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**Sexing consent in International Law**

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1. **Introduction**

This paper brings feminist legal insights to bear on the concept of consent in international treaty-making in order to reveal how consent, formalised in a particular way in international law through the 1969 Vienna Convention on the Law of Treaties, continues to perpetuate the myth of the ending of empire with the formal ending of colonial rule. I draw on feminist legal ideas on law and subjectivity-formation to analyse the current conception of the state, the region and inter-state relations that are implicit in the concept of consent in international law. In doing so, I aim to illustrate how feminist legal insight can be a unique, critical[[1]](#footnote-1) and perceptive way of articulating the relationship between international law and power, while revealing sites and spaces for further theorising and analysis of this relationship.

This paper proceeds in four sections. First, I analyse how the principle of consent is currently conceived of in international law, focusing on its articulation in the 1969 Vienna Convention on the Law of Treaties.[[2]](#footnote-2) I highlight a range of coercive state practices that are currently permissible under that principle, and the implicit ideas of the nature of the state and relations between states, that this approach foregrounds. Secondly, I offer a recent example of a point of deep tension in peace-time international treaty-making that exemplifies the challenge of legally recognising contemporary practices of inter-state coercion through the current conceptualisation of consent that underpins international law.[[3]](#footnote-3) This encounter is between the European Union (EU) and certain African states and regional entities, where the EU exerted legal and economic pressure to deliver a definitive conclusion to protracted negotiations and agreement on trade. By tracing the origins of this point of tension in colonial history, I aim to show how its current manifestation is the result of legal, economic and political continuities across time, across different institutionalised legal spaces at international and regional levels. Thus, the complex context of EU-ACP relations and its significance to the recent treaty-making practices exhibited by the EU and recalcitrant African and Pacific states, proves difficult to adequately capture through current notion of consent in international law.

In the third section, I draw from aspects of feminist legal scholarship on the sexed nature of law and of the state in international law in order to better reveal the strategies of power and exclusion involved in treaty-making under the VCLT. By ‘sexing’ consent under the VCLT – by this I mean revealing the masculine/feminine dichotomy underpinning concepts, techniques and rationales in the VCLT – I aim to show how a sensibility towards sexual differentiation can profoundly deepen critical inquiry and focus on spaces and sites within law that merit further feminist theorising and analysis. Three aspects of treaty-making practices under the VCLT are highlighted – the reliance on use of force or threats of force against a state; the legal reconfiguration of relations between states against their will, and the sheer dominance of the particular legal form and rationality of international trade law, over other forms and rationalities permissible within international law.

In the concluding section, I offer reflections on the unique contribution that feminist perspectives on international law can make to the identification and analysis of the ongoing legalisation of exploitative international relations.

1. **The concept of consent in international law**

The principle of consent is widely recognised to be one of the foundational principles of international law, central to its authority, legitimacy, validity and its role in the wider international order. [[4]](#footnote-4) International law is generally acknowledged to be ‘based on’ the concept of consent.[[5]](#footnote-5) In contemporary international law, the recognisable methods of expression of consent are articulated in Articles 11-17 in the 1969 Vienna Convention on the Law of Treaties (VCLT).

Article 11 of the VCLT addresses the means by which a state expresses consent to be bound by a treaty – by signature, exchange of instrument constituting a treaty, ratification, acceptance, approval or accession, ‘or by any other means if so agreed’. [[6]](#footnote-6) It is clear from the details of Articles 11-17, that the concept of consent implied is one in which actions (signature, exchange, approval etc.) are assumed to express the clear and unambiguous intention of the state.[[7]](#footnote-7)

But how does the VCLT view differences between states that may manifest as inequalities of power and possibly affect the freedom of less powerful states to consent to be bound by a treaty? Article 52 notes that if a treaty has been ‘procured’ by the threat or use of force ‘in violation of the principles of international law embodied in the Charter of the United Nations’,[[8]](#footnote-8) then the treaty is ‘void’. Similarly, if a state’s expression of consent to be bound by a treaty has been ‘procured by the coercion of its representative through acts of threats directed against him’, this expression ‘shall be without any legal effect.’[[9]](#footnote-9) The ideas of ‘threat’ and ‘use of force’ here in the VCLT limit the meaning of those terms to only those forms that are ‘in violation of the principles of international law.’ In other words, only those forms of threat and force currently already recognised by international law *as such*, will be the basis of a determination of coercion of a state, potentially resulting in the voiding of the treaty in question. Peters notes that reference to the Charter implies that ‘force’ means only military force. The limited scope of that term was controversial during the drafting process, with some African and socialist states arguing for the inclusion of a prohibition on economic and political pressure.[[10]](#footnote-10) Though an additional declaration was subsequently added to the VCLT that ‘condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent,’[[11]](#footnote-11) no clause was added that further elaborated on the concept of ‘freedom of consent’ such that the kinds of political or economic coercion that would nullify a treaty could be identified.

Maria Drakopoulou makes the point that though the ‘founding of law’s jurisdiction always announces a discontinuity with, and rejection of, the past. Yet, despite this demarcation, it remains closely linked with this past (because) the axiom of non-law (or corrupt law) founds the new law’s jurisdiction.’[[12]](#footnote-12) In this context, we can see that, against a former international legal order that enabled and legitimised a colonial order based on a denial of sovereign statehood and legal personality to people and territories of the Orient, the VCLT is established as the legal code through which international treaties will be developed into the future. In this ‘new’ order, the VCLT for the first time, brings into being an idea of coercion based only on military intervention which invalidates treaties that have been consented to under that rubric. However, by focusing on military coercion only, this particular articulation of coercion actually institutionalises and legitimises centuries-old modes of economic and political power and domination utilised by colonial powers to progress their relations in areas such as free trade brought about through political and economic coercion. Thus, these modes of non-military coercive power in international treaty-making are placed beyond the legal lens of the VCLT and can continue unchallenged. [[13]](#footnote-13)

However, the VCLT also legalised other implicit ideas about the state and international relations. The recognition of only military incursion as invalidating state consent reveals that the VCLT also institutionalised a very limited idea of sovereignty solely bound up with the physical integrity of its territorial boundaries. The idea that sovereignty may include autonomy in other aspects of statehood such as economic decision-making, is excluded from consideration. [[14]](#footnote-14) Similarly, the idea of the state is a singular one, devoid of internal features and interests. Thus, the needs of particular groups within the state, such as minorities or women remain invisible. The VCLT also presents a very unique temporal order, one focused on the future, not one cognizant of the cumulative effects of a history of unequal relations through colonisation. In a similar way, it also excludes from consideration the possibility of coercion of a state or a smaller bloc of states, by a larger bloc of states; or coercion that may target specific policy areas and levels of the state, or the cumulative impact of such efforts over time.

In order to better examine how the VCLT’s approach to coercion, the state and relations between states relates to contemporary international treaty-making, let us now turn to one recent example of international trade treaty-making between the European Union (EU), and states and regional organisations of the African, Caribbean and Pacific (ACP regions.

1. **Towards consent? Engagement and resistance in EPA encounters between the EU and African states**

Over the last several years, negotiations between the EU one of the world’s most powerful trade blocs, and states and regional entities in the African, Caribbean and Pacific (ACP) region,[[15]](#footnote-15) on trade agreements called Economic Partnership Agreements (EPAs)[[16]](#footnote-16) have been characterised by periods of prolonged stalemate in negotiations, broken by measures including what can only be described as coercive measures from the EU, that in turn resulted in halting and unwilling responses by ACP states and regional organisations. The actions of all parties to the EPAs – the EU, ACP regional organisations and states – are an excellent illustration of the tangled practices of contemporary international trade treaty-making between unequal economic powers to which the formalised concept of consent in treaty-making in international law bears only little relation. For example, at the end of 2007 in response to several missed deadlines for completion of EPAs negotiations, the EU introduced the signing of ‘interim’ EPAs (iEPAs) as one strategy to meet a schedule on WTO compatibility.[[17]](#footnote-17) However, this measure was only partly successful[[18]](#footnote-18) with most ACP states not signing these arrangements, and with some who had earlier *initialled* a draft iEPA, not *signing* these subsequently.[[19]](#footnote-19)

Several years’ later, on 30th September 2011, again to encourage conclusion of protracted EPA negotiations, the European Commission (EC) announced that countries that had concluded EPAs but that had not taken the necessary steps to ratify them, would no longer benefit from preferential market access to Europe from 1st January 2014.[[20]](#footnote-20) [[21]](#footnote-21) Civil society commentators noted at the end of 2014 that the ultimatum had the desired effect, with several new EPAs being initialled. [[22]](#footnote-22)

The success of this coercive strategy was evident as, later again in June 2016, media and NGO reports announced that the European Union was set to rachet up pressure once more on recalcitrant African states to ensure continual progress on implementation of EPAs, this time with Ghana, Ivory Coast, Kenya, Botswana, Namibia and Swaziland.[[23]](#footnote-23) According to these reports, the EU had prepared draft delegated acts that would exclude the six non-LDC countries from the list of African states benefiting from preferential EU market access under the European Market Access Regulation (MAR1528), if they missed a 1st October 2016 deadline for EPA ratification or provisional application. [[24]](#footnote-24)

Unsurprisingly, over the years, the EU’s approach to the conclusion of EPA negotiations has been roundly condemned by politicians from the ACP states and regional organisations, from civil society organisations and within the EU itself,[[25]](#footnote-25) and most recently from the ACP institution.[[26]](#footnote-26) However, the EU’s approach is perhaps better understood if a *longue durée* approach to its history is taken. The EU’s narrative of relations with ACP states is that of a ‘partnership’ whose most recent legal iteration through the Cotonou Partnership Agreement (2000-2020) aims at ‘eradicating poverty in the longer-term …. [c]ontributing to peace, security and a stable and democratic political environment in the ACP states, with the ACP countries playing a strengthened and equal role in the international context.”[[27]](#footnote-27) A critical reading of this narrative would highlight how it captures well the melding of two projects of ‘commerce and civilisation promise universalism’ particularly dominant within organised international relations since World War II. The first project aims at an international community engendered through international law based on a particular idea of the nation-state. The second promotes an idea of development centred on economic growth.[[28]](#footnote-28) For both projects, the formation of states able to promote international commerce is a shared lynchpin, justifying a ‘structural logic’ of circular interventions from the international to the national, legitimised and facilitated through international law. [[29]](#footnote-29)

This critical perspective can trace continuities in iterations of these twin projects between the current aims and provisions of the Cotonou Partnership Agreement to key points in EU-ACP relations in the past. Precedents include the 1957 Treaty Establishing the European Economic Community included Article 131 that created an Association of Overseas Countries and Territories ‘to bring into association with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands’ in order to ‘permit the furthering of the interests and prosperity of the inhabitants of those countries and territories in such a manner as to lead them to the economic, social and cultural development to which they expect.’[[30]](#footnote-30) These sentiments were echoed in the earlier Schumann Declaration of 9th May, 1950, which signalled the founding of the European Coal and Steel Community (widely viewed as the precursor to the current EU). It included the following paragraph -

-“This production will be offered *to the world as a whole* without distinction or exception, with the aim of contributing to *raising living standards and to promoting peaceful achievements*. With increased resources Europe will be able to pursue the achievement of *one of its essential tasks,* namely*, the development of the African continent*. In this way, there will be realised simply and speedily that *fusion of interest* which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.” [[31]](#footnote-31)

That rationale was also evident in the Berlin West Africa Conference of 1884-1885. [[32]](#footnote-32) The Preamble of Its ‘General Act’ described its purpose of managing the ongoing process of colonisation in Africa thus – “Wishing to regulate in a spirit of good mutual understanding the conditions most favourable to the development of commerce and of civilisation in certain regions of Africa.”[[33]](#footnote-33)

The perceived parallel between EPAs, and historic unequal economic relations between Africa and Europe under colonialism, was not lost on many observers. [[34]](#footnote-34) The EPA process bears parallels with the phenomenon of ‘unequal’, or ‘forced’ treaties[[35]](#footnote-35) in the 19th century between certain Western powers and states in East Asia including Japan,[[36]](#footnote-36) Siam[[37]](#footnote-37) and China. [[38]](#footnote-38) Features common to those unequal treaties, such as their primary purpose in opening up those locations for trade and addressing issues such as fixing import duties, including Most-Favoured Nation (MFN) clauses, and including provisions for foreign investors; the approach of the Western powers to negotiate as a bloc together; the scale of the treaties in terms of geographical reach, and the lack of provision for their termination, [[39]](#footnote-39) are shared with contemporary EPAs. [[40]](#footnote-40)

However, the ‘commerce and civilisation promise’ is not an entirely coherent one, being riddled with inner tensions that, in the EU-ACP context, crystallised in disputes over the development impacts of measures designed to promote liberalised trade. Over the duration of the EPA negotiations from 2002 until the time of writing, ACP states have consistently protested certain measures proposed by the EU for inclusion in EPAs on the basis that these threatened their national and regional development priorities.[[41]](#footnote-41) To engage more fully with a critical analysis of the international ‘commerce and civilisation’ project and to reveal and make real the practices through which this is institutionalised through international law, I depart from prevailing critiques of the content and negotiations process of EPAs which have largely left intact the rationales, the legal techniques, the nature of the legal form and the subject positions ascribed within the canon of international economic law, in particular.[[42]](#footnote-42) Instead, I draw from aspects of feminist legal scholarship to show how a sensibility towards sexual differentiation can profoundly deepen critical inquiry in international law and focus on spaces and sites within law that merit further feminist theorising and analysis.

1. **Piercing the ‘tea and roses’ myth of international economic law[[43]](#footnote-43)**

In this section I bring feminist legal perspectives to bear on three aspects of treaty-making practices under the VCLT. The first deepens earlier critical analysis on the problematic reliance within the VCLT on the use of force or threats of force against a state in order to invalidate state consent and thus invalidate a treaty. The second aspect explores how prevailing treaty-making norms shape not only the legal subjectivity of states, but of regions also. Here I highlight how a particular kind of regionalism has been privileged through agreement on EPAs, by drawing parallels with selective forms of legal subjectivity granted to women. I link this practice to a third feature of international law - the sheer dominance of the particular legal form and rationality of international trade law, over other forms permissible within international law.

It is certainly worth exploring further on the role ascribed to violence in the form of military force within the VCLT. In simple terms, the VCLT only recognises this high threshold of violence as evidence of a form of coercion that nullifies consent, thereby voiding a treaty. This implies that the normal state of play with recognising ‘free’ consent is that, absent evidence of military force, consent is assumed. This approach mirrors the interplay of the elements of the crime of rape - force and non-consent - with victim resistance. In the domestic statutes and case-law of many jurisdictions that address adult claims of unwanted sex, proof of force or threat is still required in order to prove ‘non-consent’ and secure a conviction. For example, in an analysis of criminal sexual assault and rape laws in fifty states across the United States (US), Decker and Baroni sought to determine which states still required evidence of force to convict a perpetrator of a sex offence.[[44]](#footnote-44) Their research showed that just over half of the states (28) could convict a defendant of at least one sex offence by showing that victim did not consent to the sexual act, with the prosecution not required to show that the perpetrator used force or threats of force against the victim in order to meet the statutory requirements. However, eleven of these twenty-eight states still required a showing of “forcible compulsion” or “incapacity to consent” for sexual penetration offences.[[45]](#footnote-45) They concluded that though increasingly, states had some provision that criminalised sexual relations based on non-physical coercion in their statutes, most of these provisions lacked teeth and that convictions on these grounds were scarce. [[46]](#footnote-46)

McGregor points out that “[t]his approach to consent effectively assumes the default position that women are consenting to sex, that there is a presumption of consent which could only be defeated by the most extreme circumstances.”[[47]](#footnote-47) This focus on the centrality of force and a requirement for resistance in order to secure a conviction has been highlighted by feminists as evidence of how rape continues to be seen as “’a male perception of threatening situations’ and a male way of responding to a threatening situation.” [[48]](#footnote-48) Thus one focus in many rape trials has been on the woman’s actions to resist the rape, which, unless involving a physical fight near to death in many cases, would have been deemed to be consensual.

The VCLT’s approach to state’s consent as only being questionable in the context of use of military force (with other forms of coercion not even recognised) powerfully echoes the predominant role attributed to force (over other kinds of coercion) in domestic criminal law as evidence of the victim’s non-consent in sexual assault and rape cases. Thus the doctrine, practices and conceptions of inter-personal and inter-state relations of power that legally define and underpin consent both in the context of the VCLT and in domestic criminal law in many jurisdictions have a deeply sexuated quality.

The second aspect of feminist legal insight that I wish to bring to bear on international treaty-making is the idea that legal subjectivity can have different meanings for women and for men. We have already seen how the idea of the state inherent in the VCLT symbolically reflects many of the traits of the masculine autonomous, self-directed liberal subject in liberal law that feminist legal theorists have long pointed out. In this view, the liberal legal subject is one who exists outside of relations with others and wider society, who is rational and self-interested and rationally pursues his needs and desires in encounters with others.[[49]](#footnote-49) Paralleling this view of the masculine liberal subject, is that of the state in international law, which pursues relations with other states through a contractual approach. This view is one which continues to prevail in contemporary writing on the principle of consent in international law [[50]](#footnote-50) and underpins central tenets of international relations theory. [[51]](#footnote-51)

However, feminist legal theorists have highlighted that even when women have attained legal subjectivity, they continue to have difficulties in doing so in terms that equate with that afforded men. [[52]](#footnote-52) Further, retaining that subjectivity in a way that resonates with their lived experience can be problematic. [[53]](#footnote-53) I propose that there is a parallel here between women’s experience of attaining and retaining a subjectivity in law that ‘makes sense’ for their lives, and that of the developing countries and LDCs that negotiated EPAs with the EU. In the following example, I explore how international law more broadly, and international economic law in particular, privileges only certain kinds of subjectivities for LDC and developing country states in EPAs through an analysis of the EU’s approach to regionalism in EPAs.

One issue that captures well the tensions between the stated objectives of the Cotonou Agreement’s EPAs, and the EU’s negotiations on EPAs, is in the EU’s approach to regionalism and regional integration.[[54]](#footnote-54) The EU already wielded a strong influence on approaches to regionalism in Africa, for reasons of history and as a model of regionalism in its own right. [[55]](#footnote-55) However, in the context of the EPA negotiations it made several proposals that appeared at odds with first, the stated aims of the Cotonou Agreement on regionalism and regional integration, and the EU’s own commitments to regionalism,[[56]](#footnote-56) and secondly, with then-prevailing African approaches to regionalism. One initiative that captured this gulf between the EU’s approach to regionalism through EPAs and prevailing African approaches to regionalism at the time, emerged early in its negotiations with the EU’s issuance of an ‘EU Toolbox’ on regional integration.[[57]](#footnote-57) This reflected EU-held views on the key features of an African regional trade entity, within the context of its EPA negotiations. Unfortunately, this did not match with reality at the time, with African regional economic organisations serving several purposes, only one of which is regional economic integration. In addition, several African states had memberships of more than one African regional economic organisation. The gap between the EU’s approach to regional economic integration and that already existing in the African continent had a number of consequences for African states. As EPA negotiations progressed, it lead to several revised membership configurations of regional economic entities and made the calculations of relative gains and losses for country members of more than one regional economic entity a very complex affair. [[58]](#footnote-58) Hurt has pointed out that by splitting the ACP group into negotiating regions which did not correspond to existing regional organisations, ACP control over their own integration processes was weakened. [[59]](#footnote-59)

A most striking example of divergent thinking between the EU and ACP regions on EPAs and regionalism was the EU’s insistence that ‘community levies’ be eliminated in regions where they are currently applied e.g. in the ECOWAS region. Community levies are a means by which regional institutions obtain funding for their activities (e.g. ECOWAS charges .5% levy on all non-community imports), and the lack of secure funding is recognised as a key challenge to the establishment and effective operation of the necessary institutional mechanisms to operate a regional economic entity. [[60]](#footnote-60) By including proposals for the elimination of community levies within EPA negotiations, the EU’s approach was condemned as being unsupportive of and actively undermining African and continental plans for regionalism. [[61]](#footnote-61)

Gathii has highlighted that African regional trade agreements – that is, the ones that they had already negotiated with each other prior to the EPA negotiations – differ sharply from those pursued within the EU, and those such as the North Atlantic Free Trade Agreement (NAFTA). By contrast with the EU and NAFTA agreements, he proposes that African regional trade agreements (RTAs) should be viewed as “flexible regimes of co-operation” over “rules requiring ‘scrupulous and rigorous adherence” [[62]](#footnote-62) and rather than being compared to instruments leading to a proto-EU or –NAFTA, instead should be viewed in light of what African states themselves want to accomplish. Thus, African RTAs are not exclusively trade regimes, but serve as frameworks for the co-ordination of a range of cross-border development projects such as access to riparian waterways. Where trade matters have been a focus, a flexible approach to their implementation has been taken in order to ensure a balancing of gains and losses, especially in relation to compensation for LDCs for losses arising from liberalisation. In this way, African RTAs diverge from the neoclassical/comparative advantage model underpinning the EU’s approach. Though the former may not be the most efficient in terms of facilitating inter-regional trade, their value for African states’ leadership, lies in their function as forums for co-ordination of more immediate development projects. [[63]](#footnote-63)

By applying a feminist consciousness of the variability of impacts of uniform legal subjectivity on different entities, we can see how the ‘uniform’ subjectivity of the prevailing typology of regionalism – of free trade area (FTA), to customs union, to common market, to economic union of African RTAs - through the EPA negotiations, has excluded the development-focused and political flexibilities that they formerly contained. African leaders, with the support of the EU, have chosen a form of regionalism that is both politically contentious and ambitious. Echoing Gathii’s earlier analysis of African RTAs, Ravenhill has observed that rather than a focus on shorter-term gain through access to European imports or European markets, instead “[p]riority should be given to functional cooperation and to trade facilitation processes that concentrate on the removal of the plethora of nontariff barriers that currently impede trade across Africa’s borders.”[[64]](#footnote-64)

Finally, I turn to the particular patterns of relations and subject positions engendered by the form of international trade law at play in the EU-ACP negotiations. Anne Orford has forensically analysed how trade agreements embody an ‘economy of sacrifice’ founded on a calculation of risk and reward that requires decision-makers to understand themselves as “bound to respond to the demands of the market, to sacrifice their own (their citizens, their public obligations) in the expectation of the reward of the righteous in the future by the Father (God/Market) who sees in secret.” [[65]](#footnote-65) She points out how the demands to sacrifice are much greater for developing countries and LDC Members of the WTO than for developing countries, and that the burdens of that sacrifice fall unequally between women and men in ways that are not always transparent. [[66]](#footnote-66) How can the differential impacts of the EPAs on men and women be made more explicit? One option could be through human rights impact assessment of EU trade agreements arising from the EU’s 2012 Strategic Framework and Action Plan on Human Rights and Democracy.[[67]](#footnote-67) ‘Guidelines’ recently issued on the analysis of human rights impacts of trade specify that gender equality and non-discrimination should be considered as cross-cutting issues in these analyses. [[68]](#footnote-68) However, EU analyses of EPAs undertaken to date have been limited to assessments of ‘economic’ impacts, and have not included any reference to the impact of EPAs on women. [[69]](#footnote-69) This is despite information that women form the predominant workforce in sensitive sectors such as agriculture, where poverty rates are high. [[70]](#footnote-70) It is telling that this institutional silence on the effects of EPAs on women is taking place even though gender equality is identified as one of the objectives of the Cotonou Agreement[[71]](#footnote-71) and gender equality is ‘mainstreamed’ across its three pillars of trade, development co-operation and political relations. [[72]](#footnote-72) Such actions substantiate observations that the EU’s gender mainstreaming approach is primarily a neoliberal economic strategy for improving human capital and removing barriers to trade and to labour-market participation for women.[[73]](#footnote-73) The goal of gender equality is thus mediated through a trade liberalisation lens with the mutual compatibility of both thus ensured.

**Conclusion**

“Ingrained in the dichotomies law institutes, sexual difference is evidenced as a systemic element of its power and thereby shares its peculiar affinity to stasis. Permanently attached to law’s being, structuring the cultural images that acts of separation and engendering elaborate and transmit, sexual difference becomes integral to the way law images and reads the world, and thus highly resistant to change.”[[74]](#footnote-74)

In this paper, I’ve focused on the concept of concept in the VCLT and how it acts as a ‘boundary concept’, playing a central role in adriotly and creatively managing the boundaries between politics and law, past and present, core and periphery. By drawing from critical perspectives on international law, we can see how this concept facilitates a denial of the expression and effects of coercion and duress in contemporary unequal treaty-making between states, thereby continuing modes of authority and manifestation of power that have prevailed in international relations from colonial times. Recent EU negotiations on trade agreements (EPAs) with ACP states and regions offer a telling contemporary example.

However, by applying a feminist lens to both the concept of consent in the VCLT, and the particular legal form, rationales and techniques within international trade law prevailing in the EPAs, we are challenged to reflect on the dichotomy between the way that international law is more usually described, practiced and critiqued and its suppression of ideas and experiences that do not fit this narrative. We can see more clearly see the ways in which international law captures and repeats certain legal subjectivities, in this case sexualised subjectivities with corresponding legal forms, that mirror those in domestic law. In a similar way, we can see the key role played by a very high threshold of violence (physical violence in domestic law, and military force in international law) in stabilising a legal framework that legitimises otherwise coercive relations between persons and between states.

I propose that a feminist lens also highlights sites and spaces within international law that warrant further analysis and theorising. One such example is the myriad practices of resistance, dissent, refusal and disinclination that were repeatedly exhibited by ACP states and regional organisations over their several years’ negotiations of EPAs with the EU. These acts symbolically and practically can be construed as deliberate acts of resistance towards agreements perceived as being unequal. And yet, they remain legally invisible as they are not currently recognised by such clauses in the VCLT as those on reservations. [[75]](#footnote-75) In focusing on the concept of ‘consent’ as currently articulated in the VCLT, it is clear that there is a need for further exploration of what a concept of ‘non-consent’ might look like in international treaty-making. Such work would be invaluable to highlighting, and challenging, the legal practices and techniques that institutionalise and legitimise rationales that underpin problematic projects pursued through international law, such as that of the ‘commerce and civilisation’ project that has endured for far too long.

1. By critical I mean a focus on the production of knowledge focused on the analysis of power and inequality. [↑](#footnote-ref-1)
2. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (VCLT). [↑](#footnote-ref-2)
3. I refer here to the principle of consent articulated in Article 11 of the 1969 Vienna Convention on the Law of treaties. Article 11 is titled ‘Means of expressing consent to be bound by a treaty’ and states ‘[T]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.’ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. [↑](#footnote-ref-3)
4. Matthew Lister, ‘The Legitimating role of consent in International Law’ (2010-2011) 11 Chic J Intl L 663. See also Samantha Besson, ‘State Consent and Disagreement in International Law Making; Dissolving the Paradox.’ (2016) 29 Leiden JIL 289. [↑](#footnote-ref-4)
5. See PCIJ, *S.S. Lotus Case (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Rep Series A No 10, para. 35: ‘The rules of law binding upon states . . . emanate from their own free will.’ Also ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3, para. 47: ‘Here, as elsewhere, a body of rules could only have developed with the consent of those concerned.’ [↑](#footnote-ref-5)
6. This paper primarily focuses on the earlier means as these are acknowledged to be the most prevalent practices. Though ‘by any other means if so agreed’ has seen some evolution in recent years. Malgosia Fitzmaurice, ‘Consent to be bound – Anything New Under the Sun?’ (2005) 74 Nordic J I L 483. [↑](#footnote-ref-6)
7. This approach primarily stems from the Common Law tradition, which emphasises the freedom of parties to contract (and the responsibility of both parties to be fully informed on the nature and consequences of the contract - the caveat emptor principle), over the historical emphasis of that of the Civil Law tradition, which took account of the overall fairness of the contract to both parties and the impact of the contract on the wider community. [↑](#footnote-ref-7)
8. Article 2 of the Charter states – ‘the threat or use of force against the *territorial integrity* or *political independence* of any state’ (own emphasis). [↑](#footnote-ref-8)
9. Article 51 VCLT. [↑](#footnote-ref-9)
10. Anne Peters, ‘Treaties, Unequal’ in *Max Planck Encyclopedia of Public International Law* at 52. [↑](#footnote-ref-10)
11. Final Act of the United Nations Conference on the Law of Treaties A/CONF.39/26, [↑](#footnote-ref-11)
12. Maria Drakopoulou, ‘On the founding of law’s jurisdiction and the politics of sexual difference: the case of Roman Law’ in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge Cavendish, 2007) at 54. [↑](#footnote-ref-12)
13. Matthew Craven, ‘Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade.’ (2015) 3 LRIL 31. [↑](#footnote-ref-13)
14. Note that in doing so, the VCLT takes a very definite stance on an issue that was hotly debated within the UN on many occasions over the 1960s and 1970s. The issue of economic sovereignty had emerged frequently in debates at that time on international relations between North and South and were clearly articulated in several Declarations. See for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples GAR 1514 (XV) of 14 December 1960, affirmed ‘that peoples may, for their own ends, freely dispose of their natural wealth and resources *without prejudice to any obligations arising out of international economic co-operation*.’(own italics). [↑](#footnote-ref-14)
15. The ACP bloc consists of seven regions – West Africa, Central Africa, Eastern and Southern Africa, the East African Community, the Southern African Development Community, the Caribbean and the Pacific regions. These include 79 Member-States, all of them as signatories to the Cotonou Partnership Agreement (2000-2020) - 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. Many of these are Least Developed Countries (LDCs) designated as such by the United Nations, and whose status as LDCs is also recognised by the World Trade Organisation (WTO). LDC status confers rights to preferential access to EU markets under the EU’s ‘Everything But Arms’ scheme. Developing countries have preferential access to EU markets under the EU’s Generalised System of Preferences (GSP) and GSP+ schemes. [↑](#footnote-ref-15)
16. These EPAs are negotiated as part of a wider trade, aid and international relations agreement between the EU and nearly 80 African, Caribbean and Pacific states called the Cotonou Partnership Agreement (CPA) (2000-2020). [↑](#footnote-ref-16)
17. The WTO waiver for EU preferences under the Cotonou Agreement was scheduled to expire in 2007. [↑](#footnote-ref-17)
18. By the initial scheduled deadline of 2007, only eighteen African states (including most non-LDCs and some LDCs) had initialled interim EPAs, as had two Pacific non-LDCs (Fiji and Papua New Guinea), while Caribbean countries had approved full EPAs. ODI, ECDPM, ‘interim EPAs in Africa: What’s in them and what’s next?’ ICTSD (2008) 7 Trade Negotiations Insights No. 3 available at <http://www.ictsd.org/bridges-news/trade-negotiations-insights/news/interim-epas-in-africa-what%E2%80%99s-in-them-and-what%E2%80%99s-next> [↑](#footnote-ref-18)
19. Namibia originally initialled the draft EPA but did not later sign it. Henning Melber, ‘Namibia and the Economic Partnership Agreement’ Pambazuka News Wednesday August 14th 2013. See also BIDPA Briefing, ‘’Signing of the Interim Economic Partnership Agreement.’ BIDPA, September 2009 available at [www.bidpa.bw](http://www.bidpa.bw). Some ‘regional’ iEPAs were actually only signed by one member state of that region at that time e.g. “Central African” interim EPAs had been signed in 2009 by Cameroon only and the “Pacific” interim EPA had been signed in 2009 by Papua New Guinea and Fiji only. See CAFOD, ‘EU ultimatum brings EPA negotiations to conclusion.’ [↑](#footnote-ref-19)
20. The Commission identified 18 countries from the 36 countries that had initialled or signed an agreement that had either to sign and start the ratification of their existing EPA or conclude a new regional EPA. The group included Haiti, which had been struck by a catastrophic earthquake in 2010. This was to be achieved by the withdrawal of market access under Market Access Regulation (MAR) 1528 of January 2008 which required countries to initiate EPA ratification processes ‘within a reasonable period of time’. See Council Regulation (EC) no 1528/2007 as regards the exclusion of a number of countries from the list of regions or states that have concluded negotiations. European Commission proposal on amending Annex I to Council Regulation (EC) No 1528/2007, Brussels, 30.9.2011 COM(2011) 598 final. The European Parliament, by a large majority, granted the African countries an extension until October 2014 to ratify their interim Economic Partnership Agreements (iEPAs). ‘EU Pressures Seven Africa countries to complete trade agreements.’ EURACTIV April 23rd 2013 available at <http://www.euractiv.com/section/development-policy/news/eu-pressures-seven-african-countries-to-complete-trade-agreements/> [↑](#footnote-ref-20)
21. International relations scholars have identified this action as a credible ultimatum – a threat backed by a deadline, whose implementation could be unilaterally implemented by the EU.[Annika Björkdahl](http://link.springer.com/search?facet-creator=%22Annika+Bj%C3%B6rkdahl%22), [Ole Elgström](http://link.springer.com/search?facet-creator=%22Ole+Elgstr%C3%B6m%22), ‘The EPA negotiations – A channel for norm import and export?’in Annika,[Björkdahl,](http://uottawa-primo.hosted.exlibrisgroup.com/primo_library/libweb/action/search.do?vl%28freeText0%29=Bjo%cc%88rkdahl%2c+Annika%2c+editor.+&vl%28284248662UI0%29=creator&vl%28284248663UI1%29=all_items&fn=search&tab=default_tab&mode=Basic&vid=UOTTAWA&scp.scps=scope%3a%28UOTTAWA_DSPACE%29%2cscope%3a%28UOTTAWA_III%29%2cscope%3a%28UOTTAWA_SFX%29%2cprimo_central_multiple_fe&ct=lateralLinking)  Natalia [Chaban,](http://uottawa-primo.hosted.exlibrisgroup.com/primo_library/libweb/action/search.do?vl%28freeText0%29=+Chaban%2c+Natalia%2c+editor.+&vl%28284248662UI0%29=creator&vl%28284248663UI1%29=all_items&fn=search&tab=default_tab&mode=Basic&vid=UOTTAWA&scp.scps=scope%3a%28UOTTAWA_DSPACE%29%2cscope%3a%28UOTTAWA_III%29%2cscope%3a%28UOTTAWA_SFX%29%2cprimo_central_multiple_fe&ct=lateralLinking)  John Leslie & Annick [Masselot (eds)](http://uottawa-primo.hosted.exlibrisgroup.com/primo_library/libweb/action/search.do?vl%28freeText0%29=+Masselot%2c+Annick%2c+editor.&vl%28284248662UI0%29=creator&vl%28284248663UI1%29=all_items&fn=search&tab=default_tab&mode=Basic&vid=UOTTAWA&scp.scps=scope%3a%28UOTTAWA_DSPACE%29%2cscope%3a%28UOTTAWA_III%29%2cscope%3a%28UOTTAWA_SFX%29%2cprimo_central_multiple_fe&ct=lateralLinking)  *Importing EU norms : conceptual framework and empirical findings* (Cham Switzerland: Springer, 2015), 133 at 147-148. [↑](#footnote-ref-21)
22. CONCORD, ‘EU ultimatum brings EPA negotiations to conclusion.’ CONCORD Cotonou Working Group Briefing Paper, December 2014 available at <http://concordeurope.org/> . The new EPAs were signed by West Africa, Southern Africa and the EAC. [↑](#footnote-ref-22)
23. The end of the preferential access enjoyed by these six countries will have dramatic consequences for the countries’ public finances. For countries in West Africa in general, it is expected that they would lose approx. E3.2 billion per year in lost customs duty from 2020 onwards. [↑](#footnote-ref-23)
24. #  [Cécile Barbière](http://www.euractiv.com/authors/cecile-barbiere/), ‘Brussels to end preferential trade access for uncooperative African countries’ June 10th 2016 EURACTIV, available at <http://www.euractiv.com/section/development-policy/news/brussels-to-end-preferential-trade-access-for-uncooperative-african-countries/>. Also S2B ‘The EU destabilizes and blackmails African states to secure its economic interests.’ Jun 15th 2016 at <http://www.s2bnetwork.org/eu-blackmails-african-states/>.

 [↑](#footnote-ref-24)
25. MEP critique. Also EP Committee on International Trade…..refs….. [↑](#footnote-ref-25)
26. See Para 58 of the DECLARATION OF THE 8TH SUMMIT OF ACP HEADS OF STATE AND GOVERNMENT OF THE ACP GROUP OF STATES issued on June 1st 2016 in Port Moresby in Papua New Guinea which stated **“We are concerned** that all ACP States have not been able to conclude Economic Partnership Agreements (EPAs) due to the excessive demands from the European Union that has weakened regional economic integration processes.” <http://www.acp.int/content/declaration-8th-summit-acp-heads-state-and-government-acp-group-states> [↑](#footnote-ref-26)
27. European Commission HRFASP, *Evaluation of the Cotonou Partnership Agreement*, Brussels, 15.7.2016 SWD(2016) 250 final at 6. Available at <http://ec.europa.eu/europeaid/news-and-events/results-evaluation-cotonou-partnership-agreement-announced_en>. [↑](#footnote-ref-27)
28. #  For a detailed analysis of how these projects came to characterise peace-time international law after World War II, see generally Sundhya Pahuja, *Decolonising international law : development, economic growth and the politics of universality* (Cambridge: Cambridge University Press, 2011).

 [↑](#footnote-ref-28)
29. I use the term ‘structural logic’ here drawing from its use by Matthew Craven, who describes it as a range of interventions that occupy ‘the ‘gap’ between reality and aspiration’ which can well have perverse outcomes. *Supra* note 13 at 57-58. [↑](#footnote-ref-29)
30. European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023>. [↑](#footnote-ref-30)
31. By production, Schumann was referring to the Franco-German production of coal and steel here. It was to be “under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe.” Declaration of 9th May, 1950 delivered by Robert Schumann. Available at [www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf](http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf). Italics my own. [↑](#footnote-ref-31)
32. Most of the participants at the conference were European and were early members of the EU. These included Prussia (Germany), France, the Netherlands, Portugal, Hungary, Belgium, Denmark, Spain, the United Kingdom, Italy and Luxembourg. [↑](#footnote-ref-32)
33. General Act of Conference of Berlin Concerning the Congo, signed at Berlin, February 26th 1885, 1909 3 AJIL 7. Italics my own. Article 6 exhorted “All Powers [to]engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade; they shall protect …all the institutions and enterprises religious, scientific or charitable, created and organised for these objects or tending to instruct the natives and to make them understand and appreciate the advantages of civilisation.” [↑](#footnote-ref-33)
34. The Kenya Human Rights Commission (a private NGO) circulated an advertisement on EPAs in Kenya’s most widely circulated daily newspaper, ‘The Daily Nation’ on 5th December 2008 with the stark title “EPA = Recolonisation of Kenya” over an image of Africans in chains (image on file with author) evoking slavery motifs. This link to colonial history was also prominent in more restrained, yet still critical, EPA commentary from stakeholders such as NGOs. See for example, Timothy Kondo, *Alternatives to the EU’s EPAs in South Africa* (Comhlamh, 2012) at 6. The power of the ‘re-colonisation’ motif used by anti-EPA activists was recognised as difficult to challenge by EU and African state representatives at the time (communications on file with author). [↑](#footnote-ref-34)
35. Anne Peters, ‘Treaties, Unequal’ in *Max Planck Encyclopedia of Public International Law* at 1. [↑](#footnote-ref-35)
36. 1858 with the US, Russia, the UK, France and the Netherlands. (treaty refs) [↑](#footnote-ref-36)
37. Several treaties concluded in the 1850s and 60s with, variously, the US, France, Denmark, Poland, the Netherlands, Germany and Spain. (treaty refs) [↑](#footnote-ref-37)
38. Treaties from the 1840s to 1901 with Britain, Russia and with Japan, the Netherlands, Spain, the USA, Italy, Germany, Austria-Hungary and France. (treaty refs). [↑](#footnote-ref-38)
39. Craven, *supra* note 13 at 343-345. [↑](#footnote-ref-39)
40. However, this concept of ‘unequal treaty’ as one that recognises not just the procedural nature of its conclusion but also the unequal nature of its substantive content, is not recognised under the VCLT. In her analysis, Peters, *supra* note X notes four potential grounds for a determination of a treaty being unequal, including lack of reciprocity, infringement of sovereignty, violation of ius cogens and a conflict with Article 103 of the UN Charter. None of these (other than reciprocity) address the substance of the treaty. In addition, she notes that each of these contains such significant legal weakness as to make effective resort to them legally unlikely. At 38-44. Li reaches a similar conclusion – Jangfeng Li, ‘Equal or unequal: Seeking a new paradigm for the misused theory of ‘Unequal Treaties” in contemporary international law.’ (2016) 38 Hous J Int’l L 465. [↑](#footnote-ref-40)
41. INcl details on EU proposals on liberalisation rates; on export taxes; on MFN etc. And details on negative development effects. [↑](#footnote-ref-41)
42. These critiques, though immensely valuable to revealing the inequalities inherent in the negotiations processes on EPAs and the problematic nature of the clauses on trade liberalisation of EPAS vis-à-vis what is permissible under international trade law, do so within a framework which accepts as given the rationales underpinning international trade law and seek ways to maximise LDC and developing country interests within this framework. See reports and analyses from South Centre; ECDPM (refs). [↑](#footnote-ref-42)
43. I use the term ‘tea and roses’ to draw attention to the disguised feminised nature of the ‘civilisation and commerce’ trope particular to international trade law. The products – tea and roses – are key exports from East Africa (Kenya in particular) to the EU. There is a symmetry to their production and eventual use that is deeply troubling from a feminist perspective. The production and export of these products rely on highly feminised labour practices that fail to adequately recognise women’s caring relations within their families and communities. Their end use as products are strongly associated with feminine ideals of family and social care (tea) and commodified romantic love (roses). [↑](#footnote-ref-43)
44. John F. Decker & Peter G Baroni, “’No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law.” (2012) 101 J Crim L & Criminology 1081. [↑](#footnote-ref-44)
45. They defined forcible compulsion as either a “[p]hysical force that overcomes reasonable resistance” or “a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person.” Decker & Baroni *ibid* at footnote 8, 1083. [↑](#footnote-ref-45)
46. *Ibid* 1125. [↑](#footnote-ref-46)
47. Jane McGregor, *The Legal Heritage of the Crime of Rape* (Routledge, 2011)at 76. [↑](#footnote-ref-47)
48. Susan Estrich, *Real Rape*. (Cambridge: Harvard University Press, 1987) quoted in McGregor *infra* at 82. [↑](#footnote-ref-48)
49. Rosemary Hunter, ‘Contesting the dominant Paradigm: Feminist Critiques of Legal Liberalism’ in Margaret Davies & Vanessa Munroe (eds), *Ashgate Research Companion to Feminist Legal Theory*, (Abingdon, Oxon: Ashgate, 2013) at 13. She quotes Anna Grear’s description of the ‘paradigmatic legal subject’ as a ‘socially decontextualized, hyper-rational, wilful individual systematically stripped of embodied particularities in order to appear neutral and, of course, theoretically genderless, serving the mediation of power linked to property and capital accumulation’ [↑](#footnote-ref-49)
50. Matthew Lister, ‘The Legitimising Role of Consent in international Law’, (2010-2011) 11 Chi J Int’l L 663 who concludes that consent remains a fundamental legitimising device for international law, and Samantha Besson, ‘State Consent and Disagreement in international Law-Making’ (2016) LJInt’l L 289 who, though proposing an intriguing ‘disagreement-attuned’ account of consent, and recognising that ‘state consent should be expressed and *potentially* exchanged in a fair and egalitarian fashion’ (own emphasis at 310), does not address the potential for coercion that disagreement and consent in the context of unequal relations between states could imply. [↑](#footnote-ref-50)
51. Slaughter, Wendt [↑](#footnote-ref-51)
52. Hunter, supra note 49 at 13 – 30. See also the many prohibitions on bodily autonomy for women that continue to exist in relation to abortion which can affect, for example, their rights to travel beyond their own jurisdiction to receive health care. [↑](#footnote-ref-52)
53. ###  See for example, the qualified critiques of the UN’s Security Council’s Women Peace and Security Agenda, which though welcoming the long-overdue explicit recognition of a women’s dimension to the UN’s Peace and Security Agenda, highlight a number of problematic aspects of this Agenda, including the continuing persistence of masculinised perceptions of, for example, violence and accountability ([Sahla Aroussi](http://journals1.scholarsportal.info.proxy.bib.uottawa.ca/search?q=Sahla%20Aroussi&search_in=AUTHOR&sub=), ‘Women, Peace and Security’: Addressing Accountability for Wartime Sexual Violence.’ (2011) 13 Int’l Fem J Pol 576); claims that it reinforces racial-sexual boundaries (Nicola Pratt, ‘Reconceptualizing Gender, Reinscribing Racial–Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on “Women, Peace and Security.”’ (2013) 57 Int’l Studies Qtr 772), and that opportunities for feminist theorising on a ‘re-gendering’ of the military remain under-attended to ([Claire Duncanson](http://journals1.scholarsportal.info.proxy.bib.uottawa.ca/search?q=Claire%20Duncanson&search_in=AUTHOR&sub=) & [Rachel Woodward](http://journals1.scholarsportal.info.proxy.bib.uottawa.ca/search?q=Rachel%20Woodward&search_in=AUTHOR&sub=), ‘Regendering the military: Theorizing women’s military participation.‘ (2016) 47 Sec Dialogue 3).

 [↑](#footnote-ref-53)
54. This issue is not normally prominent in critiques of EPAs. I have selected it as it is an aspect of international relations that is increasingly prominent as an international site and space of global governance, in which law plays a key role. However, the regional also retains potential as a legal space for the articulation of ideals not articulated within the international or domestic realms. References to regionalism can be found in many aspects of the Cotonou Agreement. [↑](#footnote-ref-54)
55. ###  John Ravenhill, ‘Regional Integration in Africa, Theory and Practice’ in Daniel Levine & Dawn Nagar (eds), *Region building in Africa: Political and Economic Challenges* (New York: Palgrave Macmillan, 2016) at 41.

 [↑](#footnote-ref-55)
56. Article 1(4) states that ‘Regional and sub-regional integration processes which foster the integration of the ACP countries into the world economy in terms of trade and private investment shall be encouraged and supported’. Article 2 mentions regionalisation as one of the fundamental principles, noting that ‘Particular emphasis shall be placed on the regional dimension’. With respect to economic and trade cooperation, Article 35.2 stipulates that ‘Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy’. Article 37.5 which states that the negotiations of EPAs shall ‘tak[e] into account regional integration process within the ACP’. [↑](#footnote-ref-56)
57. This consisted of five components addressing issues in trade in services and goods, rules such as in SPS and IP, the establishment of regional enforcement mechanisms and other initiatives on regional co-operation. Philippe de Loumbarde, ‘Supporting Regional Integration – A Roadmap of Indicators and Tools.’ UNU/CRIS Occasional Papers 2003-3 at 5-6. Available at [www*.*cris.unu.edu/sites/cris.unu.edu/files/O-**2003**-3.pdf](http://www.cris.unu.edu/sites/cris.unu.edu/files/O-2003-3.pdf). [↑](#footnote-ref-57)
58. Bilal and Stevens demonstrate this complexity when attempting to capture the impact of proposed liberalisation commitments in the ESA region. Five ESA states had initialled an iEPA with the same text at the end of 2007 (Comoros, Madagascar, Mauritius, Seychelles, and Zimbabwe). All of them also established their liberalisation schedules in relation to the COMESA common external tariff (CET). During 2008, Zambia also initialled the iEPA text (meaning that six of the 11 ESA countries had then done so), but its liberalisation schedule was completely different, with no reference to a CET and different start and end dates. Thus, the ESA iEPA consisted of five partly and one completely different country cases. Sanoussi Bilal & Christopher Stevens (eds), *The Interim Economic Partnership Agreements between the EU and African States. Contents, challenges and prospects.* ECPDM Policy Management Report No. 17. (Maastricht: ECPDM, 2009) at 138. The original ESA group at the start of the EPA negotiations included the East African Community (EAC) states of Burundi, Kenya, Rwanda, Tanzania and Uganda, however in 2007, they agreed a separate iEPA based on the newly formed EAC customs union. [↑](#footnote-ref-58)
59. Stephen R. Hurt, ‘Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the end of the Lomé Convention,’ (2003) 24 Third W Qtly (1) 161 at 173. [↑](#footnote-ref-59)
60. T Dinka & W Kennes, ‘Africa's Regional Integration Arrangements: History and Challenges. ECDPM Discussion Paper 74, (Maastricht: ECDPM, 2007). Available at <http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/0AFF1EE6DDE15146C12579CE004774B2?OpenDocument#sthash.y6RUJa5g.dpuf>. Community levies also emerged as an issue for CEMAC. See European Parliament DG for External Policies, *African, Caribbean and Pacific (ACP) countries’ positions on Economic Partnership Agreements (ACP)* EXPO/B/DEVE/2013/30, (European Union, 2014) at 34. Available at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>. [↑](#footnote-ref-60)
61. Refs in newspaper……. [↑](#footnote-ref-61)
62. James Thuo Gathii, ‘African Regional Trade Regimes as Flexible Legal Regimes.’ Albany Law School Working Paper Series 20 (2009) at 2. [↑](#footnote-ref-62)
63. *Ibid.*  [↑](#footnote-ref-63)
64. Ravenhill, *supra* note 55 at 45-46. [↑](#footnote-ref-64)
65. Anne Orford, “Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice” in (2005) 18 L J Int’l Law 179 at 198. [↑](#footnote-ref-65)
66. She describes how the Report of an Appellate Body decision on *EC Measures Concerning Meat and Meat Products* (EC-Hormones) dispute (, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, DSR 1998, 135, included a particular decision-making approach to food safety that challenged the scientific evidence relied upon by the EU to evaluate the carcinogenic potential of one hormone. The Appellate Body held that even if the scientific evidence concerning the risk to women was correct, only 371 women currently living in the member states of the EU would die as a result of trade in hormone-related beef, while the EU’s total population in 1995 was 371 million. Orford correctly draws the Appellate Body’s implication that the deaths of this number of women would not justify enacting measures that would halt or hamper the trade in hormone-treated beef. *Ibid* 191. [↑](#footnote-ref-66)
67. It includes a commitment to develop “a methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements.” (ref to source). There is now a burgeoning literature on HRIAs of trade agreements that seeks to identify the impacts of trade agreements on international trade and investment agreements, towards better law- and policy-making on trade. See for example, Walker, Harisson, de Schutter (refs) [↑](#footnote-ref-67)
68. ‘Guidelines’ were produced in July 2015. European Commission DG Trade, ‘*Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*,’ (undated) Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1344>. At 7. [↑](#footnote-ref-68)
69. See for example the European Commission’s DG Trade reports on ‘‘The Economic Impact of the SADC EPA Group - EU Economic Partnership Agreement’ June 2016, and ‘The Economic Impact of the West Africa – EU Economic Partnership Agreement’ March 2016, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1344>. Neither report included a gender analysis of the economic impact of either EPA. [↑](#footnote-ref-69)
70. In Kenya, for example, over 80% of women live in the rural areas where majority are engaged in the farming of food and cash crops, livestock keeping and other agro-based income generating activities. Women form about 70% of all employees in the agricultural sector and their wages are low and uncertain. See CEDAW, Combined fifth and sixth periodic reports of States parties, Kenya, 16th October 2006, CEDAW/C/KEN/6 at para 140, pg 38. [↑](#footnote-ref-70)
71. Article 1 (ref CPA) [↑](#footnote-ref-71)
72. Articles 8, 20, 31 and 31a. See also clauses in iEPAs….refs…. [↑](#footnote-ref-72)
73. Jacqui True, ‘Trading-Off Gender Equality for Global Europe? The European Union and Free Trade Agreements.’ 2009 14 European For Aff Rev 723 at 741-742. [↑](#footnote-ref-73)
74. Drakopolou, *supra* note 12 at 55. [↑](#footnote-ref-74)
75. Articles 19 – 23 address reservations. [↑](#footnote-ref-75)