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THE RULE OF LAW PROMOTION THROUGH TRADE IN THE "ASSOCIATED" EASTERN NEIGHBOURHOOD

Abstract:
This article aims to investigate the phenomenon of the rule of law promotion exercised by the EU through the Deep and Comprehensive Free Trade Agreements (DCFTAs). First, the article emphasizes the unique combination of normative and market power the EU uses to diffuse its norms through trade liberalization. Next, it provides an insight into the particularities of the European Neighbourhood Policy as a policy context for the conclusion and implementation of the Association Agreements, including the DCFTAs with Ukraine, Moldova and Georgia, as well as the conceptual problematic and scope of the rule of law as a value the EU seeks to externalize. Using the DCFTAs with Ukraine, Moldova, and Georgia) as a single group case study of the transparency dimension of the rule of law, the central part of the article analyzes the DCFTAs substantive requirements, directed toward promoting transparency in the partner states (while categorizing the requirements into the most general ones; cooperation-related; and discipline-specific) and the legal mechanisms that make these clauses operational (e.g., the institutional framework of the AAs, gradual approximation and monitoring clauses, and the Dispute Settlement Mechanism). In concluding, the article summarizes the state-of-the-art of the rule of law promotion through the DCFTAs, distinguishes the major challenges the respective phenomenon faces, and emphasizes the prospects for and difficulties of using the DCFTAs as an instrument of rule of law promotion.

Keywords: Association Agreement, approximation, Deep and Comprehensive Free Trade Agreement, Rule of Law, value promotion

INTRODUCTION

The background behind the present article is shaped by four major trends. First of all, the present dynamics of conflict and cooperation in the multipolar world fuels the

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debate regarding the European Union's (EU) power in international relationships and, subsequently, the legal manifestations thereof.[1] Moreover, the global rise of nationalism, state-centrism and protectionism[2] creates the need to reassess the normative role the EU seeks to exercise in its external relations. In turn, the core of the Union's normative power is represented by the external promotion of the values the Union is founded upon.[3] Pursuant to Article 2 of the Treaty on European Union (TEU), these values include "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Article 21(1) TEU stipulates that the above values are the "guiding principles" of the EU's action in the international arena, and Article 21(2)(a)(b) TEU mentions the "safeguarding" of the Union's values and their "consolidation" as the objectives of such EU actions. In focusing on the EU's rule of law promotion, it is worthwhile mentioning that, despite the fact that the Union promotes the rule of law through various external policies and legal instruments, there is no uniform approach to defining the rule of law for the purposes of the EU's external action.[4] Subsequently, there is no uniform approach to assessing the impact of the Union's rule of law promotion on domestic legal systems, neither in general nor by recourse to particular legal instruments applied by the EU.[5] Thus, a present understanding of the normative role the EU plays abroad clearlymust be complemented with an insight into the conceptual foundations of the EU's promotion of the rule of law and the legal pathways of the respective norms' diffusion.

The second trend constituting the background of this article is represented by the ambitious "deep" bi- and plurilateral trade liberalization agenda[6] pursued by the EU following the deadlock of the WTO Doha Round.[7] Importantly, the free trade agreements negotiated and concluded by the EU in the recent decade go far beyond trade in goods and encompass various disciplines, such as trade in services, technical barriers to trade, mutual access to contract procurement procedures, sustainable development, as

[1] *E.g.* P. Holden, *In Search of Structural Power: EU Aid Policy as a Global Political Instrument*, Routledge, London: 2016; T. Lenz, *EU Normative Power and Regionalization: Ideational Diffusion and its Limits*, 48(2) Cooperation and Conflict 211 (2013).

[2] *See* A. Smith, *Nations and Nationalism in a Global Era*, John Wiley and Sons, Cambridge: 2013; M. Telo (ed.), *European Union and New Regionalism. Competing Regionalism and Global Governance in a Post-Hegemonic Era*, Ashgate Publishing, Aldershot: 2014.

[3] I. Manners, *The EU's Normative Power in Changing World Politics*, in: A. Gerrits (ed.), *Normative Power Europe in a Changing World: A Discussion*, Netherlands Institute of International Relations, The Hague: 2009, p. 3.

[4] *See* D. Kochenov, *The ENP Conditionality: Pre-Accession Mistakes Repeated*, in: L. Delcour, E. Tulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Nomos, Baden-Baden: 2008, pp. 105-110.

[5] *Ibidem*.

[6] *See* Communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Global Europe: Competing in the World", [2006] COM (2006) 567 final.

[7] *See generally* A. Narlikar (ed.), *Deadlocks in Multilateral Negotiations: Causes and Solutions*, Cambridge University Press, Cambridge: 2010.

well as competition and state aid.[8] Since the creation of "cooperative regional orders", as provided in the EU's Global Strategy, is directed, *inter alia*, to "reaping economic gains",[9] deep trade liberalization represents a crucial means of the Union's order-building and, subsequently, the European Neighbourhood Policy (ENP). Moreover, the "deep" nature of the trade liberalization with the EU inevitably impacts domestic legislation, thus this aspect can be considered as representing part of the Union's rule of law promotion agenda. Ultimately, the ever-deepening trade liberalization ambitions of the EU, the tightening of the trade-development nexus.[10] And the importance of trade for the Union's regional order-building activities together create the need to make full use of the rule of law promotion potential of the EU Free Trade Agreements (FTA) and streamline their application.

Third, the ENP presently faces an array of difficulties, requiring concentration on uncontroversial common priorities, such as economic growth and mutually beneficial free trade. Facilitating transformation in the "Associated Neighbourhood" (Ukraine, Moldova and Georgia) becomes ever more difficult due to the lack of incentives, domestic political situations, and strategic concerns.[11] As it stems from these observations, sector cooperation tends to promote the fundamental value-related standards, such as transparency, accountability and inclusiveness. Given the present circumstances of the impossible advancement of political relations between the EU and the "associated" Neighbours, the focus on trade, sector cooperation, and the promotion of fundamental values through the above pathways can be viewed as at least a temporary solution for sustaining the EU's leverage in the region.[12]

Fourth, pursuant to Article 21(3) TEU, the EU seeks to ensure consistency in the different areas of its external action. Directly linked to the effectiveness of the EU foreign policies, their coherence ranges from the avoidance of overlaps between actions taken within different policy fields to creating synergies aimed at achieving common aims.[13] The emphasis on synergies is contained in the 2006 European Consensus on Development that underlines the Union's need to consider developmental objectives in its external policies, such as trade, environment, and climate change.[14] Consequently,

[8] *See* B.A. Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford University Press, Oxford: 2016.

[9] EU External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, available at: http://www.eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf (accessed 30 June 2018).

[10] *See generally* M. Carbone, J. Orbie (eds.), *The Trade-Development Nexus in the European Union: Differentiation, Coherence and Norms*, Taylor and Francis Group, London: 2014.

[11] *See* A. Wilson, *Partners for life: 'Europe's unanswered Eastern question'*, European Council on Foreign Relations Policy Brief, October 2017.

[12] *Ibidem.*

[13] C. Gebhard, *The Problem of Coherence in the European Union's International Relations*, in: C. Hill, M. Smith, S. Vanhoonacker (eds.), *International Relations and the European Union*, Oxford University Press, Oxford: 2017, p. 125.

[14] Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled "The European Consensus", [2006] C 46.

analysis of the FTAs' role in the advancement of the rule of law is essential for strengthening the existing synergies between the Union's external economic policy and the promotion of its fundamental values.

In view of the above trends, this article aims to investigate the phenomenon of rule of law promotion through trade liberalization in the "associated Neighbourhood" of the EU (Ukraine, Moldova and Georgia). The aim of the article requires that the arguments be addressed as follows: First, the article discusses the EU's norms' transfer to third countries from the standpoint of the "civilian power Europe" debate and introduces the policy and legal framework of the European Neighbourhood Policy, with a focus on the EU's bilateral economic relationships with Ukraine, Moldova and Georgia. This discussion is followed by an analysis of the conceptual problematics of the rule of law. The central part of the article focuses on distinguishing and categorizing the major mechanisms of the rule of law promotion contained in the EU's DCFTAs with the "associated Neighbours", using the example of transparency as a key component of this umbrella concept. In conclusion, the article elaborates on the major prospects and problems of the Union's policy of promoting the rule of law through trade liberalization. Ultimately, the study points out the potential of the modern FTAs for achieving non-trade-related aims (namely, values-promotion) and thus, to create new bridges between the EU's external economic law and its external value-promotion activities.

1. THE FOUNDATIONS OF EU'S VALUE-PROMOTION: THE "CIVILIAN POWER EUROPE" CONCEPTUAL DEBATE

The concept of power is central for understanding the processes shaping the international system.[15] Most commonly, political scientists link power to an actor's ability to influence other actors' decisions and actions.[16] Since the 1970s, the uniqueness of the European Community (later the EU) as an international actor has given rise to intense scholarly debate on the EU's self-conceptualization as a power, as well as the actual nature and mechanisms of the Union's power.[17] Despite its vagueness, repeatedly emphasized in the scholarship,[18] the early "civilian power Europe" (CPE) concept has long dominated the debate and opened up pathways for a multitude of the EU-specific concepts of power.[19] F. Duchene, author of the CPE concept, defined the European

[15] *See* M. Barnett, R. Duvall, *Power in International Politics*, 59(1) International Organization 39 (2005), pp. 40-42.

[16] *Ibidem*, p. 44.

[17] *See generally* A. Boening, J.F. Kremer, A. Van Loon (eds.), *Global Power Europe*, Vol. 1: *Theoretical and Institutional Approaches to the EU's External Relations*, Springer, Berlin: 2013.

[18] *See* C.W. Burckhardt, *Why is there a public debate about the idea of a 'civilian power Europe'?*, LSE European Institute Working Paper 2004/02.

[19] S. Ozoguz-Bolgi, *Is the EU Becoming a Global Power after the Treaty of Lisbon?*, in: A. Boening, J. Kremer, A. van Loon (eds.), *Global Power Europe*, Vol. 1: *Theoretical and Institutional Approaches to the EU's External Relations*, Springer, Berlin: 2013, pp. 6-7.

Community as a "civilian group of countries long on economic power and relatively short on armed force."[20] The continuous development of the EU's military capabilities since the era of the Yugoslav Wars has turned out to be, however, a key element that has led to questioning the CPE framework and the development of new pathways to conceptualizing the EU's power within the international system.[21]

To understand the politics of the EU's value-promotion through trade liberalization, this article suggests applying four "civilian power Europe" concepts that can be substantively divided into two groups. While the normative and structural power approaches explain the EU's leverage by referring to its identity, values and norms, market, and trade power, other "civilian power Europe" theories tend to emphasize the economic aspects of the EU's power.[22] The foundational concept, frequently applied by scholars in the studies of the EU's value-promotion, is that of "normative power Europe" (NPE), a term coined by I. Manners.[23] In his view, the orientation on fundamental values, lying at the heart of the Union's identity, particularly "predisposes the Union to act in a normative way in world politics."[24] Thus, the unique nature of the EU as a polity, its value-based identity and its striving to act as a "global common good"[25] differentiate the Union from other international actors, which behave in a realist manner, and allow it to diffuse its rules beyond its borders. Consequently, I. Manners distinguished six major mechanisms of the EU's norms' diffusion, i.e. contagion (unintentional diffusion of norms); informational; procedural (through the institutionalization of relationships with non-Member States and international organizations); transference (through trade, aid and technical assistance, including conditionality); overt diffusion (the EU's presence in third states); and cultural filter.[26]

While the NPE focuses on substantiating the phenomenon of the EU's norms' transfer, the operational "structural power Europe" concept is directed toward the impact of EU actions in different domains, using the idea of structures.[27]According to S. Keukeleire, structural foreign policy is "the policy, which, conducted over the long-term, aims at sustainably influencing or shaping political, legal, economic, social, security or other structures in a given space."[28] In turn, the term "structures" refers to "the relatively

[20] F. Duchene, *The EC and the Uncertainties of Independence*, in: M. Kohnstamm, W. Hager (eds.), *A Nation Writ Large? Foreign Policy Problems before the European Community*, Palgrave MacMillan, London: 1973, p. 19.

[21] A. E. Juncos, *The EU's post-Conflict Intervention in Bosnia and Herzegovina: (Re)integrating the Balkans and/or (re)Inventing the EU*, VI(2) Southeast European Politics 88 (2005), p. 89.

[22] *See* I. Manners, *Normative Power Europe: a Contradiction in Terms?*, 40(2) Journal of Common Market Studies 235 (2002); S. Keukeleire, T. Delreux, *The Foreign Policy of the European Union*, Palgrave Macmillan, London: 2014, pp. 28-31; Ch. Damro, *Market Power Europe*, 19 Journal of European Public Policy 682 (2012); S. Meunier, K. Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 Journal of European Public Policy 906 (2006).

[23] *See* Manners, *supra* note 22.

[24] *Ibidem*, p. 252.

[25] L. Aggestam, *Introduction: Ethical Power Europe?*, 84(1) International Affairs 1 (2008), p. 8.

[26] Manners, *supra* note 22, p. 245.

[27] Keukeleire & Delreux, *supra* note 22, p. 28.

[28] *Ibidem*.

permanent organizing principles, institutions and norms" that shape particular sectors of a given society (e.g., economic, political, social etc.) at various levels (individual, societal, state, inter-societal etc.).[29] At the societal level, the most common examples of structures are democracy, the rule of law, and the liberal market economy.[30] The sustainability of the promoted structures is conditioned on material and non-material factors. In case of the EU's structural foreign policy, material factors refer to the Union's financial instruments and technical expertise, while the non-material factors encompass the legitimacy of the promoted structures and their proximity and accessibility to the cultures and beliefs in a target state. The non-material factors in particular pose a major challenge to the internalization of the structures promoted by the EU, as for instance in both the Southern and Eastern Neighbourhoods.[31]

Despite the fact that both NPE and 'structural power Europe' touch upon the use of the EU's material capabilities in the external diffusion of the Union's norms,[32] neither of these conceptions emphasizes the economic dimension of the EU's leverage. However, as stated by H. Haukkala in her NPE-based study dedicated to the EU enlargement process, "it is only through the unique and rich combination of stick and carrots that are present in the accession process that the EU can exert the strongest normative influence on its partners."[33] This statement can be also substantiated by referral to the studies of the EU's economic conditionality in its ENP and EU development policy,[34] Thus, the understanding of the EU's power underlying value-promotion through trade would not be complete without referring to the EU's nature as a single market and its powerful position in world trade. Pursuant to both the market power Europe (MPE) and trade power Europe (TPE) concepts, the key driver behind the EU's power is that it represents the largest economy in the world.[35] As argued by D. Drezner, market size

[29] *Ibidem*.

[30] R. Metais, Ch. Thepaut, *What Is Structural Foreign Policy?*, in: R. Metais, Ch. Thepaut, S. Keukeleire (eds.), *The European Union's Rule of Law Promotion in its Neighbourhood: A Structural Foreign Policy Analysis*, College of Europe, Bruges: 2013, p. 6.

[31] Keukeleire & Delreux, *supra* note 22, p. 31. *See also* P. Manoli, *A Structural Foreign Policy Perspective on the European Neighbourhood Policy*, in: S. Gstoehl and S. Schunz (eds.), *Theoretizing the European Neighbourhood Policy*, Routledge, London: 2016, pp. 124-143.

[32] On the transference and overt diffusion pathways of norms' diffusion, *see* Manners, *supra* note 22, p. 245. On the material factors in structural foreign policy, *see* Keukeleire & Delreux, *supra* note 22, pp. 30-31. For the critique regarding the lacking attention to material factors in civilian and normative power concepts, *see* K.E. Smith, *Beyond the Civilian Power Europe Debate*, 3(17) Politique Européenne 63 (2005), pp. 64-66.

[33] H. Haukkala, *The European Union as Regional Normative Hegemon: The Case of European Neighbourhood Policy*, in: R. Whitman (ed.), *Normative Power Europe: Empirical and Theoretical Perspectives*, Springer, Berlin: 2011, p. 47.

[34] *See generally* J. Kelley, *New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy*, 44(1) Journal of Common Market Studies 29 (2006); O. Stokke (ed.), *Aid and Political Conditionality*, Frank Cass, London: 2006.

[35] Damro, *supra* note 22, p. 682. *See also* European Commission, *Priority: Internal Market*, available at: https://ec.europa.eu/commission/priorities/internal-market_en (accessed 30 June 2018).

supports the externalization of the EU's internal rules in two major ways; namely by creating material incentives for governments to coordinate their regulatory standards with those of the large market, and second by influencing their perceptions regarding the outcomes of adopting the respective standards.[36] Furthermore, integration into the EU market is particularly attractive given its broad scope, which includes, *inter alia*, public procurement, standardization, and the Digital Single Market. Third, the EU trade-development nexus makes it attractive for developing partner countries to comply with the EU's conditions, contained in the FTAs, since this allows them to obtain not only market access, but also unilateral trade preferences and aid.[37]

To sum up, from the standpoint of the power Europe debate, the EU applies both normative/structural and market/trade power to promote its values and other norms through the FTAs. Thus, the unique combination of material (market access, trade preferences, financial and technical assistance) and ideational factors (EU's normative identity, foreign policy goals, the perceptions of the Union in a partner country) creates the foundations for the promotion of the EU's values and norms through trade liberalization.

2. THE EUROPEAN NEIGHBOURHOOD POLICY: BACKGROUND, LEGAL BASIS AND INSTRUMENTS

The ENP represents a geographically comprehensive umbrella initiative that brings together the regional and bilateral dimensions of the EU's foreign policies in the Eastern and Southern Neighbourhoods.[38] Due to its clear distinguishment from enlargement, scholars tend to label the ENP as "a substitute for EU membership", "an integration without membership" and/or "a model of extending integration beyond the EU borders."[39] The Lisbon Treaty constitutionalized the EU's special relations with the Neighbourhood by supplementing the TEU with Article 8. According to Article 8(1) TEU, "the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based

[36] D. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes*, Princeton University Press, Princeton: 2007, p. 32.

[37] *See* M. Carbone, J. Orbie (eds.), *The Trade- Development Nexus in the European Union: Differentiation, Coherence and Norms*, Taylor and Francis Group, London: 2014.

[38] B. Van Vooren, R.A. Wessel, *EU External Relations Law. Text, Cases, Materials*, Cambridge University Press, Cambridge: 2014, pp. 540-541.

[39] *E.g.* R. Petrov, *The New EU-Ukraine Enhanced Agreement versus the EU-Ukraine Partnership and Cooperation Agreement*, in: F. Maiani, R. Petrov, E. Mouliroya (eds.), *European Integration without EU Membership: Models, Experiences, Perspectives*, EUI Working Paper 2009/10, pp. 39-47; K. Raik, T. Tamminen, *Inclusive and Exclusive Differentiation: Enlargement and the European Neighbourhood Policy*, in: J. Jokela (ed.), *Multi-speed Europe. Differentiated Integration in the External Relations of the European Union*, FIIA Report 38 (2014), pp. 45-64.

on cooperation." Building upon Article 8(1) TEU, the 2014 Regulation establishing the European Neighbourhood Instrument also refers to the ENP as a framework for a "privileged relationship, building upon a mutual commitment to, and promotion of, the values of democracy and human rights, the rule of law, good governance and the principles of a market economy and sustainable and inclusive development."[40] It's worth noting that the threat of terrorism and radicalization, and the ongoing conflicts in the Neighbourhood, determined the securitization of the ENP following its 2015 Review, as well as strengthening the links between economic development and the advancement of fundamental values on the one hand, and security and stability on the other.[41] Thus, the ENP is characterized by "the final objective of security, stability and prosperity through conditionally offering a stake in the internal market, disconnected from potential EU enlargement."[42]

The "umbrella" nature of the ENP determines the high degree of the policy's differentiation. The idea of differentiation is substantiated by the need to have recourse to the individual needs, multifaceted particularities, and geopolitical preferences of each partner state. Linking the differentiation to conditionality, the ENP proclaims that the "pace of development of the EU's relationship with each partner country will depend on its degree of commitment to common values, as well as its will and capacity to implement agreed priorities."[43] Differentiated relationships in the Neighbourhood condition the variation in the types of agreements between the EU and its Neighbours. The legal basis for the conclusion of such agreements is contained in Article 8(2) TEU, which tends to repeat the language of the Article 217 TFEU on association. Presently, the Eastern Neighbourhood represents a two-speed partnership. While the EU has concluded innovative Association Agreements that encompass "deep and comprehensive free trade" with Ukraine, Moldova and Georgia, the second, outer "circle" of integration is represented by Belarus, Armenia and Azerbaijan, which are not interested in deep integration with the EU.[44] The relations between the EU and Armenia are governed by the newly concluded Comprehensive and Enhanced Partnership Agreement (CEPA).[45] Partnership and Cooperation Agreements (PCAs) concluded in the mid-

[40] Regulation (EU) No 232/2014 of the European Parliament and of the Council establishing a European Neighbourhood Instrument, OJ 77, 15 March 2014, pp. 27-43.

[41] Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Review of the European Neighbourhood Policy", [2015], JOIN (2015) 50 final.

[42] Van Vooren & Wessel, *supra* note 38, p. 541.

[43] Commission of the European Communities, European Neighbourhood Policy Strategy Paper [2004], COM 373 final, p. 8.

[44] Raik & Tamminen, *supra* note 39, pp. 45-46.

[45] Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, [2017], JOIN/2017/037.

1990s continue to serve as the foundation for the EU-Belarus and the EU-Azerbaijan relations.[46]

Before proceeding to the problematics of the rule of law in the EU's external economic relations, it is important to note that the DCFTAs between the EU and the 'associated' Eastern Neighbours are marked by their uniquely broad scope. Thus, the DCFTAs encompass a variety of disciplines, ranging from the conventional liberalization of trade in goods to elaborate provisions on mutual access to contract procurement procedures, levelling technical barriers to trade (TBT), as well as the establishment of trade in services and electronic commerce.[47] In turn, both the broad scope and the comprehensive nature of the DCFTAs condition the extensive norms' transfer from the EU to the "associated Neighbourhood", which is illustrated by, *inter alia,* the requirements that partner states' approximate their domestic legislation with the respective *acquis communautaire* and comply with the WTO rules.[48] Furthermore, combined with the EU's strong market power in the region and its importance as a normative actor on one hand, and the "associated Neighbours" European aspirations on the other, the comprehensiveness of the DCFTAs provides room for the Union to pursue non-trade-related goals through these agreements.[49] The legal avenues available for promoting the rule of law as a non-trade-related goal through the DCFTAs will be further analysed in the central part of this article.

3. THE CONCEPTUAL PROBLEMATICS AND SCOPE OF THE RULE OF LAW IN EU LAW

3.1. The rule of law as a fundamental value of the EU

The history of the rule of law as a fundamental value of the European Communities dates back to the concept of the European supranational legal Community (*Rechtsgemeinschaft*), coined by the first EEC Commission President W. Hallstein, which gave rise to the theory of European integration through law.[50] Importantly, Hallstein conceptualized the Community as Rechtsgemeinschaft in three senses: as a creation of law (*Rechtsschöpfung*); a source of law (*Rechtsquelle*); and the legal order (*Rechtsordnung*) and legal policy (*Rechtspolitik*).[51] Since the concepts of the Rechtsgemeinschaft, Rechts-

[46] Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Belarus, of the other part [1995], COM 95/44/FINAL; ECSC, Euratom Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, [1999], OJ L 246, pp. 1-2.

[47] *See* Araujo, *supra* note 8, pp. 137-145; pp. 179-199; pp. 203-223.

[48] *Ibidem*, p. 196, pp. 21-25.

[49] *See generally ibidem*, pp. 228-233.

[50] W. Hallstein, *Die Europäische Gemeinschaft (The European Community)*, ECON, München: 1979, p. 51.

[51] *Ibidem*, p. 53.

staat[52] and the rule of law significantly differ in their substance, the Court of Justice of the European Union's (CJEU) referral to the EC as a "Community based on the rule of law" in its landmark *Les Verts* judgment determined the significant conceptual disarray.[53] Nevertheless, analysis of this judgment makes it possible to acquire insights into the CJEU's early understanding of the rule of law. First, the CJEU implicitly pointed to the rule of law as a "positive good in itself" or, in other words, a value. Second, since the judgment refers to the Treaty as the "basic Constitutional Charter", hence the rule of law can be understood as a constitutional principle of the Community. Finally, while not discussing the scope of the rule of law, the Court approached it from the formal standpoint and associated it with both the Union's institutions and those of the Member States, which were subjected to the Treaty.[54]

For the first time, the rule of law acquired the imprimatur of primary law with the adoption of the Maastricht Treaty, which however neither mentioned it as a fundamental principle or value of the Community nor referred to its substance.[55] Pursuant to the Treaty of Amsterdam, the rule of law began to be viewed in three dimensions: as a founding principle of the EU (Article 6(1) TEU), whose breach can lead to the application of sanctions (Article 7(1) TEU); a criterion for the EU membership (Article 49 TEU); and an objective of the CFSP (Article 11 TEU).[56] Pursuant to the Treaty of Lisbon, the internal dimension of the rule of law lies in its nature as a common fundamental value of the EU (Article 2 TEU) and the objective of the EU's institutions' actions (Article 3(1) TEU in conjunction with Article 13(1) TEU).[57] Externally, the rule of law applies as a criterion for membership in the Union (Article 49(1) TEU) and as an objective of the EU's external action (Article 21(1) TEU).[58] Notwithstanding the constitutive nature of the rule of law for the Community and its relatively long history in the EU legal system, its substance has not yet been clarified in either primary or secondary law of the Union.[59] Viewed in this light, some insight into the respective conceptual problematics and the components of the rule of law is required in order to investigate the promotion of this value through trade liberalization.

3.2. The conceptual problematics of the rule of law

In the relevant literature, the rule of law is referred to as an "expansive" and "essentially contested" concept, and simultaneously as the "panacea for the world's problems." The

[52] *Ibidem*.

[53] Case 294/83 *Parti ecologiste Les Verts v. the European Parliament* [1986] ECR 1339.

[54] *Ibidem*, para. 23.

[55] Treaty on European Union (Maastricht Treaty).

[56] Treaty on European Union (Amsterdam Treaty), Article 7, Article 11, Article 49.

[57] Treaty on European Union (Lisbon Treaty), Article 2, Article 3, Article 13.

[58] Treaty on European Union (Lisbon Treaty), Article 49, Article 21.

[59] *See generally* Kochenov, *supra* note 4, pp. 105-110; L. Pech, *Rule of law as a guiding principle of the European Union's external action*, CLEER Working Paper 2012/13.

analysis of the conceptual problematics of the rule of law in the EU context and beyond makes it possible to distinguish six major issues.

First, as argued by C. Schmidt, "the rule of law is conceptually empty if it does not receive its actual sense through a certain opposition."[60] Thus, an analysis of the "opposing concepts" is required to investigate the rationale behind the rule of law principle and the major functions it performs in a state. By juxtaposing the rule of law and "the rule of status", R. Fallon distinguished several functions and three major purposes the rule of law is to pursue as a solution to the inequality and arbitrariness stemming from the rule of men. First, the rule of law "should protect against anarchy and the Hobbesian war of law against all."[61] Second, the rule of law should provide individuals with an opportunity to plan their affairs and predict the legal consequences of particular deeds. Third, the political ideal of the rule of law needs to serve as a guarantee against at least some types of state arbitrariness.[62] The above insights serve as the basis for the understanding of the conceptual origins of the rule of law.

Second, the scholarship distinguishes between the formal and substantive understandings ofdefining the rule of law. The core of the formal approach to the rule of law stems directly from the above dichotomy between the rule of law and the rule of men. According to Raz, the formal precepts of the rule of law include its prospective nature, openness, and the clarity of laws; the relative stability of laws; open, stable and clear rules of law-making; guaranteed independence of the judiciary; observance of the principles of "natural justice" (open and fair hearings, absence of bias etc.); review powers of the courts, as well as accessibility to courts and limited discretion on the part of the crime-prevention agencies.[63] Since the formal approach recognizes the inability of morally objectionable regimes to comply with the rule of law requirement, post-war Europe witnessed the rise of the substantive conception of the rule of law, i.e. emphasis on the substance of laws rather than their formal characteristics.[64] Thus, the German concept of material rule of law (*materieller Rechtstaat*) concentrates on material justice (*materielle Gerechtigkeit*), human rights and an order directed toward the public good (*am Gemeinwohl orientierte Ordnung*).[65] The English concept, however, is strongly rights-oriented, rather than focusing on justice and social security dimensions.[66] An analysis of the different approaches to the rule of law, presently manifested by the leading international organizations (e.g., the UN, the OSCE, the Council of Europe)

[60] C. Schmidt *Constitutional Theory*, Duke University Press, Durham: 2008, p. 181.

[61] R. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97(1) Columbia Law Review 1 (1997), p. 8.

[62] *Ibidem*, pp. 9-10.

[63] J. Raz, *The Authority of Law. Essays on Law and Morality* (2nd ed.), Oxford University Press, Oxford: 2009, pp. 211-212.

[64] P. Craig, *Formal and Substantive Approaches to the Rule of Law: An Analytical Framework*, 1 Public Law 467 (1997), p. 468.

[65] *See* B. Enzmann, *Der Demokratische Verfassungsstaat: Entstehung, Elemente, Herausforderungen*, Springer, Berlin: 2012, pp. 51-57.

[66] T. Bingham, *The Rule of Law*, Penguin, London: 2013, p. 13.

shows that all of them tend to emphasize both the substantive components of the rule of law along with the formal ones.[67]

Third, the above differences between the classical English substantive rule of law concept and the German material rule of law approach perfectly illustrates the key difficulty in defining the rule of law for the purposes of the EU legal system; namely, the different understandings of the rule of law in the constitutional traditions of the Member States.[68] Consequently, the question arises whether a consensual EU-wide definition of the rule of law can be applied. The first attempt to do so can be traced in the 2014 EU Rule of Law Framework.[69] introducing as a "pre-Article 7 procedure" for addressing systemic threats to the rule of law, such as the present rule of law crises in Poland and Hungary.[70] The Framework applies the consensual approach to the rule of law developed by the Venice Commission. However, the "soft law" nature of both the Framework and the Rule of Law Checklist, the limited experience with the Framework's application, and its non-applicability to the external dimension of the rule of law make it problematic to establish whether any consensus on the rule of law has been reached so far. Nevertheless, as the crises in Poland and Hungary show, a common understanding of values is essential for sustaining the integrity of the Union, as well as consolidating its international role.

Fourth, if viewed as a crucial means to prevent conflicts and mitigate the complexities of the post-conflict period,[71] the rule of law represents a frequent target of international projects. Despite the fact that international organizations tend to praise a comprehensive substantive approach to the rule of law, their excessively technocratic institutions-only focus is widely criticised in the scholarship as the key deficiency in their rule of law promotion activities.[72] Thus, according to the arguments by K. Erbeznik and J. Cao, the crucial fallacy of rule of law reforms lies in the donors' non-consideration of the

[67] *See* T. Fitschen, *Inventing the Rule of Law for the United Nations*, in: A.V. Bogdandy and R. Wolfrum (eds.), 12 Max Planck Yearbook of United Nations Law, Brill, Amsterdam: 2008, pp. 347-380; F. Evers, *OSCE efforts to promote the rule of law. History, structures*, *surveys*, Working Paper No. 20 of the Centre for OSCE Research, 03/2010; European Commission for Democracy through Law, *Rule of Law Checklist*, Study No. 711/13, CDL/AD(2016)007.

[68] *See* L. Pech, *The rule of law as a constitutional principle of the European Union*, Jean Monnet Working Paper 04/09, pp. 22-41.

[69] Communication from the Commission to the European Parliament and the Council "A new EU Framework to Strengthen the Rule of Law, [2014], COM (2014) 158 final/2.

[70] For an overview of the present threats to the rule of law threats posed by Poland and Hungary, *see* B. Bugaric, *Protecting democracy and the rule of law in the European Union: The Hungarian challenge.* LEQS Paper No. 79/2014; A. Gostynska-Jakubowska, *Poland: Europe's new enfant terrible*, Bulletin of the Centre for European Reform 01/2016.

[71] *See generally* J. Ray, *Democracy and International Conflict. An Evaluation of the Democratic Peace Proposition*, Islington, Reaktion Books: 1998; A. Hurwitz, R. Huang, *Civil War and the Rule of Law: Security, Development and Human Rights*, Boulder: Lynne Rienner: 2014; J.J.C. Voorhoeve, *From War to the Rule of Law: Peace-Building after Violent Conflicts*, Amsterdam University Press, Amsterdam: 2007.

[72] *E.g.* K. Erbeznik, *Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18(2) Indiana Journal of Global Legal Studies 873 (2011); M.J. Trebilcock, M. Prado, *Advanced Introduction to Law and Development*, Edward Elgar, Cheltenham: 2014.

political and cultural particularities of target societies.[73] Moreover, crucial obstacles to efficient rule of law actions concern the opposing economic interests in the respective societies and the rent-seeking effects of foreign aid dependency.

Fifth, the value-promotion of the EU is particularly marked by a fuzzy boundary between the rule of law and democracy.[74] As argued by O'Donnell, the EU seeks to promote "the democratic rule of law with fundamental rights"[75] and, consequently, the clear delimitation between these values is not obligatory anymore. Such a concept, however, contradicts the traditional understanding of substantive rule of law as serving not only as the foundation for transparent, accountable and inclusive institutions, but also as a means to limit the discretion of the ruling majority.[76] Moreover, drawing a borderline between democracy and the rule of law is essential to counter the impression that the Union's prioritizes stability over democracy, something it is frequently accused of.[77] Thus, some demarcation between the values is essential for creating a coherent and legitimate external action.

Sixth, the aims of the present article make it topical to trace the linkage between the rule of law and economic development. Analysis of the major developments in economic theories and movements since the early post-war era to the present day makes it possible to distinguish two major approaches to the law in general and to the rule of law in particular. The early post-war theoreticians and the adherents of the dependencies and the world systems theory tended to view law from a pragmatic standpoint, as an instrument for converting economic theories into policies.[78] The independent emphasis on law was first made under the auspices of the Law and Development Movement (LDM), which sought to promote political, social and economic development in Southeast Asia and Latin America by transplanting Western norms and structures.[79] Following

[73] Erbeznik, *supra* note 72, pp. 878-879; L. Cao, *Culture in Law and Development: Nurturing Positive Change*, Oxford University Press, Oxford: 2016, pp. 187-198.

[74] K. Nikolaidis, R. Kleinfeld, *Rethinking Europe's "rule of law" and enlargement agenda: The fundamental dilemma*, SIGMA Paper No. 49/2012, pp. 10-12.

[75] G. O'Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15(4) Journal of Democracy 32 (2004).

[76] *See* H. Lauth, *Rechtstaat, Rechtssysteme und Demokratie*, in: M. Becker, H.J. Lauth, G. Pickel (eds.), *Rechtstaat und Demokratie. Theoretische und empirische Studien zum Recht in der Demokratie*, Springer, Berlin: 2001, pp. 21-22.

[77] *E.g.* V. Van Hüllen, *EU Democracy Promotion and the Arab Spring: International Cooperation and Authoritarianism*, Springer, Berlin: 2015, pp. 22-23; J. Bridoux, M. Kurki, *Cosmetic Agreements and the Cracks Beneath: Ideological Convergences and Divergences in U.S. and EU Democracy Promotion in Civil Society*, 28(1) Cambridge Review of International Affairs 55 (2015).

[78] *See* J.E. Stiglitz, D. Kennedy, *Law and Economics with Chinese Characteristics. Institutions for Promoting Development in the Twenty-first Century*, Oxford University Press, Oxford: 2013, pp. 23-24; J.C. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies in the Northeast Asian Experience*, 28(2) University of Pennsylvania Journal of International Law 219 (2007), p. 240.

[79] *See* K. Kroncke, *Law and Development as Anti-Comparative Law*, 45 Vanderbilt Journal of Transnational Law 477 (2012), pp. 479-482. For a critique of the LDM, *see* D. Trubeck, M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the USA*, Wisconsin Law Review 1062 (1974).

the collapse of the LDM, the focus on norms and institutions regained momentum with the introduction of the new institutionalism and governance theories, which were reflected in the "Washington consensus" by the World Bank.[80] According to D. Rodrik, the basis for the modern law-development nexus is constituted by the so-called "augmented Washington consensus", elements of which are, in turn, emphasized in the EU's cooperation with its Eastern Neighbours.[81] They include, *inter alia*, financial liberalization, financial codes and standards, trade liberalization, openness to FDI, corporate law and governance, compliance with the WTO agreements, etc.[82] Rodrik's insight supports the previous statements with regard to the considerable potential of the DCFTAs to diffuse the EU's norms and values, based on an analysis of the disciplines they contain. It is, however, worth mentioning that the conceptual documents underlying the ENP barely refer to the law-development nexus, emphasizing rather the role of law and economic development in stabilization.[83]

Ultimately, the above review shows that a systemic and coherent rule of law action through trade liberalization requires an in-depth understanding of the specific features of the rule of law concept and its application, as well as its linkages to democracy and economic development.

3.3. The components of the rule of law

Analysis of the value-promoting aspect of the EU DCFTAs with Ukraine, Moldova and Georgia requires not only an understanding of the conceptual problematics of the rule of law, but also distinguishing and defining the key elements of this umbrella concept. The major sources to be considered include the case law of the CJEU; the CoE Rule of Law Checklist (whose applicability is confirmed by the 2014 EU Rule of Law Framework); and the theoretical contributions featuring the constitutional traditions of the EU Member States.[84] Analysis of the respective sources allows for distinguishing six major dimensions of the rule of law, namely: legality; legal certainty; independence and impartiality of public authorities (especially, the judiciary); equality and non-discrimination; the relationship between international and domestic law; and public accountability and the transparency of the authorities. Due to the space limitations of the present article, it will further focus on the single issue of the promotion of transparency through the DCFTAs in the Eastern Neighbourhood,

[80] *See* T. Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52(1) Harvard International Law Journal 287 (2011), pp. 302-304.

[81] D. Rodrik, *Goodbye, Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from the Decade of Reform,* XLIV Journal of Economic Literature 973 (2006), pp. 977-978.

[82] *Ibidem*.

[83] *E.g.* Joint Communication, *supra* note 41, pp. 4-7.

[84] *See* European Commission for Democracy through Law, *Rule of Law Checklist*, Study No. 711/13, CDL/AD(2016)007; Communication from the Commission to the European Parliament and the Council "A new EU Framework to Strengthen the Rule of Law", [2014], COM (2014) 158 final/2. *E.g.* Pech, *supra* note 59; Craig, *supra* note 64, p. 468.

while carefully tracing the links to the various dimensions of the rule of law mentioned above.

The principle of legality (also commonly referred to as "lawfulness") encompasses a range of components, particular to the formal understanding of the rule of law, such as the supremacy of laws, their general nature, and the consistency of a legal system.[85] Moreover, the principle entails an institutional dimension, concentrating on the clear horizontal and vertical delineation of powers between different authorities as a foundation for their observance of the law in general and positive human rights obligations in particular.[86] Ensuring institutions' compliance with laws also requires clear procedures for introducing exceptions to laws and the delegation of state competences to private bodies.[87] In procedural terms, the principle of legality is primarily associated with transparent and accountable law-making procedures.[88] Pursuant to the CoE Rule of Law Checklist, the legal certainty requirement encompasses, *inter alia*, the accessibility of laws, regulations and court decisions; the foreseeability of laws; stability of laws; their prospective nature, as well as the "nullum crimen sine lege", "nulla poena sine lege" and res judicata principles.[89]

Next, the authorities' independence from each other is ensured through multiple checks and balances, such as the proper delineation of authority between institutions, guaranteed financial autonomy, as well as fair and sufficient salaries.[90] In particular, "an independent, transparent and impartial judicial system, free from political influence, which guarantees equal access to justice, protection of human rights, gender equality and non-discrimination, and full application of the law" represents a crucial goal the EU pursues in its relations with its Neighbours.[91] Tightly linked to the principles of independence, equality and non-discrimination is the principle of impartiality, which is investigated based on the public perceptions thereof, the public perceptions of corruption, and the application of anti-corruption measures to public bodies.[92]

The principles of equality and non-discrimination play a crucial role in the EU's legal order, located at the crossroads of the triangular relationship between the rule of

[85] *See* European Commission, *supra* note 84, pp. 11-14. *See also* A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed.), Springer, Berlin: 1979, p. 202; S. Unger, *Das Verfassungsprinzip der Demokratie. Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips*, Mohr Siebeck, Tübingen: 2008, p. 17.

[86] European Commission *supra* note 84, p. 11.

[87] *Ibidem*, p. 14.

[88] *Ibidem*.

[89] *Ibidem*, pp. 15-17. *See also* M. Fernwick, M. Simes, S. Wrbka, *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law*, Bloomsbury Publishing, London: 2017.

[90] European Commission, *supra* note 84, pp. 20-22.

[91] Joint Communication, *supra* note 41, p. 5.

[92] European Commission, *supra* note 84, pp. 20-22; *See also* Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste v. Union française de l'express* (*UFEX) and Others* [2008], ECR I4777; Case C-367/95 *Commission of the European Communities v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL* [1998], ECR I-01719.

law, democracy and human rights.[93] According to the CoE Rule of Law Checklist, a state's adherence to the rule of law requires a constitutional stipulation of the principle of equality, a state's immediate commitment to this principle, and an effective system for ensuring individuals' right be free from discrimination.[94] In addition, adherence to the non-discrimination principle is associated not only with the constitutional prohibition of discrimination, but providing clear definitions of direct and indirect discrimination in laws, and justifications for any deviations from this principle.[95] Moreover, the essential prerequisites for adherence to the principle of non-discrimination include the possibility of judicial review of laws alleged to violate the requirements of equality and non-discrimination, and the availability of effective remedies against possible breaches.[96]

According to the Article 3(5) TEU, the EU aims to "contribute to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." The crucial challenges to this aim are reflected in the CoE's limited approach to the relationship between international and domestic law (contradicting Article 3(5) TEU),[97] and the uncertainties of the interplay between international law and the law of the EU as an autonomous legal order.[98] However, since the EU explicitly supports the multilateral treaty process, the observance of key international law standards (usually specified on a case-by-case basis) represents a vital component of the EU's rule of law promotion agenda, including, *inter alia*, within the context of the present generation of FTAs.

Ensuring institutions' compliance with laws and preventing their misuse or abuse of powers requires public accountability and transparency in their functioning.[99] According to M. Busuioc, public accountability can be understood as a three-component relationship between an actor (a public authority) and a forum (society).[100] The respective components (or stages) include an actor providing a forum with information regarding

[93] *See* Treaty on the European Union, Article 2, Article 3(3), Article 9, and Article 21. *See also* S. Carrera, E. Guild, N. Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism*, European Parliament, Brussels: 2013, pp. 21-22; pp. 31-35.

[94] European Commission, *supra* note 84, pp. 18-19.

[95] *Ibidem*.

[96] *Ibidem*.

[97] *Ibidem*, p. 12 (levelling the above requirement purely to the international human rights obligations); Treaty on the European Union, Article 3.

[98] For an in-detail review of the relationship between the EU and international law, *see* Van Vooren & Wessel, *supra* note 38, pp. 208-243. *See also* K. Lenaerts, *The Kadi Saga and the Rule of Law within the EU*, 67 SMU Law Review: 707 (2014).

[99] *E.g.* M. Bovens, *Public Accountability*, in: E. Ferlie, L.E. Lynn, C. Pollitt (eds.), *The Oxford Handbook of Public Management*, Oxford University Press, Oxford: 2007, p. 182. *See also* D. Curtin, M. Hillebrandt, *Transparency in the EU: Constitutional Overtones, Institutional Dynamics and the Escape Catch of Secrecy*, in: A. Lazowski, S. Blockmans (eds.), *Research Handbook on EU Institutional Law*, Edward Elgar Publishing, Cheltenham: 2016, pp. 190-191.

[100] E.M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford University Press, Oxford: 2013, p. 32.

its activities; the debate between the actor and the forum as regards the former's activities; and, finally, the "redistributive justice" element, allowing the forum to sanction the actor.[101] Based on the above, the key indicators of accountability include the legal basis for an accountability relationship; an obligation placed on an institution to provide an accountability forum with information regarding its activities; an obligation to engage in the debating phase; and finally the sanctioning power of an accountability forum.

Last, but not least, the transparency requirement constitutes a necessary component of the broader standards of legality (in part related to the transparency of the law-making procedures) and legal certainty (in part related to the accessibility of legislation and court decisions and the legal clarity requirement).[102] Since the EU views accountability to citizens and transparency as a means to counter the "democratic deficit", the transparency standard is also intertwined with inclusiveness, legitimacy, and democracy.[103] In EU law terms, the principle of transparency applies not only to the law-making procedures at the European Parliament, but also to the decision-making procedures exercised in multiple institutions, bodies, and agencies of the Union.[104] Moreover, the crucial component of the evolving EU-wide principle of transparency is the right to access the documents of EU institutions, stipulated in Regulation 1049/2001/EC.[105] Next, the legal clarity requirement also extends to the national legal orders of the Member States, *inter alia* through the requirement of "precision, clarity and transparency" in the process of transposing directives into the national laws of the Member States.[106] Finally, an important component of transparency in the EU law context is the "duty to give reasons" for legislative and administrative acts, stipulated in Article 296 TFEU and Article 41 CFR.[107]

4. PROMOTION OF THE RULE OF LAW THROUGH DCFTAS

4.1. "Essential element clauses"

Bi- and pluri-lateral association and trade agreements between the EU and third countries usually include standard conditionality clauses. The so-called "common values" conditionality structure contains an "essential element clause" (specifying the core values on which "the relationships between the parties are premised"[108]) and a

[101] *Ibidem*.

[102] European Commission, *supra* note 84, pp. 13-17.

[103] *See* G. Majone, *Europe's Democratic Deficit: The Question of Standards*, 4(1) European Law Journal 5 (1998).

[104] Curtin & Hillebrandt, *supra* note 99, pp. 190-191.

[105] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and the Commission documents, [2001] OJ L 145/43.

[106] Case C-417/99 *Commission v. Spain* [2001], ECR 1-6015, para. 40.

[107] Charter of Fundamental Rights of the European Union, [2000], OJ C/364.

[108] N. Hachez, *Essential elements clauses in EU trade agreements making trade work in a way that helps human rights?*, Working Paper No. 158 of the Leuven Centre for Global Governance Studies, p. 8.

"suspension clause" (defining the procedure for suspending the agreement in case of violation of the essential elements). The history of the respective conditionality clauses dates back to Article 5 of the 1989 Lome IV Convention, which referred to human rights but was not yet operative.[109] At the present time, the model "common values" conditionality structure is constituted by the Articles 9 and 96 of the Cotonou Agreement between the EU and the ACP countries.[110]

As compared to Article 9 of the Cotonou Agreement and the "essential element" clauses, contained in the EU's SAAs with Western Balkans, the 'common values' conditionality structures of the EU's Association Agreements (AAs) with Ukraine, Moldova and Georgia are more elaborate. First, together with the hard "common values" conditionality, the EU's AAs with the above states contain the parties' commitments to a broad range of principles that are, however, not addressed as 'essential elements', but rather as "underpinning" the relationships between the parties and "are central to" enhancing them.[111] Among them, one can mention the principles of a free market economy, sustainable development, effective multilateralism, good governance, as well as the fight against corruption and organized crime.[112] The above provisions also contain references to the parties' commitments under the UN, the Council of Europe, and the OSCE treaties.[113] Second, apart from the standard "essential elements" clause (Article 2 of the EU-Ukraine AA), Article 6 of the EU-Ukraine AA, dedicated to "dialogue and cooperation on domestic reform", refers to the stability and effectiveness of democratic institutions, the rule of law, and respect for human rights and fundamental freedoms as the principles to be ensured in the internal policies of the parties.[114] By comparison, Article 4 of the EU AAs with both Moldova and Georgia, entitled "Domestic reform" specifies an array of cooperation targets, such as reform of the judiciary, of law enforcement agencies, of public administration and civil service, as well as countering corruption.[115] Cooperation on the rule of law and fundamental freedoms is also underlined in the AAs with regard to Freedom, Security and Justice.[116] Third, as already noted by G. Van

[109] Fourth ACP-EEC Lome Convention [1989], Article 5.

[110] Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, [2000], OJ L 317, Article 9, Article 96. *See also* L. Bartels, *A model human rights clause for the EU's international trade agreements*, German Institute for Human Rights and the MISEREOR, 2014, pp. 10-11.

[111] Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part, [2014], OJ L 161, Article 3; Association Agreement between the European Union and the European Atomic Energy Community, and their Member States, of the one part, and Georgia, of the other part, [2014], OJ L 261/14, Article 2(2)(3)(4); Association Agreement between the European Union and the European Atomic Energy Community, and their Member States, of the one part, and the Republic of Moldova, of the other part, [2014], OJ L 260, Article 2(2)(3)(4).

[112] *Ibidem*.

[113] *Ibidem*.

[114] EU-Ukraine AA, Article 2, Article 6.

[115] EU-Moldova AA, Article 4.

[116] EU-Ukraine AA, Article 14; EU-Moldova AA, Article 12; EU-Georgia AA, Article 13.

der Loo with respect to the EU-Ukraine AA, the "essential elements" clauses of the AAs with the Eastern Neighbours include a strong emphasis on security.[117] All three clauses mention "countering the proliferation of weapons of mass destruction, related materials and their means of delivery" as an "essential element."[118] Furthermore, under Article 2 of the EU-Ukraine AA, the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and integrity"[119] are also referred to as "essential elements", which is highly topical in view of Russia's 2014 annexation of Crimea and its ongoing armed presence in Eastern Ukraine. Last, but not least, the "suspension clause", included into the EU-Ukraine AA, represents the single and most remarkable example of the explicit conditionality between the "common values" and market access provisions, allowing for the suspension of the specific DCFTA-based trade benefits in the event of a violation by Ukraine of any of the common values defined as "essential elements."[120]

While the above analysis unveils the promising agenda for the EU's invocation of "essential elements" clauses in partner countries, the experience of the ACP countries shows that the Union tends not to activate the respective clauses often enough, and even when doing so manifests a selective approach.[121] Moreover, the activation of the respective clauses usually leads to consultations and the suspension of aid rather than the actual lifting of trade preferences. Consequently, it can be argued that presently the "essential element" clauses represent a political tool, allowing the Union to launch dialogue with partner states in the event of alarming developments, rather than a road to economic sanctions. Nevertheless, the "essential elements" clauses included in the framework AAs served as the foundation for including specific values-related commitments into the DCFTAs and further cooperation on the respective matters.

4.2. Transparency: general, cooperation-related, and discipline-specific provisions

Tightly linked to the standards of legality, legal certainty and public accountability, the principle of transparency represents a crucial component of the rule of law. The analysis of the transparency-related provisions contained in the EU's DCFTAs with the Eastern Neighbours allows for dividing them into three groups. They include 1) the norms contained in the transparency-specific chapters of each DCFTA; 2) the norms governing administrative and technical cooperation; and 3) sector-specific transparency provisions (e.g., public procurement, competition, and state aid).

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[117] *See* G. Van der Loo, *The EU-Ukraine Association Agreement and Deep Comprehensive Free Trade Area: A New Legal Instrument for EU without Membership*, Brill, Leiden: 2016.

[118] *See* EU-Ukraine AA, Article 2, EU-Moldova AA, Article 2, EU-Georgia AA, Article 2

[119] EU-Ukraine AA, Article 2.

[120] *See* EU-Ukraine AA, Article 478(3)(b). *See also* Van der Loo, *supra* note 117, p. 209.

[121] Hachez, *supra* note 108, p. 18.

4.2.1. Transparency-specific chapters of the DCFTAs

In view of the impact the regulatory environment exerts on trade and investment, as well as the importance of adherence to the principles of legal certainty and proportionality with respect to economic operators, the DCFTAs with Eastern Neighbours contain elaborate publication requirements as regards laws, regulations, judicial decisions, and other "measures of general application."[122] Both the respective publication requirements (which will "enable any person to become acquainted with the above measures") and the requirements regarding the establishment of contact points to address enquiries encompassing all the disciplines are enshrined in the AAs under the title "Trade and Trade-related Matters."[123] Since the respective titles of the AAs address a broad range of issues (e.g., standards, competition and state aid, public procurement, financial markets) which are also relevant for national economic operators, the requirements related to publication and contact points clearly contribute to the domestic dimension of transparency, and thus to the rule of law.[124]

Of special relevance for the domestic dimension of the rule of law are the DCFTAs' requirements concerning the review and appeal mechanisms. Pursuant to the Article 224(1) of the EU-Georgia AA and Article 360(1) of the EU-Moldova AA "each party shall establish or maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of administrative action relating to matters, covered by the Titles V and IV ("Trade and Trade-related matters") respectively."[125] Using similar wording, Article 286(1) of the EU-Ukraine AA additionally points to the independence "of the office or authority entrusted with administrative enforcement [which] shall not have any substantial interest in the outcome of the matter."[126] Furthermore, the chapters under study specify some particulars of the proceedings, namely the parties' right to support or defend their positions and the need for evidence to be used to substantiate the decision.[127] Moreover, the subsequent provisions refer to the two further pillars of administrative procedure, such as the decisions being subject to an appeal or judicial review and the binding nature of previous decisions on the practice of the respective administrative authority with respect to subsequent administrative actions.[128] Since an independent judiciary lies at the heart of the rule of law concept, and also intersects with the standards of legality, legal certainty and human rights, the above provisions manifestly bind the partner states to advance the state of the rule of law through ensuring a functional

[122] EU-Ukraine AA, Title IV, Chapter 12; EU-Moldova AA, Title V, Chapter 12; EU-Georgia AA, Title IV, Chapter 12.

[123] *See* EU-Ukraine AA, Articles 283-284; EU-Moldova AA, Articles 357-358; EU-Georgia Association Agreement, Articles 221-222.

[124] *See* EU-Ukraine AA, Title IV; EU-Moldova AA, Title V; EU-Georgia AA, Title IV,

[125] *See* EU-Moldova AA, Article 224(1); EU-Georgia Association Agreement, Article 360(1).

[126] EU-Ukraine AA, Article 286(1).

[127] *See* EU-Ukraine AA, Article 286(2); EU-Moldova AA, Article 360(2); EU-Georgia AA, Article 224(2).

[128] *Ibidem*.

judiciary.[129] The above requirements intersect with the multiple provisions on judicial reform contained in all three DCFTAs. However, their implementation constitutes a challenge to the partner states.[130]

Last, but not least, parties to the AAs under study "recognize the importance of the principle of good administrative behaviour and agree to cooperate in promoting such principle, including through exchange of information and best practices."[131] The scope of this principle is highlighted in the 20 June 2007 CoE Recommendation to member states on good administration. It is worth noting that pursuant to the above Recommendation, the principles of good administration closely resemble the key components of the rule of law, namely lawfulness (legality), equality, impartiality, proportionality, legal certainty, participation, and transparency, as well as respect for privacy.[132] Thus it can be seen that despite the explicit dedication to transparency in the considered chapters of the EU's DCFTAs with the Eastern Neighbours, the provisions address a broad array of standards encompassed by the umbrella principle of the rule of law, both through binding provisions and by recourse to soft law.

4.2.2. Transparency standards in administrative and technical cooperation

As stated above, in all three DCFTAs under study administrative cooperation "is essential for the implementation and control of the preferential treatment" with regard to the trade in goods.[133] While the AAs' sections on administrative cooperation do not explicitly refer to the transparency standard, the analysis of cases addressed by the Agreements as "a failure to provide customs administrative cooperation in investigating customs irregularities or fraud"[134] illustrates that the administrative cooperation is to great extent based on transparency. Similarly, the parties' cooperation with the Association Committee in trade configuration as regards the management of administrative errors and consultations on the FTAs and customs unions with third countries requires adherence to the transparency standard.

It is worth mentioning that the administrative cooperation provisions view transparency in two dimensions: as the domestic authorities' transparent application of the rules on preferential treatment (e.g., the application of the rules of origin) and transparency in the information exchange with another party to the Agreement.[135] Importantly, the former dimension of transparency is tightly intertwined with the legality component

[129] *See* Van der Loo, *supra* note 117, p. 288.

[130] *E.g.* EU-Ukraine AA, Article 14, Article 252(c); EU-Moldova AA, Article 4, Article 12, Article 332; EU-Georgia AA, Article 4; Article 13, Article 202. *See also* R. Petrov, P. Kalinichenko, *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, 60(2) International and Comparative Law Quarterly 325 (2011).

[131] EU-Ukraine AA, Article 287; EU-Moldova AA, Article 361; EU-Georgia AA, Article 225.

[132] Recommendation of the CoE Committee of Ministers to member states on good administration, CM/Rec [2007]7.

[133] EU-Ukraine AA, Article 37(1); EU-Moldova AA, Article 155(1); EU-Georgia AA, Article 34(1).

[134] EU-Ukraine AA, Article 37(3); EU-Moldova AA, Article 155(3); EU-Georgia AA, Article 34(3).

[135] *Ibidem*.

of the rule of law, since it requires abiding by the legal requirements governing the provision of preferential treatment. Notwithstanding the importance of transparency in the administrative cooperation, the above regulations lack the far-reaching nature and transformative potential of those contained in the transparency-specific chapters of the DCFTAs under study, analysed above. The standards relating to publication of the measures of general application, access to documents and judicial protection contained in the above-discussed chapters relate to a broad array of issues, even going beyond the scope of the DCFTAs, whereas the cooperation-related standards predominantly affect the functioning of customs authorities. On the other hand, while the DCFTAs' chapters on transparency lack specific sanctions, non-compliance with the transparency requirements in the administrative cooperation domain may lead to the temporary suspension of trade preferences.[136]

In view of the importance of international technical regulations and standards in the establishment of barrier-free trade, all three DCFTAs under study specifically address technical barriers to trade, metrology, accreditation, and conformity assessment. Pursuant to the analysis of the respective provisions of the DCFTAs, it can be stated that the levelling of technical barriers to trade in the EU's relations with the "advanced" Neighbours takes three forms: the parties' affirmation of the rights and obligations under the WTO TBT Agreement; technical cooperation (regulatory cooperation, cooperation between the respective organizations and bodies, and infrastructure development); and finally, the approximation of domestic legislation to the EU standards.[137] All of the above activities are inextricably linked to the transparency principle. For example, adherence to the TBT Agreement requires fulfilling multiple transparency requirements relating to notifications, publications, the functioning of enquiry points and the procedures regarding information exchange.[138] By analogy, with respect to the administrative cooperation requirements it can be also stated that the regulatory cooperation requires transparency in the exchange of information and "best practices." Finally, the approximation of the respective EU *acquis* and the transposition of the EU's standards into the "associated Neighbours" domestic legislation requires achieving and maintaining "the level of administrative and institutional effectiveness necessary to provide an effective and transparent system."[139] Nonetheless, as opposed to the approximation/ transposition requirements contained in other DCFTAs' disciplines (e.g., services and establishment, public procurement), the approximation of technical standards and regulations is not linked to market access conditionality.[140]

[136] EU-Ukraine AA, Title IV, Chapter 12; EU-Moldova AA, Title V, Chapter 12; EU-Georgia AA, Title IV, Chapter 12.

[137] *See* EU-Ukraine AA, Title IV, Chapter 3; EU-Moldova AA, Title V, Chapter 3; EU-Georgia AA, Title IV, Chapter 3.

[138] Agreement on Technical Barriers to Trade, 1186 UNTS 276 (entered into force 1 January 1980). *E.g.* Article 2(9)(10), Article 5(6)(7)(8)(9), Article 8(1), Article 10(1)(2)(3).

[139] EU-Ukraine AA, Article 56(2)(ii); EU-Moldova AA, Article 173(2)(b); EU-Georgia AA, Article 47(2)(b).

[140] *See* Van der Loo, *supra* note 117, pp. 308-309.

Ultimately, efficient administrative and technical cooperation, being directed toward creating a predictable trading environment, inevitably requires the parties' adherence to the transparency principle. The example of cooperation on the levelling of technical barriers to trade illustrates that the DCFTAs employ a number of legal mechanisms, such as recourse to international trade agreements as well as the approximation and transposition clauses. However, these provisions, which govern the administrative and technical cooperation between the EU and the associated Neighbours, impact the state of the rule of law in the latter only in particular domains, such as the development and introduction of technical regulations and standards and the functioning of customs.

4.2.3. Transparency standards and the public procurement domain

As mentioned above, the "deep" nature of the DCFTAs and the prospects of the Neighbours' integration into the EU's Single Market enhance the significance of the Agreements in terms of their "norms transfer" potential.[141] In view of the "contribution of transparent, non-discriminatory, competitive and open tendering to sustainable economic development", the DCFTA's chapters on public procurement tend to contain multiple transparency provisions. First and foremost, similar to case of technical cooperation the EU uses approximation requirements as a tool to promote incorporation of the above principles into the efficient public procurement system.[142] Importantly, the public procurement domain is particularly characterized by strict 'market access' conditionality. In other words, the associated Neighbours "will only be granted (additional) access to a specific section of the EU Internal market, if the EU determines, after a strict monitoring procedure that Ukraine [as well as, Moldova and Georgia] implemented their legislative approximation commitments."[143] Second, the DCFTAs promote the transparency of domestic public procurement systems in Ukraine, Moldova and Georgia by introducing the parties' obligations as regards the establishment and maintenance of "an appropriate institutional framework and mechanisms, necessary for the proper functioning of the public procurement system and the implementation of the relevant principles."[144] Importantly, along with requiring the 'associated Neighbours' to establish and maintain a central executive in the public procurement domain, the Agreement also binds them to ensure the review of decisions by the contracting authority by an impartial and independent body, together with the opportunity for judicial review.[145]

Third, along with the approximation- and institutions-related requirements, the Agreements also contain provisions establishing the basic standards regulating the award of contracts. The transparency component of the rule of law is manifested in the vast majority of the above requirements, including, *inter alia*, the publication of the intended

[141] *Ibidem*, p. 304.
[142] EU-Ukraine AA, Article 148; EU-Moldova AA, Article 268(1); EU-Georgia AA, Article 141.
[143] Van der Loo, *supra* note 117, p. 207.
[144] EU-Ukraine AA, Article 150; EU-Moldova AA, Article 270; EU-Georgia AA, Article 143.
[145] *Ibidem*.

procurements, the specific items required in the description of the subject-matter of the contract, the establishment of sufficient time limits for an expression of interest, the use of a qualification system, and the right to judicial review.[146] Hence, similar to the case of the transparency-specific chapters of the DCFTAs, the public procurement domain is characterized by the interplay of the multiple components of the rule of law, such as transparency, legality (e.g., the adherence to the particular pieces of the EU legislation and the observance of the respective basic standards), legal certainty (foreseeability of procedures, access to documents), equality and non-discrimination, as well as the independence and impartiality of the review bodies, including courts. Thus, the strength of the rule of law component in the public procurement domain, coupled with the market access conditionality, shows that the DCFTAs are directed toward establishing comprehensive public procurement reforms in the associated Neighbourhood.

4.3. The operational nature of the rule of law in the AAs/DCFTAs

The comprehensiveness of the AAs, providing for, *inter alia,* the gradual integration of the associated Neighbours' economies into the EU's Single Market, determines the operational nature of the Agreements. Thus, analysis of the provisions aimed at ensuring the operational nature of the Parties' obligations under the auspices of trade-related chapters of the AAs is essential to developing an understanding of the implementation of the respective norms.

4.3.1. Institutional framework of the AAs

To a great extent, the fulfilment of the obligations contained in the AAs is reinforced by their multilevel institutional structure. The annual summit meetings at the highest political level will provide "overall guidance" as regards the implementation of the Agreements, as well as "an opportunity to discuss any bilateral or international issues of mutual interest."[147] The AAs confer the specific function of supervising and monitoring the application and implementation of the Agreements to the Association Council.[148] Established at the ministerial level and comprised of the members of the Council of the EU and the European Commission, the Association Council is authorized to take legally-binding decisions within the scope of the respective agreements.[149] Importantly, in particular it is the Association Council that decides on further market openings for the "associated Neighbours" following its monitoring of the implementation of the respective legislative approximation commitments.[150] The Association Council is assisted by the Association Committee, which appoints, *inter alia*, a specific body (the Trade Committee) to address the issues related to the DCFTAs.[151] In turn, the

[146] EU-Ukraine AA, Article 151; EU-Moldova AA, Article 271; EU-Georgia AA, Article 144.
[147] EU-Ukraine AA, Article 460(1); EU-Moldova AA, Article 433; EU-Georgia AA, Article 403.
[148] EU-Ukraine AA, Article 461; EU-Moldova AA, Article 434; EU-Georgia AA, Article 404.
[149] *Ibidem*.
[150] EU-Ukraine AA, Article 463; EU-Moldova AA, Article 436; EU-Georgia AA, Article 406.
[151] EU-Ukraine AA, Article 464; EU-Moldova AA, Article 437; EU-Georgia AA, Article 407.

Association Committee shall be assisted by further sub-committees, established under the auspices of the respective AAs.[152] Last but not least, the AAs provide for forums for interparliamentary and civil society cooperation.[153] Thus, the institutional framework of the AAs plays a crucial role in making the Agreements operational, by ensuring a continuous dialogue between the Parties and by monitoring the fulfilment of respective commitments and the public accountability of the implementation process.

4.3.2. Approximation and monitoring

As has already been mentioned above, the EU's DCFTAs with the associated Neighbours contain binding legislative approximation clauses, directed at tackling the non-tariff barriers to trade and creating a legal environment conducive to the partial integration of the partner countries into the EU's Single Market. As underlined by R. Petrov, a proper understanding of partner countries' obligations under the respective AAs requires distinguishing between the concepts of "gradual approximation", "standard approximation" and "soft approximation."[154] In case of the EU-Ukraine AA, the "gradual approximation clause" reaffirms the country's obligation to "carry out gradual approximation of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement."[155] As underlined by the clause, despite the common logics the gradual approximation "shall be without prejudice to any specific principles and obligations on regulatory approximation under Title IV ("Trade and Trade-related Matters of the Agreement")."[156] It is worth noting that Article 474 of the EU-Ukraine AA does not point out any market integration "carrots" that fulfilment of the respective obligations may bring to Ukraine.

As opposed to the "gradual approximation" clauses, characterized by their general nature, the "standard approximation clauses" attached to each chapter of the EU's economic cooperation with the associated Neighbours are far "deeper." First, as can be exemplified by the referral to the approximation-related obligations of the chapters on "Technical barriers to trade", standard approximation clauses go beyond the incorporation of the relevant EU *acquis,* and include specific requirements with respect to carrying out specific administrative and institutional reforms.[157] Undoubtedly, the above broadly-formulated requirements, backed by the market access conditionality and strict monitoring procedures, create a sound framework for the Union's promotion of the rule of law standards through trade in the "associated Neighbourhood." Secondly, the in-depth nature of the market integration within particular fields, such as for instance

[152] EU-Ukraine AA, Article 466; EU-Moldova AA, Article 439; EU-Georgia AA, Article 409.

[153] EU-Ukraine AA, Articles 467-470; EU-Moldova AA, Articles 440-443; EU-Georgia AA, Articles 410-413.

[154] R. Petrov, *Approximation of laws in the EU-Ukraine Association Agreement*, available at: http://bit.ly/2GXq34F (accessed 30 June 2018).

[155] EU-Ukraine AA, Article 474.

[156] *Ibidem*.

[157] EU-Ukraine AA, Article 56; EU-Moldova AA, Article 173; EU-Georgia AA, Article 46.

public procurement, also implies taking "due account of … any modifications of the EU acquis occurring in the meantime."[158] This dynamic obligation of approximation is aimed at ensuring the continuing nature of the legal uniformity[159] and, what is also important, the continuing close cooperation between the EU and the partner countries through the functioning of the respective association bodies. As reflected in the procurement procedures described above, the dynamic nature of the approximation obligations, coupled with the elaborate conditionality and monitoring procedures, enhances the EU's ability to utilize approximation for the sake of rule of law promotion. This statement can be substantiated by evidence from the EU-STRAT research project, underlining the importance of the dynamic framework of the legislative approximation process for sustaining the EU's leverage in the "associated" Neighbourhood.[160]

Third, the standard approximation clauses require taking "due account of the corresponding case law of the European Court of Justice."[161] Along with the above mentioned requirements, this one explicitly testifies to the deep nature of the legislative approximation to be conducted pursuant to the AAs. The significance of the CJEU's role in the legislative approximation is also confirmed by the AAs' provisions on the interpretation of the provisions of the EU law for the purposes of the regulatory approximation-specific dispute settlement procedure.[162] For instance, Article 322(2) of the EU-Ukraine AA stipulates that "where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question, which ruling shall be binding on the arbitration panel."[163] The extension of the Court's jurisdiction over the Arbitration Tribunal illustrates the EU's desire to maintain full control over the interpretation of the Union's law and, consequently, maintain the integrity of the EU's legal order vis-à-vis external influences. Despite the fact that the "soft approximation clauses" tend to avoid the binding phrases contained in the standard approximation clauses, they still encourage partner countries to conduct the respective approximation and refer to the specific *acquis* acts and timetables contained in the AAs.[164] Along with "hard" conditionality, the "soft" approach can also be effective, especially with regard to influencing not only domestic laws, but also institutional and administrative practices.

Moreover, the "General and final provisions" of the AAs contain strict monitoring procedures, inspired by the pre-accession logic that provides, *inter alia*, for a focus on

[158] EU-Ukraine AA, Article 153; EU-Moldova AA, Article 273; EU-Georgia AA, Article 146.

[159] A. Lazowski, *Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union*, 45 Common Market Law Review 1433 (2008).

[160] K. Wolczuk, L. Delcour, R. Dragneva, K. Maniokas, D. Zeruolis, *The Association Agreement as a Dynamic Framework: Between Modernization and Integration*, EU-STRAT Working Paper Series 06/2017.

[161] EU-Ukraine AA, Article 153(2); EU-Moldova AA, Article 273(2); EU-Georgia AA, Article 146(2).

[162] *See e.g.* Article 322(2) EU-Ukraine AA.

[163] EU-Ukraine AA, Article 322(2).

[164] *See supra* note 154.

the continuity of the legislative approximation and the aspects of their implementation and enforcement.[165] An important novelty is represented by the provision for on-the-spot missions in the assessment of approximation, which missions' aim is to ensure that approximation goes beyond the formal adaptation of the respective *acquis*.[166] It is worth mentioning that a market opening would not automatically follow from a positive assessment, as it explicitly requires an approval by the Association Council.[167] The recommendations or decisions of the joint bodies (as well as their failure to come up with such recommendations or decisions) cannot be addressed in the dispute settlement procedure.[168] Overall, the strictness of the approximation and monitoring clauses reflects the ambitious nature of the market integration envisioned under the AAs and, consequently, their norms' transfer potential. The above insights also reveal that the design of the approximation and monitoring clauses makes it possible for the Union to exert a dynamic and systemic influence on the rule of law standards in the partner states, using the prospect of a market opening as a "carrot."

4.3.3. Financial cooperation and anti-fraud provisions

The complex nature of the legislative and practice-related changes which are required to implement the AA/DCFTAs obligations gives rise to the need for the EU's technical and financial assistance. The AAs' financial assistance clauses specify the parties' obligation to inform the Association Council about the "progress and implementation of financial assistance and its impact upon pursuing the objectives of the Agreement."[169] To ensure sound financial management, the AAs contain multiple provisions which oblige the associated Neighbours' governments to conduct financial checks over the operations financed with EU funds, take measures to prevent and remedy corruption practices, as well as to investigate and prosecute cases of fraud, corruption, or other irregularities, including conflicts of interest.[170] Importantly, the associated Neighbours' governments are obliged to communicate the application of all the above measures (ranging from the preventive ones to those stipulating prosecution) to the European Commission.[171] Moreover, the AAs serve as the legal basis for the checks, inspections,

[165] *See* EU-Ukraine AA, Article 475; EU-Moldova AA, Articles 450-451; EU-Georgia AA, Article 419.

[166] *Ibidem. See also* G. Van der Loo, P. Van Elsuwege, R. Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Working Paper 2014/09, p. 13.

[167] EU-Ukraine AA, Article 475(5); EU-Moldova AA, Article 452(2); EU-Georgia AA, Article 419(5).

[168] EU-Ukraine AA, Article 475(6); EU-Moldova AA, Article 452(3); EU-Georgia AA, Article 419(6).

[169] EU-Ukraine AA, Article 458; EU-Moldova AA, Article 418; EU-Georgia AA, Article 388.

[170] EU-Ukraine AA, Title VI "Financial cooperation with anti-fraud provisions"; *see* Annex XLIII; EU-Moldova AA, Title VI "Financial assistance, and anti-fraud and control provisions"; EU-Georgia AA, VII "Financial assistance, and anti-fraud and control provisions."

[171] EU-Ukraine AA, Annex XLIII, Articles 1-5; EU-Moldova AA, Articles 423-426; EU-Georgia AA, Articles 393-396.

controls and other anti-fraud measures conducted by the European Commission, the European Court of Auditors, and the OLAF.[172] Last but not least, the AAs provide for the European Commission's application of administrative measures to protect the Union's financial interests, and provide the basic principles concerning the recovery of EU funds.[173] In view of the importance of bilateral cooperation projects and unilateral financial and technical assistance for the implementation of the DCFTAs' goals, the associated neighbours' governmental obligations under the AAs' financial cooperation and anti-fraud provisions serve as a guarantee of the targeted use of the EU's funds and, subsequently, successful cooperation projects.

4.3.4. Dispute-settlement mechanism

The EU's AAs with its Eastern Neighbours contain two parallel dispute settlement mechanisms. The disputes concerning the non-DCFTA parts of the AAs are settled by a binding decision taken by the Association Council following a period of consultations.[174] The complaining party is allowed to take "appropriate measures" if agreement is not reached within the Association Council after three months.[175] In turn, the disputes arising from the DCFTAs are resolved through a sophisticated Dispute Settlement Mechanism (DSM), which resembles the quasi-judicial WTO Dispute Settlement Understanding (DSU).[176] Under the DSM, the Parties are first expected to endeavour to resolve a dispute regarding the interpretation and application of the DCFTA through consultations.[177] In the event the Parties fail to resolve the dispute through consultations, the complaining party can request the establishment of an arbitration panel. As emphasized by G. Van der Loo, the important novelty of the DSM is that "either party has the right to establish the panel and that another party cannot block the initiation of the arbitration proceedings by refusing to appoint its arbitrator."[178] The DSM chapters also provide for a specific procedure to conciliate urgent energy disputes.[179] The arbitration panel shall interpret the DCFTA's provisions based on the 1969 Vienna Convention on the Law of the Treaties, and with recourse to the "relevant interpretations established in reports of panels and the Appellate Body adopted by the WTO DSB."[180]

The ruling of the arbitration panel is binding upon the parties, and they "shall take any measure necessary to comply in good faith" with it.[181] Based on the above require-

[172] EU-Ukraine AA, Annex XLIII, Articles 5-6; EU-Moldova AA, Articles 427-428; EU-Georgia AA, Articles 397-398.

[173] EU-Ukraine AA, Annex XLIII, Articles 7-8; EU-Moldova AA, Articles 429-430; EU-Georgia AA, Articles 399-400.

[174] EU-Ukraine AA, Article 477; EU-Moldova AA, Article 454; EU-Georgia AA, Article 421.

[175] EU-Ukraine AA, Article 478; EU-Moldova AA, Article 455; EU-Georgia AA, Article 422.

[176] Van der Loo, *supra* note 117, p. 293.

[177] EU-Ukraine AA, Article 305; EU-Moldova AA, Article 382; EU-Georgia AA, Article 246.

[178] Van der Loo, *supra* note 117, p. 294.

[179] EU-Ukraine AA, Article 309; EU-Moldova AA, Article 388; EU-Georgia AA, Article 252.

[180] EU-Ukraine AA, Article 320; EU-Moldova AA, Article 401; EU-Georgia AA, Article 265.

[181] EU-Ukraine AA, Article 311; EU-Moldova AA, Article 390; EU-Georgia AA, Article 254.

ment, the "Compliance" sections of the DCFTAs provide for a reasonable period of time for compliance and remedies in the event of non-compliance.[182] It should also be mentioned that the EU-Ukraine AA stipulates a procedure under the mediation mechanism applicable to measures falling within the scope of the National Treatment and Market Access for Goods chapters of the DCFTA.[183] The DSM, modelled after the DSU and a range of post-2006 EU FTAs, plays a crucial role in resolving the disputes arising from the DCFTAs and in ensuring the Parties' compliance with their obligations under the DCFTAs, including those related to legislative approximation.

CONCLUDING REMARKS

The unique combination of normative and market power, as well as the striving for the sustainability of promoted structures, creates the foundation for the Union to use its economic agreements as an instrument to achieve non-trade-related goals, such as the externalization of the Union's values. The above analysis of the promotion of the transparency standard as a component of the umbrella concept of the rule of law showcases that the DCFTAs with the Eastern neighbours contain a range of regulatory mechanisms capable of advancing the state of the rule of law in the associated Neighbourhood. Along with the standard "common values" conditionality, they include the introduction of basic standards, recourse to the WTO law, as well as the gradual and dynamic legislative approximation requirements, coupled with the market access conditionality. The realization of the above mechanisms is supported by the functioning of the multilevel institutional framework of the AAs, enhanced monitoring of the gradual approximation, the EU's unilateral technical and financial assistance (governed by the respective AA's financial cooperation-related and anti-fraud provisions) and the elaborate DSM. As compared to the substantive transparency requirements associated with the administrative and technical cooperation, the more promising rule of law promotion mechanisms are contained in the DCFTAs' transparency-specific chapters and the disciplines, wherein it is expected to fulfil a most ambitious market integration agenda (e.g., services and establishment, public procurement). The above analysis also helps to understand that the DCFTAs' provisions tend to create bridges between the different dimensions of the rule of law, such as transparency, legal certainty (especially with regard to the access to the judiciary) and the relationship between the domestic and international law.

Despite the particularities of the EU's power, the comprehensiveness of the considered DCFTAs and their disciplines' relatedness to the different dimensions of the rule of law, the application of the DCFTAs as a value-promotion tool faces a number of challenges. In the most general terms, these challenges can be classified into three

[182] *See* EU-Ukraine AA, Articles 311-316; EU-Moldova AA, Articles 390-395; EU-Georgia AA, Articles 254-260.

[183] EU-Ukraine AA, Article 333.

groups: those stemming from the "essentially contested" nature of the rule of law as a value the EU promotes worldwide; those stemming from the EU's present approach to the Neighbourhood; and, finally, those related to the legal mechanisms embedded into the DCFTAs. First, since the rule of law represents an "essentially contested" concept and the attempts to find a European-wide consensus on it are quite recent, the EU and its institutions lack analytical tools to assess and measure the Union's policies' impact on the state of the rule of law in an associated country. In this regard, additional complexities may arise from the conceptual issues within the particular dimensions of the rule of law, such as the relationship between the international and the EU legal order. Second, a crucial source of challenges deals with the lack of the Union's and Eastern Neighbours' consensus as regards the final outcome of the ENP. The existing capabilities-expectations gap coupled with the lack of radically novel incentives results in the lack of the conducive environment to the genuine transformation of the "associated Neighbourhood" and the formal legislative approximation. Moreover, the lack of a comprehensive strategy of the EU's value-promotion in the Neighbourhood will inevitably result in challenges to the way of strategizing the Union's rule of law promotion in the Neighbourhood. In turn, a coherent strategy of the rule of law promotion through the FTAs requires coordinating the regulatory measures on the one hand, and the EU's financial and technical assistance on the other. Third, since the DCFTAs were concluded recently and are innovative with regard to their scope and the legal instruments applied, it is not yet clear how all the considered instruments will be applied by the EU in practice. For instance, the interplay of the "common values" and "market access" conditionality introduced in the EU-Ukraine AA has given rise to considerable concern.

Notwithstanding the above, the tight links between the law and economic development, as well as the ambitious scope of the EU's trade liberalization with the "associated Neighbourhood" countries condition the yet insufficiently explored potential of using FTAs to pursue non-trade-related goals, such as the promotion of fundamental values, protection of the environment, or improving labour and social standards. Thus, research into the legal avenues for pursuing the above goals through trade, and the challenges that subsequently arise, represents a promising area in the studies on the EU law of external relations.