-making on priority actions in the external agenda.<sup>6</sup>

Today the Union's current values-based external agenda is taking on increasingly coherent and concrete form, pulling together the Union's international commitments as well as the respect of EU level labour, environment and human rights standards. Significantly, the EU Commission's commitment to transparency in its conducting of EU international negotiations on trade and investment has taken on a whole new dimension. This throws into stark contrast the lesions in governance at multilateral level even where global consensus on values are clear in what is an increasingly complex and contested global order. The policy landscape has been speeding up in the last 3 years in measures to be agreed by the Member States at EU level, and in all EU external relations with third countries including in trade and investment, and the EU Global Strategy for Foreign and Security Policy of 2016, revised in 2017,<sup>7</sup> and the Juncker Package 2017.<sup>8</sup> The Union's concern to engage with its own citizens

This contribution begins by listing the primary law EU Treaty provisions providing the legal basis for values in EU external actions, and then lists the policy instruments that provide the foundations for how the EU and its Member States are working out these values in the international arena today. Here, a subsection is dedicated to transparency in international negotiations, which has taken on new meaning recently and which will inevitably impact on future EU-Brazil relations. This contribution then briefly explores the structure and content of the relations between Brazil and the EU recent evolutions in the current EU values-based approach in the context of the Trade and Sustainability Chapter in the pending (not yet concluded) Association Agreement between the EU and MERCOSUL.

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6. See *Official Journal* 2017 C446/1.

7. See European Commission *Report on the Implementation of the Trade Policy Strategy Trade for [of 2015] Delivering a Progressive Trade Policy to Harness Globalisation*, COM(2017) 491 of 13 September 2017.

8. To consult the Package, of 14 September 2017, and ongoing implementation of its deliverables, go to <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1711>, last visited on 18 May 2018.

## Primary law and institutional foundations

The EU's need to upgrade its external powers and actions was obvious already at the turn of the Century, and the European Convention (2002) gives useful understanding of the evolution, rationale and current directions of the EU values agenda today, including substantive content as well as institutional arrangements<sup>9</sup>. The need for reforms were clear as much because of the complexity in the interplay between the Member States and the European Institutions as in their interactions with third countries adhering to different values systems—this in addition to the limitations and inadequacies of international institutions, rules and procedures supporting international values creation, implementation and enforcement.

Already the Mandate for Working Group VII of the Praesidium on “External Action” recognised the globalisation challenges facing the EU and expressed that “only a strong and united Union can protect its political and economic interests and defend the values, which are at the heart of the Union itself”,<sup>10</sup> setting broad parameters to the scope of options for the revision of the primary Treaties on how to define and formulate the Union's common actions, the decision-making processes and coherence between instruments of external actions, and how to improve the effectiveness of the EU on the international stage including the financing of such actions. It was also expressly mandated to explore reforms of the Union's external representation at international level and improving the synergy between diplomatic activity of the Union across the full breadth of concerned fields of policy activity as well as with the Member States. The obvious influence of the work of the Convention can be seen in the drafting of the eventual Treaty of Lisbon, both in the working out of the EU's external values agenda and in the introduction of the European External Action Service (EEAS) for the purposes of coherence and rationalisation of the EU external representation, building up the clarity and continuity in EU representation in third countries in particular, all in the aim of enhancing the Union's impact abroad.

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9. Source documentation relating to the Convention on the Future of the European Union can be found at [http://european-convention.europa.eu/EN/doc\\_register/doc\\_register9713.html?lang=EN&Content=WGVII](http://european-convention.europa.eu/EN/doc_register/doc_register9713.html?lang=EN&Content=WGVII), last visited on 16 May 2018.

10. The mandate for the working group on External Action which was drafted by the Praesidium, can be found at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00252.en02.pdf>, last visited on 16 May 2018.

The reasoning of the Final Report<sup>11</sup> of Working Group VII is reflected in the final drafting of the Treaty of Lisbon in the clarifying and consolidation of the principles and objectives of all EU external actions as well as the strategies to pursue them in international relations, and how to implement them in practice.

In terms of clarity and consolidation of the principles and objectives, certain core primary law Treaty provisions emanating from the ToL must be mentioned. Article 2 of the Treaty on European Union (TEU) declares that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 TEU expressly provides for the objectives of all EU external actions to promote peace, ensure the security of its citizens, and to promote its values and protect its interests in the world. Further, Article 21 TEU adds guidance on the principles and strategies for external actions:

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

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

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

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11. See CONV 459/02 of 16 December 2002, To be found at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00459.en02.pdf>, last visited on 16 May 2018,

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies."

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect."

In terms of reforms introduced by the ToL to the legal bases for external actions—which establish whether the competence for EU action is shared or exclusive, or limited to co-operation, and relevant decision-making procedures—the Treaty on the Functioning of the European Union is the

reference point<sup>12</sup>. Various of the EU level actions will also have external dimensions<sup>13</sup> and will require co-ordination with the relevant EU services and instruments in the context of specific external actions. The extraterritorial effect of EU rules and regulations will also be relevant.

## The EEAS, the European Union Global Strategy and values instruments

Taking up the thread of the Final Report of Working Group VII (December 2002) above concerning the implementation of the new legal and institutional constellation, the creation of the EEAS is relevant. Led by Frederica Mogherini,<sup>14</sup> it aims at improving coherence and efficiency in the Union's external relations.<sup>15</sup> By holding the double-hat of High Representative for Foreign Affairs and Security Policy at the same time as being Vice-President of the European Commission, Mogherini and her services in Brussels and partner countries, institutionalise this process towards ever more practical means of effecting coherence and efficiency in the Union's external actions. Mogherini's appointment was accompanied by the "new way of working" heralded in 2014 by the then new Jean Claude Juncker European Commission, all in the aim of increasing the collaboration between different portfolios of different Commissioners on the EU's external relations.<sup>16</sup>

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12. For the decision-making procedures dedicated to external actions: Implementing measures of the common commercial policy are based on Article 207 paragraph 2, TFEU; Implementation of development cooperation policy are based on Article 209, paragraph 1, TFEU; Economic, financial and technical cooperation with third countries other than developing countries are based on Article 212, paragraph 2, TFEU, and; the general framework for humanitarian operations are based on Article 214, paragraph 3, TFEU.

13. For a full list of the legal bases in the TFEU, see the consolidated list provided by the European Commission on the Europa website of 17 December 2009, go to [http://ec.europa.eu/codecision/docs/legal\\_bases\\_en.pdf](http://ec.europa.eu/codecision/docs/legal_bases_en.pdf), last visited on 16 May 2018.

14. Appointed in November 2014.

15. For fuller information on the responsibilities involved, go to [https://ec.europa.eu/commission/commissioners/2014-2019/mogherini\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/mogherini_en), last visited on 16 May 2018.

16. For the Mission Letter of the President of the European Commission to High Representative of the Union for Foreign Policy and Security Policy/Vice-President of the European Commission of 1 November, go to [https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner\\_mission\\_letters/mogherini\\_en.pdf](https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_mission_letters/mogherini_en.pdf), last visited on 16 May 2018. At p. 3, it provides that "You will work closely with the other Vice-Presidents and, in your area of responsibility, guide the work of the Commissioners for European Neighbourhood Policy and Enlargement Negotiations; Trade; International Cooperation and Development; and Humanitarian Aid and Crisis Management. You will also be able to draw on the Commission's policy instruments and expertise in many areas where our international partners are keen to work with us. These include policies under the responsibilities of the Commissioners for Climate Action and Energy, Transport as

The policy landscape for EU external relations has been speeding up and filling out, including in terms of the form and content of the European Union's values in its international relations. From early days on in the discussions contemplating the European Convention, the need for treaty reform and innovative ways of engaging with a globalising world was laboured, particularly the pros and cons of protectionism on the trade and investment front. A new stage has been set, with new forms of implementation in place and based on the new ToL clarity on the Union's aim and objectives together with reformed legal bases for EU actions in the global arena. The 10 Juncker Priorities in 2014-2019 have made use of this new toolkit.

The 2016 *European Union Global Strategy* (EU GS) should also be read against this backdrop, and is an expression of the intention to ensure better coherence between foreign policy decisions on the one hand, and deployment of instruments in the field of external relations on the other hand:

Guided by the values on which it is founded, the EU is committed to a rules-based multilateral international order. The Union regards the respect for and promotion of international law - including the principles of the UN Charter—to be crucial for preserving peace, human rights, sustainable development and lasting access to the global commons. Multilateral organisations—in particular the United Nations—sit at the heart of this framework of international norms. They are providers of global governance as well as fora for the peaceful resolution of disputes and jointly tackling global challenges. To strengthen rather than just preserve the rules-based multilateral system, the European Union is committed to reform, transform, and further expand the existing system. The European Union leads by example with the implementation of new and reinvigoration of existing multilateral projects like the Paris Agreement, the Sustainable Development Goals, as well as the global effort on nuclear non-proliferation and disarmament. We will

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well as Migration and Home Affairs, which have a strong external dimension". See also Juncker's ten political priorities, 14 July 2014, at Priority 9 providing for upgrading the institutional role and support for the High Representative and her mission: the HR "will have to be strong and experienced player to combine national and European tools, and all the tools available in the Commission, in a more effective way than in the past. He or she must act in concert with our European Commissioners for Trade, Development and Humanitarian Aid as well as for Neighbourhood Policy. This will require the High Representative to more fully play his/her role within the College of Commissioners. To make this possible, I intend to entrust other external relations Commissioners with the task of deputising for the High Representative both within the work of the College and on the international stage".

seek to widen the reach of international norms and institutions. Not only is the EU committed to living up to its obligations under such regimes, rather it will strongly support expanding their membership, universalisation, full implementation, and enforcement<sup>17</sup>.

Regarding the trade and investment agreements subsequently negotiated by the EU, in the face of globalisation, objections from social actors and national parliaments have threaten to disable negotiations that were intended, ultimately, to secure the benefits of international trade<sup>18</sup>. Their objections centre on the increasing scope of these agreements and the encroachment into the policy space that this involves, including the threat to democratic decision making in all fields of society. The Juncker Priorities and measures implementing it are clearly motivated by the need to restore the public's support for the democratic legitimacy of the Union and furtherance of the Union's external agenda.

The firm commitment to resisting protectionism and harnessing globalisation under the Juncker Package of September 2017, can be seen in the consensual political support of the Member States and the European Parliament.<sup>19</sup> Contributing to this apparent shift has been the impact of the societal resistance and political struggles among national parliaments during the course of 2013 over the initiatives for a Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA), were very much values-based, and the lack of transparency of parties to international negotiations has been a core reason throughout. This resistance was threatening the future of the Union's trade and investment relations agenda. The accumulating internal crises at EU level have also been an undeniable and obvious contributing factor in a more strategic approach to anchoring values into EU external actions.

Already the formulation of the new agenda for trade and investment in the Commission Communication *Trade for All* (adopted in October 2015) was to hold out transparency, efficiency and values at its heart. In Com-

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17. See European Commission Communication *Shared Vision, Common Action: A Global Strategy for the European Union's Foreign and Security Policy*, of June 2016, to be found at file:///C:/Users/kirst/Downloads/eugs\_review\_web.pdf, last visited on 10 March 2018. See also European Commission Joint Communication *A Strategic Approach to Resilience in the EU's External Action*, JOIN (2017) 21 final of 7 June 2017.

18. See European Commission *Report on the Implementation of the Trade Policy Strategy Trade for [of 2015] Delivering a Progressive Trade Policy to Harness Globalisation*, OP. Cit. n. 10, and European Commission Reflection Paper for Harnessing Globalisation COM(2017) 240 of 10 May 2017.

19. *Op. Cit.* n. 9.

mission President Juncker's September 2017 State of the Union address,<sup>20</sup> values were brought to the top of the list in his speech. The resounding political support of the Member States for the external values agenda in the Rome Declaration of March 2017 was followed by increased financial support for the external ambitions. Also, recent reporting for 2018 on the implementation of Juncker's 10 priorities in the first three years, highlights that the number of initiatives issued under the global actor priority are the second highest on the list. Being a priority area for action, the 2016 inter-institutional agreement between the European Commission, European Parliament and European Council is clearly facilitating the streamlining of decision-making at EU level in order to push ahead with this priority<sup>21</sup>.

In recent years, the EU has been manifesting the objectives of Article 3 TEU in line with the principles and guiding strategies set out in Article 21 TEU, in increasingly concrete forms in its external relations, including by taking measures to give them effect at EU level. To this list of values must be added working conditions, food safety, public health, environmental protection and animal welfare<sup>22</sup>. In terms of labour standards, the EU is supporting collective bargaining systems under the International Labour Organisation (ILO) umbrella. Corporate social responsibility (CSR) and Responsible Business Conduct (RBC) is also expressly promoted, and the EU Member States are all active in the UN Global Compact on corporate social responsibility.<sup>23</sup> Multilateral Environment Agreements are central

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20. See European Commission President Jean-Claude Juncker's State of the Union Address 2017 of 13 September 2017, Brussels to be found at [http://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm), last visited on 28 March 2018.

21. *Op. Cit.* n. 9.

22. In its 2017 Communication, *Report on the Implementation of the Trade Policy Strategy Trade for All: Delivering a Progressive Trade Policy to Harness Globalisation*, the declared aim is to bring about a "trade policy that is effective, transparent and based on values is needed more than ever before. The fundamentals of the Trade for All strategy thus continue to guide the EU's approach: openness combined with a level playing field, high standards of labour, environmental, consumer and social protection combined with the right policies at home remains the most fitting way to make globalisation work for all Europeans. The EU is committed to a rules-based multilateral trading system that underpins our prosperity, and that is essential to making trade a positive force around the globe in line with the Sustainable Development Goals. The EU's policy response seeks out partners such as Canada, Japan, Mexico, MERCOSUL, Australia or New Zealand who want to team up in building open and progressive rules for the realities of 21st century trade". See Commission Communication COM(2017) 491 final, to be found at <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-491-F1-EN-MAIN-PART-1.PDF>, last visited on 10 March 2018.

23. See European Parliament *Resolution on EU-CELAC relations*, *Op. Cit.* n. 7. For the UN Global Compact on CSR for the Region of Europe, go to <https://www.unglobalcompact.org/engage-locally/europe>, last visited on 24 February 2018.

also, and in the broader sustainable development agenda, future EU efforts must “benefit prosperity, the planet and people around the world, especially in developing countries”<sup>24</sup> and expressly embrace those values underpinning the EU’s UN commitments on climate change and development, specifically the 2030 Agenda for Sustainable Development,<sup>25</sup> the 2008 Declaration on Social Justice for Fair Globalisation, the EU Consensus on Development of 8 June 2017,<sup>26</sup> as well as the Paris Climate Agreement,<sup>27</sup> and the 2016 UN New York Declaration for Refugees and Migrants.<sup>28</sup> Concerning the latter, the New York Declaration has set the signatories the task of “[achieving] a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees by adopting a global compact on refugees in 2018”.

### Transparency becomes a value in its own right

Transparency is a key characteristic of decision-making at EU level, especially since the time of the 1990s BSE crisis and the consequent crisis of trust in EU governance. The culture of transparency and access to information regarding EU policy and law making enables the trust building among the peoples of the 28 Member States and in their institutions. The reforms

24. See *Op. Cit.* n. 4.

25. See European Commission *Next Steps for Sustainable European Future* COM(2016) 739 of 22 November 2016, to be found at [https://ec.europa.eu/europeaid/sites/devco/files/communication-next-steps-sustainable-europe-20161122\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/communication-next-steps-sustainable-europe-20161122_en.pdf), last visited on 24 February 2018, at the section 2.3 *The European Union as a committed global partner to promote the 2030 Agenda*. For the European Parliament’s position on the future rolling out of this strategy, European Parliament resolution of 6 July 2017 on EU action for sustainability, go to <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0315+0+DOC+PDF+V0//EN>, last visited on 24 February 2018. See also EU Regulation (EU) 2017/1601 creating the EFSI Guarantee and the EFSI Guarantee Fund, *OJ* 2017 L 249/1–16.

26. See European Commission, *New European Consensus on Development, ‘Our world, our dignity, our future’*, to be found at [https://ec.europa.eu/europeaid/new-european-consensus-development-our-world-our-dignity-our-future\\_en](https://ec.europa.eu/europeaid/new-european-consensus-development-our-world-our-dignity-our-future_en), last visited on 24 February 2018. For the political support for the policy development of actions under this process, see European Parliament Resolution of 1 June 2017 *the new European Consensus on Development—Our World, Our Dignity, Our Future*, to be found at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0241>, last visited on 24 February 2018.

27. In force since 1 November 2016, see the EU’s implementation through the European Commission’s Directorate General for Climate Action, <https://www.unglobalcompact.org/engage-locally/europe>, last visited on 24 February 2018.

28. See at p. 12, to be found at <https://refugeesmigrants.un.org/declaration>, last visited on 29 March 2018.

that followed have been crucial to re-establishing consumer trust in the EU's agriculture and food sectors, and the governance tools developed for the entire food chain are shaping the EU's approach to its international negotiations. Progressive Treaty reforms to decision-making processes over the lifetime of the European Union have held the aim of democratic legitimacy at their core, including by giving the European Parliament increased influence. The role of the directly elected European Parliament in the scrutiny over EU decision-making processes has been pivotal in the subsequent reform of the EU institutions and their democratic accountability as well as in the shaping of future EU external relations. Moreover, the inclusion of a broad range of stakeholders in the formulation of EU policy from earliest stages, welcoming the lobbyists representing NGOs and civil society as well as industry, is intended to make laws that are fit for purpose and capable of achieving the goals sought.

The TTIP, CETA and Ukraine Agreements all attracted society and political resistance globally, despite the considerable benefits anticipated. Issues of national sovereignty and democratic values—especially how to guarantee a country's capacity over its own public policy making—lie at the heart of the EU's values agenda. See further for comments on the EU-MERCOSUL draft Association Agreements, comprising trade provisions alongside sustainable development provisions and providing for structures to broaden transparency and the participation of civil society in implementation of the agreement.

Today, transparency has become a value in its own right, a gateway for the scrutiny and democratic accountability that enables such broad stakeholder engagement in all good faith. Time will tell whether the unprecedented promotion of transparency indeed goes far enough, and the ultimate gauge will be ratification of concluded agreements by national legislatures not to mention the growth, or not, of petitions by social networks that are capable of mobilising mass societal resistance on a global scale.<sup>29</sup> In particular, the European Commission requests that the negotiating mandates for the Council representing the Member States in international negotiations, be published. Also, to include civil society and national parliaments fully throughout international negotiations obviously implies delays where

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29. See for example, the recent criticisms by the powerful civil society platform that represent of 170 NGOs worldwide, the Seattle to Brussels Network (S2B), general declaration of 1 February 2018. See also *Joint civil society statement on the EU-Japan free trade agreement* of March 21, 2017, Brussels/Tokyo to be found at <http://s2bnetwork.org/statement-eu-japan/>, last visited on 10 March 2018

such participation goes beyond information and seeks active collaboration in the negotiated outcomes.

Ongoing legal questions before the Court of Justice of the European Union<sup>30</sup> concerning the compatibility of the CETA with EU law will inevitably be significant. These development frame unavoidable legal and political challenges to negotiations for future trade and investment treaties in particular. Today therefore, in the context of its international negotiations, the EU is engaging in unprecedented transparency, beginning with the 2015 *Trade for All* Communication, which must be seen in the context of the unprecedented social resistance to the first progressive trade agreements to be negotiated on the basis of the Treaty of Lisbon provisions. While such agreements can take years to negotiate through the EU services, the final ratification remains to be secured before national parliaments. The very real threat of rejection of the final agreement<sup>31</sup> according to national constitutional arrangements has demanded new engagement mechanisms by the EU services. Misinformation and poor reporting and engagement on complex issues are made all the more sensitive by the lack of trust in experts or failure to give them enough time to explain. The Europa Portal reference library for ongoing and previous civil society dialogues relating to trade matters over the last fifteen years or more continues.<sup>32</sup>

The last dialogue in Brussels on the EU-MERCOSUL Agreement was on 20 March 2018. Additionally, as part of the initiatives under the Juncker Package, the new Advisory Group on EU Trade Agreements has been created, comprising:

30 organisations representing business, trade unions, consumers, the environment and other areas participated in the first meeting. The number of participants is intended to foster in-depth dialogue. The Com-

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30. See Belgian Ministry for Foreign Affairs, Foreign Trade and Development Co-operation, *Minister Reynders Submits Request for an Opinion on CETA*, of 6 September 2017, to be found at [https://diplomatie.belgium.be/en/newsroom/news/2017/minister\\_reynders\\_submits\\_request\\_opinion\\_ceta](https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta), last visited on 19 December 2017. For the form and content of the request, see *CETA : Belgian Request for an Opinion from the European Court of Justice*, to be found at [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf), undated, last visited on 19 December 2017.

31. Moreover, the apparently negative precedent the *Achmea* ruling sets in respect of the CETA ISDS provisions, implies that national parliaments of the EU Member States are effectively obliged to halt their ratification processes, see CJEU Case C-284/16.

32. See <http://trade.ec.europa.eu/civilsoc/>, last visited on 28 March 2018. Regular Civil Society Dialogue meetings with Commissioner Malmström and Director-General for Trade Jean-Luc Demarty, <http://trade.ec.europa.eu/civilsoc/index.cfm>, last visited on 24 February 2018.

mission's idea is to consult the group on new issues for trade negotiations and areas where it feels it needs a broader perspective. The Commission hopes the group's input will help it in its ongoing efforts to ensure that EU trade policy is state-of-the-art and progressive.<sup>33</sup>

## The context of EU-Brazil and EU-MERCOSUL relations

For the EU Brazil relationship, Brazil was the first Latin American state to recognise EEC in 1960 and set up a permanent representation in Brussels. The EU-Brazil Framework Co-operation Agreement of 1992 was followed by the 1995 EU-MERCOSUL Framework Co-operation Agreement, and then Agreement for Scientific & Technological Co-operation was signed in 2004. As concerns trade relations, the negotiations for the inter-regional agreement between the EU and MERCOSUL regional integrations has spanned 20 years and European Commission reporting has been anticipating their conclusion since December 2017. How the EU's values are addressed in the EU-MERCOSUL Association Agreement as it stands in draft form today, is addressed further on.

With the Lisbon Summit of 2007, the EU-Brazil Strategic Partnership was established. The Strategic Partnership, rather than specifying rights and obligations of the Parties that characterise international treaty relations, it provides for the forward planning of the joint activities according to declared mutual interests, including political and economic. Brazil's Strategic Partnership will continue after signature of the EU-MERCOSUL Association Agreement. The EU-Brazil Joint Action Plan of 2008 began the programming for joint actions under the Strategic Partnership. The 1992 Co-operation Treaty between the EU and Brazil remains valid, as do subsequent Treaties on scientific and technological co-operation, and the sharing of staff resources, as well as on fusion energy research<sup>34</sup>. The influence on the rationale of these initiatives directly reflects the wording of reflecting the EU Global Strategy and efforts on sustainable develop-

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33. See DG Trade website of 1 February 2018, to be found at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1791>, last visited on 3 February 2018.

34. See the 2004 Agreement for Scientific and Technological Co-operation and the 2017 Atlantic Research and Innovation Co-operation between the EU, Brazil and South Africa, involving the Strategic Partnership on Marine Research, and the Sharing of staff and resources and infrastructure since 24 January 2013, and also, the fusion Energy Research, 2009, in force since January 2013. See also the Research and Innovation Report on Brazil of 20 December 2016, - Report on the implementation of the strategy for international cooperation in research and innovation, COM(2014) 567 final, 11.

ment in particular. On the broader Latin American context, advances in the values-agenda for the EU-Community of Latin American and Caribbean States (CELAC) are tracked in the September 2017 Resolution of the European Parliament, giving insight into its preferences for future policy directions.<sup>35</sup> The EU-CELAC channels for political dialogue illustrate the common region-to-region values-approaches to the policy development, and pressing issues to be tackled in making progress.

To institutionalise the Strategic Partnership, a framework for governmental summits and ministerial meetings as well as collaboration between senior officials, is provided for according to a Joint Action Plans of 3 years duration. Both partners contribute financing based on flexible approaches and based on reciprocity, complementarity and mutual interests. The 2012 Multi-annual Joint Action Plan remains to be renewed, although activities reflecting the broader values of the relationship continue: examples include the renewal in March 2017<sup>36</sup> of the “sector dialogues” for constructive practical political and technical co-operation between EU and Brazilian institutions on a range of topics relating to environmental protection and sustainable development, human rights, energy efficiency, etc.<sup>37</sup> The EU budget contribution is EUR 5.7 million over 3 years for the current fourth phase of the sector dialogues. Recent project and open calls include human rights as well as cultural and economic diplomacy.<sup>38</sup> Reflecting Brazil’s emergence from developing country status and the reorientation of the financing instruments by the EU, this new round of funding contribution from the European Union is sourced in the Partnership Instrument. The provision of financing to additional projects on the ground in Brazil as part of the economic and cultural diplomacy efforts of the European Union, as well as projects to further the Union’s interests in facilitating trade and the

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35. See European Parliament *Resolution on EU political relations with Latin America* (2017/2027(INI)), of 13 September 2017, to be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0345+0+DOC+PDF+V0//EN>, last visited on 24 February 2018.

36. See <http://sectordialogues.org/en/noticia/brazil-and-european-union-launched-new-phase-international-cooperation>, last visited on 3 February 2018.

37. In the first 3 phases of the sector dialogues, 30 sector dialogues involved 228 projects involving 41 Brazilian and 27 EU institutions on topics including deforestation and biodiversity, marine research, sustainable production and consumption, climate change and energy efficiency, national disasters, genetic resources, preventing chemical accidents, etc. See the *Balanco geral dos oito anos de execucao do Projeto 2008 - 2016*, to be found at <http://sectordialogues.org/pt-br/resultado/publicacao-resultados-do-projeto-apoio-aos-dialogos-setoriais-uniao-europeia-brasil>, last visited on 28 March 2018.

38. For open calls, go to <http://sectordialogues.org/encontre-projetos.php?ida=5>, last visited on 28 March 2018.

EU-MERCOSUL agreement, are an important contribution to bottom-up approaches that ensure the ultimate success of the Union's international negotiations in their broadest sense.

Turning our focus to trade and investment provision, the EU-MERCOSUL Association Agreement will contain such a chapter, and while no draft has been made public yet, public consultations on draft clauses have been broad. This is more than a trade agreement, notably for its political dialogue dimension. Anticipated human rights provisions are well-advancing the EU-MERCOSUL inter-regional Framework Cooperation Agreement of 1999. This current draft EU-MERCOSUL "Association Agreement", as it stands so far, includes provision for a Free Trade Area alongside various institutional and economic and political provisions, is the most advanced form since the beginning of the negotiations some 20 years ago, so far reaching 1,300 pages in length. Without official projections on the eventual conclusion between the Parties to the agreement, the window of opportunity for reaching agreement will necessarily be affected by the political backdrop on both sides of the Atlantic. For the EU, political availability and resources at EU level will surely be affected in 2019 by the change of European Commission and by the European Parliamentary elections, in addition to other pressing challenges, notably the secession of the United Kingdom from the EU—Brexit—at the end of March 2019. However, the December 2017 Joint Declaration of European Parliament, the European Commission and the Council of Ministers has already proved effective in progressing with today's priorities for the current term of the European Commission.<sup>39</sup>

The broader legal and political trends in the trade and investment treaties signed by the EU since the Treaty of Lisbon, is pertinent the future of the EU-MERCOSUL relationship. The European Commission's 2017 blueprint for trade and Investment actions is set in the context of the values-based approach that motivates EU financing and co-operation in the EU's broader external relations. The European Union remains open to trade and investment, intentionally rejecting protectionism while building its values into all forms of its international relationships, starting with small constellations of willing partners where needs be. The innovation of the "Trade and Sustainable Development Chapter" in EU Free Trade

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39. For the Decisions, see *Official Journal* 2017 C446/1, reported on in the 2018 report on the 10 Priorities of the Juncker Commission, 2014-2019. ([http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614679/EPRS\\_IDA\(2018\)614679\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614679/EPRS_IDA(2018)614679_EN.pdf), last visited on 28 May 2018)

Agreements dates back only to 2011, with the entry into force of the EU-South Korea Free Trade Agreement (FTA).

Further shaping and reorientation of the institutional arrangements and provision for values in these chapters are now under reformulation at EU level. Implementation and enforcement of values through trade and investment treaties are increasingly becoming subject to improvements in the implementation of the social and environmental values, as well as in fleshing out provision for transparency and civil society inclusion in international negotiations and the implementation of trade and investment agreements. Only last year, in May 2017, five Member States' foreign affairs, trade and development Ministers—Belgium, Finland, Luxembourg, the Netherlands and Sweden—wrote<sup>40</sup> to the European Commissioner for Trade, Cecilia Malmström, providing suggestions on how to further improve the Trade and Sustainable Development Chapters of trade and investment agreements. Broadly speaking, they are urging for: regular reporting and implementation strategies; more co-operation with multilateral organisations for labour and environmental agreement secretariats; supporting local actors in their contributions to the processes, and increasing their work with EU delegations and embassies in third countries, and; further improving interlinkages between the trade and investment agenda with the 2030 sustainable development agenda and the 17 sustainable development goals. Clearly the political weight of these positions will be relevant to the international negotiators and the ultimate ratification of the agreement after it has been concluded.

Already in the Namur Declaration of December 2016<sup>41</sup> which was the idea of the Belgian politician Paul Magnette, Minister-President representing the Walloon State of Belgium and brought together some 40 or more lead academics from the EU, the US and Canada last December 2017 supported and further articulated growing public concerns as to the values involved and the way in which the EU negotiates international economic and trade agreements. In the Namur Declaration, they call for the EU to “seek in good faith ways to ensure the success of already advanced, let alone already signed agreements, in the spirit of this Declaration”, before articulating and further advocating as legitimate, civil society demands for: respect

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40. See Letter of five EU Member States to Commissioner Malmström of 11 May 2017 <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail-Doc&id=33338&no=22>, last visited on 29 May 2018.

41. See the *Declaration of Namur* of 5 December 2016, to be found at <http://declarationde-namur.eu/en/index.php/namur-declaration/>, last visited on 18 December 2018.

for democratic procedures; compliance with socio-economic, sanitary and environmental legislation, and; guarantee public interests in the dispute resolution mechanism. While the European Commission's commitment to transparency and inclusion of stakeholders in its mandates and conduct of international trade and investment negotiations is indeed unprecedented compared to previous practice, not all demands of the civil society platforms, including the Namur Declaration, are addressed. In particular, to fully include national parliaments and regional assemblies in debates on the initial negotiating mandates would prove burdensome and increase the time frames for international negotiations. The challenge is to balance the legal safeguards for inclusiveness, accountability and scrutiny over international negotiations while at the same time achieve the eventual success of the negotiations and to come up with a functioning and effective trade relationship.

Both the letter from the five Member States to Commissioner Malstrom and the Namur Declaration contribute concrete suggestions of how to improve the implementation and enforcement of labour and environmental values. Very early exploration by European Commission services<sup>42</sup> is already underway into potential means for improving the implementation and enforcement of the trade and sustainable development chapters of future agreements. Avenues under exploration include a more assertive use of the TSD dispute settlement mechanism, build up the capacity of civil society stakeholders and enhancing coordination and joint action with Member States, the European Parliament, international organisations and trade partners.<sup>43</sup> A model based on sanctions is also explored, based on extending the practice under the TTIP and CETA agreements, based on state to state dispute settlement in situations of the lowering of labour or environmental standards. In both scenarios, these discussions are in their infancy and can-

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42. See the "Non-paper" of the European Commission services entitled *Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)* of 11 September 2017, to be found at [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf) last visited on 28 March 2018.

43. Non-paper of the Commission services of 11.07.2017. See also the European Parliament Resolution of 5 July 2016 on the implementation of the 2010 recommendations on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)), to be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8TA-2016-0298%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>, last visited 28 March 2018. See also the European Economic and Social Committee (EESC) Opinion on the Commission communication 'Trade for all: Towards a more responsible trade and investment policy', <http://www.eesc.europa.eu/?i=portal.en.rex-opinions.39089>, last visited on 28 March 2018.

not yet be described as policy proposals as such. Views of the Council and Member States as well as the European Parliament will play an important role in the future relevance of these early opinions.

The values basis is the EU-MERCOSUL Association Agreement currently under negotiation is apparent in the Chapter on the Global Agreement Trade Related Provisions as well as in the Chapter on Trade and Sustainable Development (referring to the draft as it stood last December 2017).

Before introducing the Trade and Sustainable Development Chapter, it is relevant to comment on values relating to human rights, which are notable by their absence in both of the Chapters. The ongoing Sustainability Impact Assessment (SIA) in support of the EU-MERCOSUL Association Agreement will be concluded in the course of 2018, and is being conducted by the consulting arm of the London School of Economics. The SIA EU-MERCOSUL involves broad stakeholder consultation in the four MERCOSUL countries<sup>44</sup> and the last consultation to be held in Sao Paulo, Brazil, was in mid-March 2018. The 2009 SIA for EU-MERCOSUL negotiations at that time on the economic, social, environmental and sectoral analyses. Focused on human rights dimension has expanded considerably since then and this is reflected in today's SIA EU-MERCOSUL. The fact of such broad reference to advances in international relations on human rights deserves comment, see page 80 *et seq* of the SIA EU-MERCOSUL. Whereas labour, food and environmental standards for instance, involve a competitive advantage for which ever partner that does not bear the costs involved in implementing these standards, there is no comparable commercial justification for incorporating human rights. The Terms of Reference for the SIA note the emerging human rights institutional and legal framework in the EU and MERCOSUL countries and "certain human rights issues stand out across national boundaries". It promises to identify potential impacts of trade measures on the various human rights obligations of the EU and MERCOSUL partner countries within the trade provisions,<sup>45</sup> and is specifically screening the rights of indigenous peoples, gender discrimination, the right to highest attainable standard of physical and mental health, and the right to an adequate standard of living.

Returning to the Trade and Sustainable Development Chapter of the EU-MERCOSUL Association Agreement, lessons can certainly be drawn

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44. See <http://www.euMERCOSULsia.com/> last visited on 8 March 2018.

45. See Table 24 of the SIA, *Op. Cit.* n. 48.

from the wave of trade agreements that have ensued<sup>46</sup> since the expansion of the legal basis for such agreements in the Treaty of Lisbon (Art. 207, TFEU). Working from a draft of the agreement<sup>47</sup> sourced from civil society platforms, relating to the negotiations between 21 February and 2 March 2018, values feature in heavily in both in the Chapter for the Global Agreement on Trade Related Provisions and, as is to be expected in the Chapter on Trade and Sustainable Development. Other specific chapters are dedicated to transparency, dispute settlement, private arbitration, trade in services, intellectual property rights, as well as a chapter on increasing dialogue on food safety, animal welfare, market access issues arising in agricultural biotechnology, anti-microbial resistance and sanitary and phytosanitary measures.

The Global Agreement contains the expression of the Parties values already throughout its preamble to the creation of the Free Trade Area. The very first stated objective is:

a modern and mutually advantageous trade agreement which creates a predictable framework to boost trade and economic activity, while promoting and protecting our shared values and perspectives on the role of government in society and retaining the right of the Parties to regulate at all levels of government to achieve public policy objectives.

The second objective provides for sustainable development in its economic, social and environmental dimensions, consistent with, and supportive of, their respective international obligations. The following stated objectives include standard provisions of a free trade agreement and its relationship with the WTO agreements, such as reducing tariff and non-tariff barriers to trade in goods and agreement is foreseen on technical standards and conformity assessment including SPS measures. Noteworthy is that the agreement includes provision for integration in global value chains, the liberalisation of trade in services, intellectual property rights' enforcement and protection, and for dispute settlement.

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46. Korea, Central America, Columbia, Peru, Georgia, Moldova Ukraine. Japan since 2017 and Mexico in 2018. Further agreements are being negotiated with Australia and New Zealand. The Mexico agreement, 36 Chapters long, is available in its draft form, and subject to ratification, go to <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833&title=New-EU-Mexico-agreement-The-Agreement-in-Principle-and-its-texts>, last visited on 28 March 2018.

47. Textual proposals can be sourced on the European Commission's website at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>, last visited on 28 May 2018.

Novel is the provision for creating a framework for the participation of civil society in the implementation of the agreement, as well as for providing a transparent and predictable regulatory environment and efficient procedures for economic operators and all the while respecting the public policy space for “public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity”. Moreover, the following Article is dedicated to the Parties’ relations with civil society through an “association council or committee”, which will comprise ministerial level representatives of the Parties and tasked with implementing the trade provisions.

Turning then to the Chapter on Trade and Sustainable Development, the rationale is to ensure that a level playing field in the environmental and social standards, to prevent backsliding in the standards set, guarding against any lowering any social, labour and environmental standards in the interests of improving trade or attract investment. The rationale is also to ensure effective implementation of the international and national standards set. Express provision—“the Parties recognise the importance of working together to achieve the objectives of this chapter”—is made for the two regional integrations to work together through multi-lateral fora to meet the objectives of this chapter, in the WTO and ILO, but also in the UN bodies, such as the UNEP and UNCTAD.

Reading the overall objective of the chapter on trade and sustainable development in the draft EU-MERCOSUL Association Agreement, it is to:

*enhance* the integration of sustainable development in the Parties’ trade and investment relationship, notably by establishing principles and actions concerning labor and environmental aspects of sustainable development of specific relevance in a trade and investment context [emphasis added].

Specific clauses in this chapter of the EU-MERCOSUL Agreement address ILO provisions and MEAs, together with the sustainable management of natural resources in areas of low carbon development, forestry, fisheries, biodiversity, including fighting illegal harvesting practices and promoting corporate social responsibility and fair and ethical trade initiatives.

As concerns the fundamental ILO conventions and other ratified up-to-date international labour conventions and working conditions, together with multilateral environmental agreements (MEAs), The approach is “a

co-operative approach based on common values and interests”, and while there is provision for dispute resolution (and keeping in mind that this clause is not final), the dispute resolution is based on “dialogue, consultation, exchange of information and co-operation to address any disagreement on the interpretation or application of this chapter”—in the current drafting, the standard dispute settlement chapter is excluded for dispute arising under the trade and sustainable development chapter. Meanwhile the transparency provision as it stands so far, rests on domestic rules and procedures, implying that where they are lacking, the transparency rights of civil society will be difficult to access. The transparency provision foresees that the Parties are open—ensuring awareness and encouraging public participation—about any trade and investment initiatives that might effect environmental protection or labour conditions, and *vice versa*.