



Furthering Democracy through the European Community's Development Policy: Legal Limitations and Possibilities

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Abstract

This discussion paper provides an analysis of the efforts by the European Community (EC) to support democracy building in developing countries. It focuses on the specific question of the legal obligations of, and limits for, the EC in seeking to further democracy through its development cooperation policy. The related issues of the promotion of human rights, gender equality and the rule of law are also touched on where relevant. The core of the paper is an examination of the legal framework governing the European Community's relations with developing countries and the possibilities for furthering democracy. The paper considers the European Community's determination of whether a third country complies, in legal terms, with its 'democratic obligations', and how it is able to control and sanction non-compliance. On the basis of these examinations the position is analysed of furthering democracy and the rule of law in the EC's development cooperation legislation. Likely developments if the Lisbon Treaty enters into force are discussed.

Summary of Recommendations

Whenever the European Community enters into an international agreement it commits itself to furthering, inter alia, democracy in the third country through the inclusion of a human rights clause. While it is arguable that the inclusion of such a clause does not conflict with the public international law principle of non-interference, it is also arguable that in certain situations such an inclusion may conflict with the principle of attributed powers. The discussion paper questions the efficiency of the way in which the European Community currently enforces compliance with its democracy conditions vis-à-vis developing countries. It recommends that the present scheme be amended in two respects: first, by ensuring a firm reaction at a much earlier stage than is presently the case; and, second, by aiming any sanction much more directly at those responsible for the infringements rather than at the whole population of the developing country. Its findings question whether legal obligations – and enforcement – are a suitable way of advancing democracy. Instead, the way forward should primarily be the use of the financing instrument, through which various activities aimed at advancing democracy and human rights in developing countries can be set in motion.

1. Introduction

This paper is part of the background material used for International IDEA's regional consultations within the framework of the Swedish 2009 EU Presidency's project on strengthening the democracy building dimension of European Union (EU) policies and actions. It provides an analysis of the legal aspects of efforts by the European Community (EC) to support democracy building through its policies directed at developing countries. It focuses on the legal obligations of and limits for the EC when seeking to further democracy through its development cooperation policy. It outlines the applicable legal mechanisms that the EC applies in its furtherance of democracy in the developing countries and analyses these mechanisms. Democracy is closely related to human rights, gender equality and the rule of law. These issues are therefore also touched on in a number of instances.

Terminology

Under EU law there is an important distinction between the European Community and the European Union. The European Community refers to the matters covered by the EC Treaty (often referred to as the 'first pillar'), whereas the European Union normally refers to the matters covered by the Treaty on European Union as well as the matters covered by the EC Treaty (often referred to as the 'three pillars'). With only a few exceptions the matters covered in this paper refer to the European Community. For that reason I use the designation European Community/EC. In a few instances, however, there are references to the Treaty on European Union and where this is the case I use the designation *European Union/EU*.¹

References to democracy are rife in EC law, but the precise meaning appears to have been left unsettled. For this reason, in this paper references to democracy should not be read as implying a single definition. Models of democracy can vary substantially and democracy is therefore not seen as presupposing a given set of institutions, but rather as a process involving political control and popular control as basic characteristics.²

The European Community does not define developing countries, but relies on the definition established by the Development Assistance Committee of the Organisation for Economic Co-operation and Development,³ that is, based on per capita income. This paper uses the same definition.⁴

¹ This is a very simplified explanation of the distinction between the EC and the EU. More elaborate explanations may be found, e.g., in chapter 1 of Chalmers et al. (2006) or in chapter 1 of Craig and de Búrca (2008). It may be added that if the Lisbon Treaty enters into force, the distinction between European Union and European Community will be abandoned so that all references will be to the European Union, cf. article 2(2)(a) of the 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community'.

² This explanation borrows extensively from International IDEA's determination of 'democracy', cf. the organization's FAQ and its State of Democracy methodology as set out in International IDEA (2008). See also Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, [2006] OJ L386/1, recital 9.

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Structure

The paper is composed of four sections. Section 2 examines the legal framework governing the European Community's relations with developing countries and the opportunities it provides for furthering democracy. Section 3 considers how, in legal terms, the European Community may determine whether a third country complies with its democratic obligations and how to control and sanction non-compliance. On the basis of the paper's examinations and analyses, section 4 draws conclusions and also comments on likely developments if the Lisbon Treaty enters into force.

2. The Legal Framework and Fundamental Principles of the European Community

Democracy is part of the foundation of the EU. It is a *sine qua non* condition pertaining to any state that has acceded to or is applying for accession to the EU. The prominent position of the democratic principle is reflected in article 6(1) of the EU Treaty, which in its first section provides as follows: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Thus, article 6(1) not only lays down that the principle of democracy is one of the foundations of the EU, but also makes clear that the principle of democracy must be attributed an importance in its own right.

Turning to the European Community's secondary legislation and in particular to the case law of the European Court of Justice, it is striking how rarely the principle of democracy is mentioned. Where the European Court of Justice makes reference to the principle it seems almost exclusively to have been used to strengthen some other argument.⁵ This is not surprising, however, taking into account how ingrained democracy is in the EU; it is simply taken for granted.⁶

Democracy is more than a legitimate objective of the European Community; as one of the principles on which the EC is founded it is obligated to defend and, possibly, also to further democracy to the extent possible. This undoubtedly applies to the EC's external policies. There are, however, certain legal limitations that must be observed.

³ See, e.g., Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (note 2), article 14(1)(2), as well as note 2 in Joint Statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', 22 November 2005 (14820/05), (hereinafter 'The European Consensus'), [2006] OJ C46/1. The European Consensus is sometimes referred to as the development policy statement or the DPS.

⁴ The list, including the presently applicable income brackets, is available at <www.oecd.org/dac/stats/daclist>.

⁵ The principle appears primarily to be quoted either where the case involves the European Parliament in the law-making procedure or where the case concerns the application of the rules on access to information. From the practice of the European Court of Justice and the Court of First Instance, see, e.g., Case C-408/95, *Eurotunnel*, [1997] ECR I-6315, para. 45, Case T-211/00, *Kuiper v. Council*, [2002] ECR I-485, para. 52, and Case C-155/07, *European Parliament v. Council*, judgment of 6 November 2008, (not yet reported), para. 78. See also the Advocate General in Case C-68/94, *Netherlands v. Council*, [1996] ECR I-2169, point 19.

⁶ This is also reflected in the Charter of Fundamental Rights of the European Union, [2000] OJ C364/1, which does not quote the principle of democracy as one of the fundamental rights, but only mentions the principle in the preamble. Some of the provisions, however, clearly presuppose a democratic society. See in particular articles 39 and 40 concerning the right to vote and to stand as a candidate in elections.

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First, it is important to emphasize that the principle of democracy is not a kind of legal panacea that can overrule all other legal provisions. Other legitimate objectives may thus carry greater weight.⁷ Second, the so-called principle of conferred powers means that the EC may only act within the limits of the powers that have been conferred on it by the EC Treaty as well as the limits of the objectives assigned to it in that Treaty.⁸ This essentially means that the EC may only actively further democracy in third countries to the extent that – explicitly or implicitly – it has been granted the powers to do so.⁹

Third, it is important to observe that the European Community must respect international law in the exercise of its powers.¹⁰ Basically, this means that the EC may only further democracy in developing countries to the extent that this does not conflict with public international law. This is relevant, for example, if the furtherance of democracy in a third country constitutes interference with that country's internal affairs in such a manner that it conflicts with international public law. Thus, in such a situation it is necessary to identify the limitations in applicable international public law. In what follows, due account must be taken of the limitations identified above.

EC Development Policy Objectives and the European Consensus

Developing and consolidating democracy are undoubtedly important objectives of the European Community's development policy. Article 177(2) of the EC Treaty provides that:

Community policy in [the area of development cooperation] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

As is apparent from article 177(2), within the EC's policy on development cooperation, democracy is not just an incidental policy objective but rather a legal obligation weighing on the EC in its relations with developing countries.

⁷ See, e.g., section 2.3 concerning humanitarian aid.

⁸ Cf. Article 5(1) of the EC Treaty.

⁹ The importance of the principle of conferred powers may be illustrated by an incident that occurred in 1982 in connection with the conflict over the Falkland Islands between Argentina and the United Kingdom. Here the European Commission suggested imposing economic sanctions against Argentina. This resulted in the adoption of Council Regulation No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, [1982] OJ L102/1. However, in the lead-up to the adoption Denmark argued that the European Community did not (then) have the necessary competence to impose sanctions as suggested. Denmark therefore refused to comply with the Regulation, but instead adopted national measures that were identical to those provided in the Council Regulation.

¹⁰ Cf. Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-6019, para. 9.

Moreover, according to article 178 of the EC Treaty, the objectives set down in article 177(2) not only apply to the European Community's policy in the area of development cooperation, but must be taken into account in all the policies implemented by the EC if they are likely to affect developing countries.¹¹ The impact of this general obligation seems to be rather limited, however, and under the present circumstances it appears fairly clear that EC law does not apply a general principle establishing a 'right to development'.¹²

Development cooperation is a competence that is shared between the European Community and its member states.¹³ By coordinating their development assistance, the EC and the member states can increase aid effectiveness. To this end, a common vision has been drawn up to guide the action of the EC – at both member state and EC level – in the field of development cooperation. In addition, a European Community Development Policy has been established to guide implementation of the vision at EC level. This common vision together with the guide for implementation form what has been called 'the European Consensus'.¹⁴ The European Consensus lays down in unequivocal terms that '[t]he primary and overarching objective of EU development cooperation is the eradication of poverty'.¹⁵ However, under the heading 'common values', it equally establishes that 'EU partnership and dialogue with third countries will promote common values of ... democracy ...'.¹⁶ Democracy thus clearly occupies an important position as part of the European Community's and the member states' development policy as is reflected in the European Consensus' numerous references to the notion.¹⁷ Within the framework of the present paper, it is worth noting that among the common values identified in the European Consensus we also find 'gender equality' and 'the rule of law'.¹⁸ In particular, the former is given a prominent position.¹⁹

In order to promote democracy – as well as the rule of law and respect for human rights and fundamental freedoms – the European Community in 2006 adopted Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide ('the financing instrument').²⁰ This regulation provides the legal basis for financing a large number of initiatives aimed at encouraging respect for democracy and human rights; and it replaced the European Initiative for

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¹¹ At first glance the obligation laid down in article 178 may appear rather similar to the general principles laid down in Part One of the EC Treaty establishing the Community's general principles. On closer examination it is clear that there are important differences. Such examination, however, rather clearly falls outside the scope of the present paper.

¹² This may be compared with the United Nations 'Declaration on the Right to Development' of 4 December 1986, General Assembly resolution A/RES/41/128, which – at least in theory – recognizes a general right to development. On this (possible) right see Rosas (2001).

¹³ This does not mean that the European Community cannot conclude international agreements in the field of development cooperation as the sole contracting partner on the EU side, cf. Case C-268/94, *Portugal v. Council*, [1996] ECR I-6177.

¹⁴ Cf. (note 3).

¹⁵ The European Consensus, para. 5.

¹⁶ The European Consensus, para. 13.

¹⁷ Cf. the European Consensus, paras. 12, 13, 16, 17, 42, 53, 60, 86, 87, 89, 101 and 103.

¹⁸ Cf. the European Consensus, paras. 13, 19, 92, 93, 97, 101 and 104.

²⁰ Published in [2006] OJ L386/1. The financing instrument covers the period 2007 to 2013.

Democracy and Human Rights.²¹ The financing instrument puts in place the legal basis for financing a number of initiatives intended to enhance respect for human rights and fundamental freedoms, and to promote and enhance democracy and democratic reform in third countries. In this way the financing instrument supports ‘a prime objective of the Community’s development policy’.²² The financing instrument lists four different means for implementing the assistance,²³ and it is explicitly stated that the instrument allows ‘for assistance independent from the consent of third country governments and other public authorities’.²⁴ Among the fields that EC assistance relates to are the strengthening of the rule of law²⁵ and the promotion and protection of gender equality.²⁶ The financing instrument provides that the latter ‘shall be taken into account whenever relevant by all assistance measures referred to in [the financing instrument]’.²⁷

As is clear from the above, the furthering of democracy occupies a prominent position among the legally established objectives of the European Community’s policy on development cooperation.

Humanitarian Aid

While development assistance is concerned with the sustainable economic and social development of developing countries (i.e. the long term and lasting improvement of living conditions) the objective of humanitarian aid is to save lives and to provide immediate relief for people facing severe crisis as a result of either natural disaster or conflict.²⁸ The European Community together with its member states form the largest provider of humanitarian aid in the world, and the European Commission alone is among the biggest sources of such aid.²⁹ The aid is regulated by the Humanitarian Aid Regulation of 1996³⁰ and in principle EC humanitarian aid may be provided to all people in need. It is, however, first and foremost aimed at developing countries and covers not only short-term relief but also disaster prevention and reconstruction operations. These operations may last as long as is necessary, but must be targeted at the immediate requirements arising out of the exceptional circumstances.

²¹ See Regulation 975/1999, which sets out the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L120/1; and Regulation 976/1999, which sets out the requirements for the implementation of EC operations, other than those of development cooperation, which, within the framework of EC cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, [1999] OJ L120/8. This earlier initiative covered the period 2000 to 2006.

²² Cf. recital 3 of the financing instrument.

²³ Cf. Article 4 of the financing instrument. These are ‘strategy papers’, ‘annual action programmes’, ‘special measures’ and ‘ad hoc measures’.

²⁴ Cf. recital 1 of the financing instrument. As is noted in Section 2.1, the European Community is bound by public international law. This means that the EC may only finance initiatives to the extent that this does not conflict with international law.

²⁵ Cf. article 2(1)(a)(ii) of the financing instrument.

²⁶ Cf. article 2(1)(a)(vi) and (b)(v) of the financing instrument.

²⁷ Cf. article 2(2) of the financing instrument.

²⁸ Compare in this respect article 177 of the EC Treaty with recitals 3, 4 and 7 of Council Regulation 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L163/1.

²⁹ Cf. European Commission, Annual Review 2007, Humanitarian Aid, Brussels 2008, pp. 1 and 26.

³⁰ Cf. (note 28).

The European Community is barred from using its provision of humanitarian aid to further democracy in developing countries.

It has been clearly established in the Humanitarian Aid Regulation that the sole aim of the aid must be to prevent or relieve human suffering. Moreover, the aid must be accorded to victims without any discrimination (including discrimination on the grounds of sex or political affiliation) and it must not be guided by, or subject to, political considerations.³¹ Thus, in accordance with fundamental humanitarian principles, the European Community may not guide – or subject – its humanitarian aid to the objective of furthering democracy. This principled approach is essential to the acceptance of aid and the ability of the European Community to deliver aid to the victims of crisis in often complex political and security contexts.³² It thus follows that the European Community is barred from using its provision of humanitarian aid to further democracy in developing countries.

Human Rights Clauses in International Agreements

In 1995 the European Commission and the Council of the European Union committed themselves to include in all agreements between the EC and third countries a clause requiring respect for democratic principles and human rights.³³ This commitment applies to all international agreements entered into by the European Community, but it is particularly important with regard to agreements entered into with developing countries. This is not surprising because: (a) breaches of human rights and violations of democratic principles are more likely in developing countries than in developed countries, everything being equal; and (b) the EC will normally be in a much more powerful position vis-à-vis developing countries than it would be vis-à-vis developed countries.³⁴

A fine contemporary example of the use of human rights clauses may be found in the Cotonou Agreement.³⁵ Article 9 of the agreement sets out the ‘essential elements and fundamental element’, which includes a reaffirmation by the parties that:

democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State

³¹ Cf. recitals 7 and 8 of the Humanitarian Aid Regulation. See also Communication from the Commission to the European Parliament and the Council: Towards a European Consensus on Humanitarian Aid, COM(2007)317 final, which in the annex defines the humanitarian principle of ‘impartiality’ in the following terms: ‘Provision of humanitarian assistance must be impartial and not based on nationality, race, religion, or political point of view. It must be based on need alone.’

³² Not surprisingly, excluding all political considerations from the European Community’s provision of humanitarian aid may prove difficult in practice. See chapter 6 in Khaliq (2008).

³³ Cf. Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final and the Council conclusions of 29 May 1995 (reported in EU Bulletin No 5 1995 at point 1.2.3).

³⁴ There is a fairly extensive literature on human rights clauses, including Fierro (2003), Bartels (2005), Liñán Noguerras and Hinojosa Martinez (2001: 307–336) and Horng (2003: 677–701).

³⁵ Partnership agreement between the members of the African, Caribbean and Pacific (ACP) Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L317/3. ‘ACP countries’ refers to a number of primarily former British and French colonies in Africa, the Caribbean and the Pacific.

to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. ...³⁶

If either the EC and the member states or one of the ACP states considers that the other party has failed to fulfil an obligation referred to in article 9(2) – including the ‘democratic principles’ – this matter may be considered during the regular political dialogue that must be conducted under the agreement. Where the political dialogue does not lead to a solution, article 96 of the agreement provides for a consultation procedure. If this consultation procedure is not successful, sanctions may be imposed on the party in breach of the obligations laid down in article 9.³⁷

Using human rights clauses to enforce compliance with democratic principles in other states – and to sanction non-compliance – may give rise to legal criticism particularly in two respects. First, it has been argued that human rights belong to a state’s internal sphere. Hence, according to this argument, one state is not entitled to promote human rights in another state. If we were to accept this argument, it would follow that where the European Community requires human rights clauses to be introduced into

international agreements with third countries, this would conflict with the public international law principle of non-interference. Although this non-interference argument has been voiced during negotiations between the EC and a developing country (Fierro 2003: 286, 303–305), it seems that today there is hardly any doubt that the inclusion of a human rights clause in an international agreement does not conflict with the obligation not to interfere in the internal affairs of other states (Fierro 2003: 75–78, 304).

Second, it is arguable that some of the legal bases of the EC Treaty available to the European Community for negotiating international agreements with developing countries do not allow the EC to introduce human rights clauses. Obviously,

this is not a problem where the EC’s legal basis includes article 181, concerning agreements in the field of development cooperation, since such agreements must pursue the objectives of EC policy in the sphere of development cooperation as set out in article 177(2), including that of ‘developing and consolidating democracy and the rule of law’. It is thus arguable that the EC not only may, but rather is obliged to further democracy whenever it enters into international agreements on the basis of article 181. In contrast,

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³⁶ Cf. Article 9(2)(2). Within the framework of the present paper, it may also be observed that in article 9(2)(1) of the Cotonou Agreement ‘... the Parties reaffirm the equality of men and women’ and that in article 9(2)(3) the agreement provides that ‘[t]he structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.’

³⁷ The European Community has been negotiating Economic Partnership Agreements with a number of groups formed among the ACP countries. An agreement with the group of Caribbean ACP countries (the Cariforum) has been concluded. This agreement does not include a human rights clause, but it does establish that the EPA is ‘based on’ the essential elements and the fundamental element clause in article 9 of the Cotonou Agreement and that the EPA shall not prevent the adoption of any measures provided for under the Cotonou Agreement’s human rights clause. The Cariforum EPA is available at <www.crn.org/documents/ACP_EU_EPA/epa_agreement/EPA_Text_15th_October08_Final.pdf>.

it is far from obvious that international agreements founded on other legal bases must – or may – pursue the objectives of the EC’s development cooperation policy. On the one hand, article 178 of the EC Treaty obliges the EC to ‘take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries’.³⁸ On the other hand, the European Court of Justice has on many occasions emphasized that whenever the EC issues a legal act it must state its correct legal basis. Failing this the European Court of Justice has shown itself ready to annul a legal act where the illegality was more than a purely formal defect.³⁹ On this background, it is submitted that where the EC intends to include a human rights clause in an agreement with one or more developing countries, due consideration must be given to whether article 181 should be included as the legal basis in addition to the primary legal basis. This is particularly relevant with regard to trade agreements founded on article 133 on the EC’s common commercial policy.⁴⁰

Three points may be noted in this connection. First, it is recalled that the ‘Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries’⁴¹ requires human rights clauses to be included in all international agreements whether or not the contracting third country is a developed or a developing one. From a political point of view it would appear to be rather problematic if the EC were to exempt developed countries from this requirement. Second, international agreements entered into within the framework of a number of international treaties – such as, for example, the World Trade Organization Agreement – do not necessarily allow the parties to impose clauses like the EC’s human rights clause. Third, while it is arguable that an agreement based exclusively on article 133 might not pursue the objective of furthering democracy as such, it is equally submitted that the EC may not actively undermine democracy – be it in the EC or outside. This means that the EC may not enter into international agreements that are liable to work against democracy.

As is clear from the above, whenever the European Community enters into an international agreement it commits itself to furthering, inter alia, democracy in the third country through the inclusion of a human rights clause. While it is arguable that the inclusion of such a clause does not conflict with the public international law principle of non-interference, it is also arguable that in certain situations such an inclusion may conflict with the principle of attributed powers.

Tariff Preferences

An important aspect of the European Community’s assistance to developing countries is the provision of privileged access to the EC market. This is primarily done by allowing

³⁸ Perhaps surprisingly the arguably most important international EC agreement in the field of development cooperation, the Cotonou Agreement, is based exclusively on article 310, which concerns association agreements.

³⁹ See, e.g., Case 45/86, *Commission v. Council* (re: GSP), [1987] ECR 1493, Case 165/87, *Commission v. Council* (Commodity Coding), [1988] ECR 5545, Case 275/87 *Commission v. Council*, [1989] ECR 259 and Case C-155/07, *European Parliament v. Council*, note 5 above.

⁴⁰ See, e.g., Proposal for a Council decision concluding the Interim Economic Partnership Agreement between the European Community and its Member States, on the one part, and the [Southern African Development Community] SADC EPA States, on the other part, COM(2008)565 final. It may be noted, however, that international agreements that are exclusively based on article 133 are rather unusual.

⁴¹ Note 33 above.

exports from developing countries to enter the EU at no or reduced customs duty under the general scheme of preferences (GSP).⁴² Essentially, the European Community's GSP scheme is composed of three categories. The first category provides a *general arrangement* that allows tariff-free access to the European Community market for manufactured products that the EC considers to be non-sensitive. The general arrangement provides only limited advantages to exporters of products that are classified as sensitive, thereby limiting its value to developing country exporters. The general arrangement is available to all beneficiary countries unless they are classified by the World Bank as a high-income country or where they are not sufficiently diversified in their exports.⁴³

The second category provides a 'special incentive arrangement for sustainable development and good governance', normally referred to as the GSP+ scheme.⁴⁴ In addition to the tariff suspension provided under the general arrangement, the GSP+ also, to a large extent, suspends the customs tariffs on sensitive products. To qualify for the GSP+ scheme the exporting country must be classified as vulnerable,⁴⁵ and it must ratify and effectively implement a number of international conventions concerning core human and labour rights as well as conventions related to the environment and to governance principles.⁴⁶ The European Commission monitors that the beneficiary countries comply with the latter condition. The list of conventions includes the:⁴⁷

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Prevention and Punishment of the Crime of Genocide

⁴² See Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, [2005] OJ L169/1.

⁴³ Cf. Regulation 980/2005, Articles 2 and 4 and recital 6.

⁴⁴ The present GSP+ scheme was established following a WTO Appellate Body ruling holding the previous scheme to conflict with the European Community's obligations under the WTO Agreement. The reason was that the previous scheme unduly discriminated between different developing countries. The replacement of the former GSP+ scheme, therefore, is a telling example of how the European Community is bound by international law. See Appellate Body Report, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004).

⁴⁵ In order to qualify as vulnerable, a country must fulfil the conditions for being a beneficiary under the general GSP arrangement and in addition the country's GSP-covered imports to the EC must represent less than 1% in value of total GSP-covered imports to the EC, cf. article 9(3) of Regulation 980/2005.

⁴⁶ Various time limits apply with regard to when ratification and implementation must have been completed. The ultimate limit was 31 December 2008, cf. article 9(1)(c).

⁴⁷ Cf. Annex III to Regulation 980/2005.

- Convention concerning Minimum Age for Admission to Employment (No. 138)
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182)
- Convention concerning the Abolition of Forced Labour (No. 105)
- Convention concerning Forced or Compulsory Labour (No. 29)
- Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No. 100)
- Convention concerning Discrimination in Respect of Employment and Occupation (No. 111)
- Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87)
- Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98)
- International Convention on the Suppression and Punishment of the Crime of Apartheid
- United Nations Convention against Corruption (Mexico).

The third and most favourable GSP category is reserved for the least developed countries.⁴⁸ In principle it allows these countries to export all their products, apart from arms and ammunition, to the European Community with no tariffs.⁴⁹ This category is therefore generally referred to as the *Everything But Arms* scheme or simply the EBA scheme.

The preferential treatment set out in the three GSP schemes may be temporarily withdrawn for a number of reasons. For the purposes of the present paper, it is particularly relevant that a developing country may see its preferential treatment temporarily withdrawn with regard to all or certain products if it is found to have seriously and systematically violated the principles laid down in the conventions listed under the GSP+ scheme.⁵⁰ Moreover, with particular regard to those countries that have qualified for the GSP+ scheme, the EC may temporarily withdraw the preferential treatment if national legislation no longer incorporates the relevant conventions or if the incorporating national legislation is not effectively implemented.⁵¹

The European Community to a large extent pursues its objective of furthering democracy in developing countries by offering economic advantages on condition that the beneficiary country complies with certain democracy conditions.

⁴⁸ The list of least developed countries is drawn up by the United Nations, which may also decide to remove countries from the list, cf. article 12(7) of Regulation 980/2005.

⁴⁹ With regard to rice, bananas and sugar there will be a gradual reduction in the tariffs, cf. article 12(2)-(4) of Regulation 980/2005. Full suspension of the tariffs will be reached in 2009.

⁵⁰ Cf. article 16(1)(a) of Regulation 980/2005.

⁵¹ Cf. article 16(2) of Regulation 980/2005.

3. Enforcing Democracy in Third Countries

The European Community to a large extent pursues its objective of furthering democracy in developing countries by offering economic advantages on condition that the beneficiary country complies with certain democracy conditions. If the beneficiary country fails to comply with the conditions, the European Community may sanction this – typically through the withdrawal of the economic advantages. To enforce compliance with the democracy conditions, three requirements must be met:

- the democracy conditions must be so precise that it is possible to determine whether the beneficiary country is in breach of its obligations;
- there must be a control system in place to verify whether the democracy conditions have been breached;
- there must be a sanctioning procedure that may be used against a beneficiary country in breach of its obligations.

It is submitted that the European Community's present regime – as outlined in Section 2 above – gives rise to concern with respect to the first and the third point.

First, as explained in section 1.2 above, models of democracy can vary substantially and democracy is therefore not seen as presupposing a given set of institutions, but rather as a process involving political control and popular control as basic characteristics. This rather flexible definition is problematic from a legal point of view since it makes it difficult to establish a specific 'standard of behaviour' against which an obligated state may be held legally responsible. Hence, there is a risk that only gross violations of the democratic principle may be 'prosecuted' whereas more limited violations may remain more or less unnoticed.⁵²

In this respect the GSP+ scheme seems to be the exception that proves the rule by laying down specific international conventions that the beneficiary country must comply with. Even though these conventions leave a certain margin for discretion to the beneficiary country, they clearly provide a much firmer standard to judge the country against.⁵³

Second, effective control on the obligated states to comply with their democratic obligations presupposes that a system of surveillance is put in place. For example, under article 8 of the Cotonou Agreement, the Parties undertake to regularly engage in a comprehensive, balanced and deep political dialogue where, inter alia, the question of failure to comply may be considered.

The GSP+ scheme seems to be the exception that proves the rule by laying down specific international conventions that the beneficiary country must comply with. Even though these conventions leave a certain margin for discretion to the beneficiary country, they clearly provide a much firmer standard to judge the country against.

⁵² The European Community has only taken steps to sanction non-compliance in cases of flagrant infringements of the democratic principle.

⁵³ Monitoring and evaluation of compliance with the GSP+ requirements are based on the public reports and observations of the relevant international organizations. See 'Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005', COM(2008) 656 final, Brussels 21.10.2008. The margin for discretion left to the European Community is therefore very limited.

Obviously, the information provided during these dialogues may be supplemented by reports of the European Community's representation in the state in question as well as information provided by EU member states, NGOs and other relevant bodies.

Third, in order to encourage compliance with democratic obligations there must be some 'incentive system' in place. Non-compliance will normally first lead to political consultations between the parties during which the European Community will endeavour to persuade the beneficiary country to live up to its obligations. If these endeavours prove unsuccessful, the EC may resort to the use of sanctions. These sanctions will normally be in the form of the full or partial withdrawal of economic assistance, such as preferential status, that the EC has accorded to the beneficiary country.

The efficiency of this type of sanctions may be questioned. In particular, two factors together give cause to doubt its efficiency. First, the inherent reticence of the enforcement system means that sanctions are only likely to be a real possibility where a beneficiary country commits gross and persistent infringements. Second, withdrawing economic assistance to the beneficiary state is likely to negatively affect the population in general. It is thus those suffering from the beneficiary country's infringement who are likely to feel the consequences of the resulting sanctions most directly.⁵⁴

It follows from the above that there are good reasons to amend the present incentive system in two respects: by ensuring a firm reaction at a much earlier stage than is presently the case, and by aiming any sanction much more directly at those responsible for the infringements.

4. Conclusions and a Look to the Future

The above examination has shown that furthering democracy and the rule of law and consolidating respect of human rights and fundamental freedoms occupy an important position in the European Community's legislation in the field of development cooperation. The examination also shows, however, that enforcement of the democratic principle leaves room for improvement.

Section 3 above makes a proposal for improving the present incentive system. Nonetheless, the examination begs the question whether legal obligations – and enforcement – are a suitable way of advancing democracy. It is submitted that in general they are not. Rather, the way forward should primarily be the one shown through the adoption of Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide,⁵⁵ through which various activities aimed at advancing democracy and human rights in developing countries can be set in motion.

The examination begs the question whether legal obligations – and enforcement – are a suitable way of advancing democracy. It is submitted that in general they are not.

At present it is uncertain whether the Lisbon Treaty will be ratified by all member states and thus enter into force. For this reason the present paper is based on the legal situation

⁵⁴ Economic sanctions are often dismissed as ineffective instruments to further democracy in a third country. This view has, however, been challenged by Marinov (2004).

⁵⁵ Cf. note 20 above.

that we know today. If, however, the Lisbon Treaty were to enter into force, this would have some important consequences for the legal situation concerning the furthering of democracy in developing countries. First, the promotion of the European core values of human dignity, freedom, democracy, equality, the rule of law and the respect for human rights would become a main objective of the European Union.⁵⁶ Second, the Lisbon Treaty would create a coherent policy framework for the European Union's external relations, in which development cooperation forms an important part. In this connection the Lisbon Treaty would establish that:

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

The Lisbon treaty further requires that in the development and implementation of the different areas of its external action the EU shall respect the above principles and pursue the above objectives. Moreover, the EU is required to ensure consistency between the different areas of its external action and between these and its other policies.

In short, if the Lisbon Treaty is ratified, democracy will be given an even more important position in the Treaty in general and in the external policy of the European Union in particular. Hence, the importance of the democratic principle in the EU's development cooperation will clearly be reinforced.

References

Literature

- Bartels, Lorand, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005)
- Chalmers, Damian et al., *European Union Law* (Cambridge: Cambridge University Press, 2006)
- Craig, Paul and de Búrca, Gráinne, *EU Law: Text, Cases and Materials*, 4th edition (Oxford: Oxford University Press, 2008)
- European Commission, *Annual Review 2007: Humanitarian Aid*, Brussels 2008
- Fierro, Elena, *The EU's Approach to Human Rights: Conditionality in Practice* (The Hague: Martinus Nijhoff Publishers, 2003)
- Hornig, Der-Chin, 'The Human Rights Clause in the European Union's External Trade and Development Agreements', *European Law Journal* (2003), pp. 677–701
- International IDEA, *Handbook on Democracy Assessment* (Stockholm: International IDEA, 2002), available at www.idea.int/publications/direct_democracy

⁵⁶ At the same time the Charter of Fundamental Rights will become legally binding on the European Union and on the member states. However, it seems clear that the Charter is aimed at the internal matters of the European Union, while external matters play only a subsidiary role. For example, the Charter includes the 'right of access to placement services' as a fundamental right whereas the 'right to development' is not mentioned.

- Khaliq, Urfan, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge: Cambridge University Press, 2008)
- Liñán Nogueras, Diego, J. and Hinojosa Martínez, Luis M., 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems', *Columbia Journal of European Law* (2001), pp. 307–336
- Marinov, Nikolay, 'Do Sanctions Help Democracy? The US and EU's Record, 1977–2004', *CDDRL Working Paper* 28(2004), available at <<http://cddrl.stanford.edu>>
- Council of the European Union, 'Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005', COM(2008) 656 final, Brussels 21.10.2008.
- Rosas, Allan 'The Right to Development', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A textbook*, 2nd edition (The Hague: Kluwer Law International, 2001)

Legislation

- Cariforum EPA Agreement, available at <www.crn.org/documents/ACP_EU_EPA/epa_agreement/EPA_Text_15th_October08_Final.pdf>
- Charter of Fundamental Rights of the European Union, [2000] OJ C364/1
- Communication from the Commission to the European Parliament and the Council – Towards a European Consensus on Humanitarian Aid, COM(2007)317 final
- Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final, available at http://ec.europa.eu/external_relations/human_rights/doc/com95_216_en.pdf
- Council conclusions of 29 May 1995, reported in EU Bulletin No 5 1995 at point 1.2.3
- Partnership agreement 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, signed in Cotonou on 23 June 2000, [2000] OJ L317/3
- Proposal for a Council decision concluding the Interim Economic Partnership Agreement between the European Community and its Member States, on the one part, and the SADC EPA States, on the other part, COM(2008)565 final
- Regulation No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, [1982] OJ L102/1
- Joint Statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', 22 November 2005 (14820/05), [2006] OJ C46/1

Council Regulation 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L163/1

Regulation 975/1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L120/1

Regulation 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, [1999] OJ L120/8

Regulation 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, [2005] OJ L169/1

Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, [2006] OJ L386/1

‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community’

United Nations’ ‘Declaration on the Right to Development’ of 4 December 1986 (resolution adopted by the General Assembly, A/RES/41/128)

Judgments and decisions

Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (April 7, 2004)

Case 45/86, *Commission v. Council* (re: GSP), [1987] ECR 1493

Case 165/87, *Commission v. Council* (Commodity Coding), [1988] ECR 5545

Case 275/87 *Commission v. Council*, [1989] ECR 259

Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-6019

Case C-68/94, *Netherlands v. Council*, [1996] ECR I-2169

Case C-268/94, *Portugal v. Council*, [1996] ECR I-6177

Case C-408/95, *Eurotunnel*, [1997] ECR I-6315

Case T-211/00, *Kuijper v. Council*, [2002] ECR I-485

Case C-155/07, *European Parliament v. Council*, judgment of 6 November 2008 (not yet reported)

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